Message

Sent: 8/29/2018 2:10:51 PM
To: Rementer, Nicole [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8584caffef2b4418b4e6430198c6355b-Rementer, N]
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

Victoria Clarke
Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. | 7348 WJCN
EPA Office: 202-564-1149
EPA Cell: 202-336-9101

From: Rementer, Nicole
Sent: Wednesday, August 29, 2018 10:07 AM
To: Clarke, Victoria <clarke.victoria@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

Nicole M. Rementer
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U.S. Environmental Protection Agency | Office of General Counsel
7426NN WJCN | 202.564.3692

From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 10:05 AM
To: Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

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From: Rementer, Nicole
Sent: Wednesday, August 29, 2018 10:04 AM
To: Clarke, Victoria <clarke.victoria@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

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From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 10:03 AM
To: Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

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From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 10:01 AM
To: Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

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From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 9:59 AM
To: Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

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From: Rementer, Nicole
Sent: Wednesday, August 29, 2018 9:58 AM
To: Clarke, Victoria <clarke.victoria@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

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From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 9:57 AM
To: Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

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EPA Cell: 202-336-9101

From: Rementer, Nicole
Sent: Wednesday, August 29, 2018 9:54 AM
To: Clarke, Victoria <clarke.victoria@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

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Attorney-Adviser | FOIA Expert Assistance Team (FEAT)
U.S. Environmental Protection Agency | Office of General Counsel

7426NN WJCN | 202.564.3692

From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 9:53 AM
To: Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Most likely, yes.

Victoria Clarke
Attorney-Advisor
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EPA Cell: 202-336-9101

From: Rementer, Nicole
Sent: Wednesday, August 29, 2018 9:52 AM
To: Clarke, Victoria <clarke.victoria@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

And this should go on the Hot Topics Agenda…

Nicole M. Rementer
Attorney-Adviser | FOIA Expert Assistance Team (FEAT)
U.S. Environmental Protection Agency | Office of General Counsel
7426NN WJCN | 202.564.3692

From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 9:47 AM
To: Sandfoss, Kristina <Sandfoss.Kristina@epa.gov>; Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Oh boy, how fun.

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Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. | 7348 WJCN
EPA Office: 202-564-1149
EPA Cell: 202-336-9101

From: Sandfoss, Kristina
Sent: Wednesday, August 29, 2018 9:43 AM
To: Clarke, Victoria <clarke.victoria@epa.gov>; Rementer, Nicole <rementer.nicole@epa.gov>
Subject: FW: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client Whaddy'all think?

From: admin@foiaonline.gov [mailto:admin@foiaonline.gov]
Sent: Tuesday, August 28, 2018 7:03 PM
To: Sandfoss, Kristina <Sandfoss.Kristina@epa.gov>
Subject: FOIA Assignment for EPA-HQ-2018-010843

Your office has been assigned to the FOIA request - EPA-HQ-2018-010843. Additional details for this item are as follows:

- Tracking Number: EPA-HQ-2018-010843
- Requester: Austin R Evers
- Request Track: Simple
- Submitted Date: 08/22/2018
- Due Date: 09/26/2018
- Short Description: N/A
- Description: See attached. EPA-18-0447

Ex. 5 - Deliberative Process | Attorney-Client

Message

From: Hill, Kevin W. [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=39972377481A439BB895D784A2159393-HILL, KEVIN]
Sent: 7/11/2018 3:37:44 PM
To: Mooney, Charlotte [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=74344eb699144ed98c9afaaf63139307-CMOONEY]; Barr, Linda [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ce32bbe21e94644a9484cace9f978d4-LBARR02]
CC: Clarke, Victoria [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Clarke, Victoria]
Subject: FW: FOIA Resources - Privileged and Confidential - Do Not Release
Attachments: FOIA Background Information.pdf; FOIA Toolkit.pdf; National FOIA Training Conference 2017 Presentation _ Binder Ready Version.pdf

Charlotte and Linda,

Attached are some FOIA Resources to distribute to FOIA reviewers only ahead of the Kickoff. This information should not be shared with anyone not working specifically on this FOIA request. Thank you.

Regards,
Kevin

Kevin W. Hill
Attorney-Adviser
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1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Office: 202-564-1652
hill.kevinw@epa.gov

The Life Cycle of a FOIA – The Key Steps to Processing Any FOIA Request

The Office of General Counsel
In conjunction with the Office of Environmental Information

September 2017

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INTRODUCTION

The Freedom of Information Act (FOIA) provides that any person, with a few narrow exceptions (*e.g.*, a fugitive), has a right, enforceable in court, to obtain access to agency records, except to the extent that such records (or portions of them) are protected from public disclosure by an applicable FOIA exemption. EPA receives thousands of FOIA requests a year, many of which are complex requests that seek records from multiple EPA offices. The Agency's response to FOIA requests is guided by the statute, 5. U.S.C. § 552, EPA's implementing FOIA regulations, 40 C.F.R. § 2.100 *et seq.*, EPA's FOIA procedures, http://intranet.epa.gov/foia/docs/FOIA-Proc_August2014-09-30FINAL(with-electronic-signature).pdf, and individual office's FOIA procedures, http://intranet.epa.gov/foia/FOIA-Procedures.html.

This document follows the lifecycle of a FOIA request and contains tips to help you successfully address any FOIA request, complex or otherwise. The document is intended for the internal use of staff and contains best practice guidelines and suggestions only. While the document and Appendix are intended to help staff comply with EPA policies, they are not themselves official EPA policy. Further, the document does not change, modify, or supersede applicable legal obligations, including obligations imposed by regulation or statute, nor is it a regulation itself.

Your use of this document is voluntary. The document is not legally enforceable and does not confer legal rights or impose legal requirements upon any member of the public, States or any other federal agency. The word "should" in this document does not connote a requirement but rather indicates a strong recommendation in terms of a best practice.

Furthermore, the suggestions in this document may not apply in a particular situation based upon the circumstances, and EPA retains the discretion to adopt approaches on a case-by-case basis that differ from this document. Finally, this is a "living document," and EPA may revise it from time to time.

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Appendix

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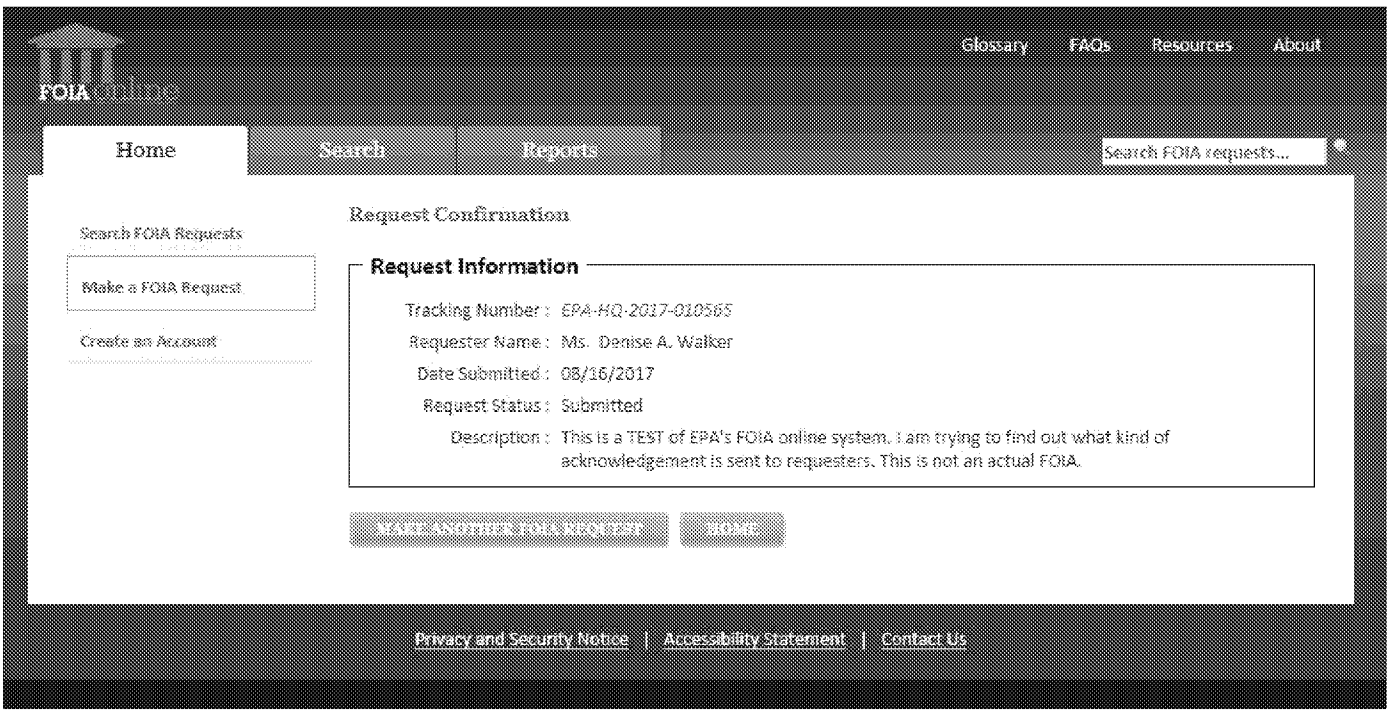
Step 1: Acknowledge Receipt of FOIA Request and Understand Your Statutory Deadlines

A. How do I acknowledge receipt of the FOIA Request?

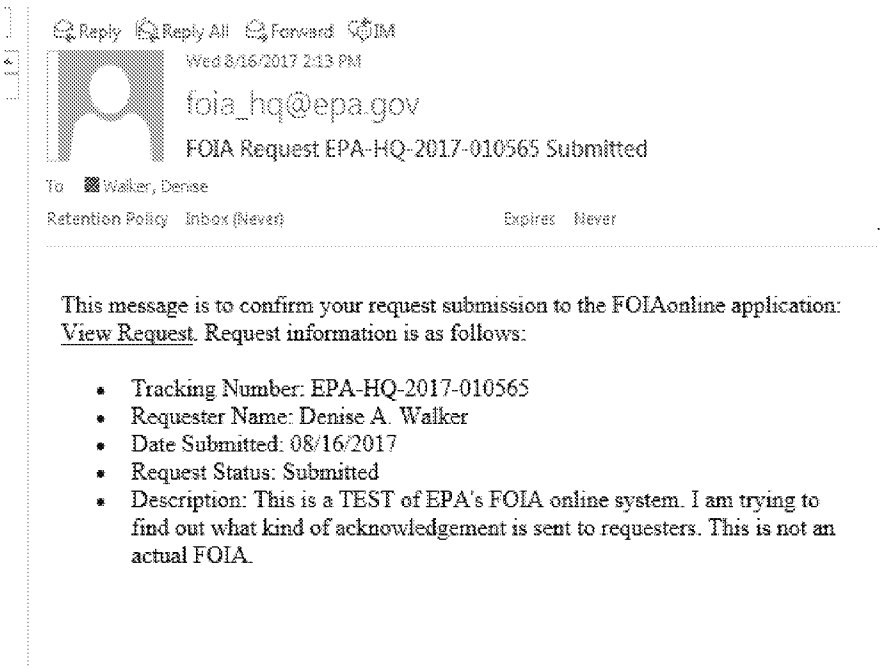
1. FOIAonline

FOIA requesters can submit their written FOIA requests to EPA electronically via FOIAonline. FOIA requesters can also submit written requests to EPA's Headquarters or Regional FOIA Officers, in which case the National FOIA Program Office, or Regional Office, if applicable, will input the request into FOIAonline. All requests are processed through FOIAonline.

Once a request is submitted to FOIAonline, the requester receives notification immediately via the FOIAonline website confirming submission of a request. In this request confirmation, the requester is provided with a tracking number, the date submitted, and a brief description of the request as provided by the requester in the submission. An example of the response a FOIA requester receives upon submission of a request via FOIAonline is as follows:



FOIAonline then automatically generates an acknowledgement e-mail to the requester such as the following:


Reply Reply All Forward IM

Wed 8/16/2017 2:13 PM

foia_hq@epa.gov

FOIA Request EPA-HQ-2017-010565 Submitted

To Walker, Denise

Retention Policy Inbox (Never) Expires Never

This message is to confirm your request submission to the FOIAonline application: View Request. Request information is as follows:

- Tracking Number: EPA-HQ-2017-010565
- Requester Name: Denise A. Walker
- Date Submitted: 08/16/2017
- Request Status: Submitted
- Description: This is a TEST of EPA's FOIA online system. I am trying to find out what kind of acknowledgement is sent to requesters. This is not an actual FOIA.

The submission confirmation and the acknowledgment email are the first communication the requester receives from the Agency. The acknowledgment email also appears as the first correspondence entry as a system-generated email, which appears under the correspondence tab in FOIAonline.

☆ **Be sure to turn on the notification feature under the "My Account" tab in FOIAonline, as the system will then generate e-mails to your Outlook account notifying you to check FOIAonline for requests or tasks that have been assigned to you. Be sure also to check regularly the "My Cases" tab in FOIAonline, as you will find all pending requests and tasks listed here.**

2. Initial communication from Action Office

When you or your office is assigned as the lead (also known as the Action Office) on a FOIA request, you should immediately review the request and ensure that assignment to your office is appropriate. If you believe that your office should not be the Action Office for a particular FOIA request, immediately notify the FOIA Coordinator or FOIA Officer in the office that you believe should be the appropriate Action Office. If there is agreement, the FOIA request should immediately be reassigned via FOIAonline to the correct office. If you are unsure of the appropriate Action Office, you should immediately work with your office's FOIA Coordinator or FOIA Officer to resolve the issue in conjunction with the National FOIA

Program Office. Be sure to communicate with the FOIA Coordinator or FOIA Officer in the other office before re-assigning the matter in FOIAonline.

After ensuring that the request is properly assigned to your office as the Action Office, as a best practice you should reach out to the requester by sending a short note through FOIAonline, letting the requester know your contact information, that you are reviewing the request and that you will be back in touch promptly once you have had a chance to review the request fully. This can be accomplished by clicking the "Create Correspondence" in FOIAonline. The note might look like this:

> *Subject: [FOIA ID # XXX-XXXX]*
> *Dear [FOIA Requester]:*
> *My office has received your FOIA request. I will contact you again after we have had an opportunity to review the request fully. I will be your point of contact. Please feel free to contact me directly with any questions or concerns. Additionally, at any point in time, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail at: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; by email at: ogis@nara.gov; by telephone at: (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769*
>
> *Sincerely,*
>
> *[Your Name]*
> *[Your Phone Number]*

Regular communication with the requester is fundamental to good FOIA processing. Start early!

OGIS, which is referenced in the sample noted above, is a FOIA resource for the public and the government. https://www.archives.gov/ogis. The FOIA Improvement Act of 2016[1] (hereinafter referred to as "the 2016 Amendments to FOIA") requires agencies to notify requesters of their right to pursue alternative dispute resolution through OGIS at certain points in the FOIA process, as explained below.

[1] https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016

B. How much time do I have to respond to a FOIA request?

1. Statutory and regulatory time limits

Under FOIA, you have 20 working days to process a request. 5 U.S.C. § 552(a)(6)(A)(i) (2006 & Supp. IV 2010). FOIAonline has a clock in the upper right hand corner that will help you keep track of how many days have passed since the National FOIA Program Office perfected the request. If you believe you can complete the request in 20 working days, let the requester know. If the request is not clear, you should seek clarification of the request.

2. Tolling time limits

You can stop the clock one time while you are waiting for clarification from a requester. 5 U.S.C. § 552(a)(6)(A)(ii). To do this, select "Stop the Clock" in FOIAonline and select the appropriate reason. Although you can only stop the clock once to clarify a request, you can stop the clock as many times as you need for fee-related reasons, including when the requester is required to provide an assurance of payment and has failed to do so. Fees are addressed more fully in Step 2.

Once the request is clarified or the fee issue is resolved, be sure to go back into FOIAonline and select "Start the Clock."

3. How do I get more time to respond to a FOIA request?

a. Unusual Circumstances and the 10-day extension. 5 U.S.C. § 552(a)(6)(B)(i). If you think you will need additional time beyond the 20 working days, you can provide the requester with a notice that you are invoking a 10-day extension for "unusual circumstances" per 5 U.S.C. § 552. This will give you a total of 30 days to respond to the request. This notice must: (1) be in writing; (2) include information on how to contact OGIS (as required by the 2016 Amendments to FOIA); (3) provide the requester with an opportunity to narrow the request (5 U.S.C. § 552(a)(6)(B)(ii)); and (4) be for one of the following reasons:

- the request requires EPA to collect responsive records from a field office or other entity separate from the office processing the request;
- the request involves a "voluminous" amount of records that must be located, compiled, and reviewed; or
- the request requires EPA to consult with another federal agency or other EPA components that have a substantial interest in the responsive information. 5 U.S.C. § 552(a)(6)(B)(iii).

b. Extension of time beyond 30 days. If there are unusual circumstances and the request cannot be processed in 30 working days, you must provide the requester an opportunity to modify the request so that it can be processed within 30 working days

or arrange for an alternative timeframe for completion of processing. 5 U.S.C. § 552(a)(6)(B)(ii). This notice must: (1) be in writing; (2) include information on how to contact OGIS (as required by the 2016 Amendments to FOIA); (3) provide the requester with an opportunity to narrow the request; and (4) be for one of the unusual circumstances set forth in section 3.a. above. Requests that require the assistance of the Office of Environmental Information's (OEI) Discovery Services Division will likely exceed the 30-day limit. Please see Step 3 for additional information on how to submit search requests to the Discovery Services Division.

4. Consequences of not responding to a FOIA within time limits

While many requests will take longer than 20 working days to complete a response, it is important to pay attention to statutory deadlines. Failing to respond to a FOIA within the statutory timeframe enables requesters to go directly to district court for relief. 5 U.S.C. § 552(a)(6)(C)(i). Failing to respond within statutory timeframes can also preclude the Agency from being able to charge fees. 5 U.S.C. § 552(a)(4)(A)(viii).

Practice Tip: Be sure to think about whether you will need additional time beyond the statutory 20 working days when you receive the request. Do not wait! Most complex FOIA requests cannot be processed in 30 working days (*i.e.*, 20 working days plus 10 days for unusual circumstances), so take appropriate steps to notify the requester and arrange for additional time as soon as possible.

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Step 2: Evaluate the FOIA Request and Determine Fees to be Charged, if Any

A. What is a proper FOIA request?

Before commencing a search for records pursuant to the FOIA, evaluate the FOIA request and confirm that it is proper. A proper FOIA request is one that sufficiently describes the records sought, *i.e.* it enables an Agency employee familiar with the subject area to locate the records with a reasonable amount of effort.

The FOIA was not intended to make government agencies full-time investigators on behalf of requesters or to allow requesters to conduct fishing expeditions through Agency files. The FOIA is about access to Agency records, but does not require the Agency to answer questions or create records to respond to a request. However, the breadth of the FOIA request or its burden on the Agency alone does not make a request improper – requests can be very large, yet still be proper. Instead, the key inquiry is whether the request sufficiently describes the records sought such that you have enough information to begin a search.

1. Applicable legal requirements

EPA's regulations at 40 C.F.R. § 2.102(c) state that the "request should reasonably describe the records you are seeking in such a way that will permit EPA employees to identify and locate them." Further, the regulations state "when possible, your request should include specific information about each record sought." Finally, the regulations state that this specific information should include (whenever possible):

- Date
- Title or name
- Author
- Recipient
- Subject

Requests do not need to have ALL of these elements to be proper requests; however, requests that contain none of these pieces of information (or only one) likely require clarification.

a. FOIA does not require EPA to do the following:

i. FOIA does not require EPA to create new records by compiling data or manipulating existing records, nor does it require the Agency to re-create records that were properly disposed of. Examples of this type of improper request include:
   - "Make me a list of all Agency actions that . . . ."
   - "I want to know what the Agency is doing about . . . ."
   - "Provide me with information about who is working on . . . ."

ii. EPA does not have to produce records over which it retains no control. An example of this type of improper request includes:
   - "Provide me emails and communications between staff at XX Contractor" (if Agency employees are not included).

iii. EPA does not have to answer questions, interrogatories, or perform research to answer requests. Examples of this type of improper request include:
   - "What files does EPA have on . . . ."
   - "What did the EPA consider or rely on to. . . ."
   - "How does EPA justify. . . ."
   - "Produce any documents that prove or disprove (statement or argument)."

iv. EPA does not have to produce purely personal records. Recall that the FOIA only requires the release of "agency records," *i.e.*, records that are created or obtained by an agency and under the agency's control at the time of the request. An example of this type of improper request includes:
   - "Please provide me EPA employee John Smith's recent home appraisal."

Practice Tip: More information on what constitutes an "agency record" vs. a "personal record" is available at: https://www.justice.gov/oip/blog/foia-update-oip-guidance-agency-records-vs-personal-recordshttps://www.justice.gov/oip/blog/foia-update-oip-guidance-agency-records-vs-personal-records

v. EPA does not have to explain or justify Agency decisions. Examples of this type of improper request:
   - "Provide the basis for the Agency's decision to . . . ."
   - "Provide any records supporting the statement that . . . ."

vi. EPA does not have to "hold" a request open for FOIA requests that seek records that EPA may create at some point in the future (*i.e.* records that do not exist at the time the request is received). Example of this type of improper request:
   - "Provide the final XYZ Report when it is finished next month."

Practice Tip: If, when reading the request, you think, "I don't even know how we would begin to search for this," you may have an improper request. Don't guess what the requester might be looking for – contact the requester to clarify! See Section 2B for more information on reaching out to the requester for clarification.

b. ***Requests that only seek information already publicly available on EPA websites.*** These types of requests can be closed once you respond to the requester and direct the requester to the specific location where EPA has made the information publicly available. Locations may include the following:

- EPA's website
- EnviroFacts
- ECHO
- MyProperty
- FOIAonline
- ChemView

See also Appendix, Step 1, Template Letter for requests that seek information that EPA has made publicly available.

2. Perfecting Requests

a. ***Under current EPA procedures***, the National FOIA Program Office documents the date on which the request is received as both the "submitted" date and "perfected" date in FOIAonline.

b. ***Because the request will be assigned to the Action Office as "perfected,"*** it is that office's responsibility to determine if the request is proper and, if necessary, to seek clarification. Again, you can only stop the clock once to clarify the request during the first 20 working days.

c. ***If you determine a request is not proper***, below are the steps to take:

i. Prepare the Improper Request/ Seeking Clarification Letter (See The Initial Detailed Response Template in Appendix, Step 1, or http://intranet.epa.gov/foia/FOIA-letters.html).

ii. Send the letter through FOIAonline or regular mail to the requester, as appropriate. If the letter is sent through regular mail, ensure that a copy is included in FOIAonline under the "correspondence" tab, so all communications can be kept as part of the FOIAonline case file.

iii. In the FOIAonline case file, click the "Stop the Clock" button on the Left Navigation.

iv. Select "Clarification" in the Reason drop down menu.

v. Explain the reason for stopping the clock in the Notes field. Also, to avoid confusion later, be sure to type in the Notes field the date by which you expect a response from the requester.

vi. Click the "Stop the Clock" button on the left side of the page in FOIAonline.

vii. Wait for the requester to respond or the due date to pass. When the requester responds and clarifies the request, click the "Start the Clock" button on the left side of the page in FOIAonline.

viii. Once you are on the "Start the Clock" screen, press the "Start the Clock" button on the bottom of the page.

ix. If the requester does not respond by the due date or fails to provide a clarification that sufficiently describes the records sought, begin the close-out process using the Closure for Failure to Modify Template (Appendix, Step 1) or http://intranet.epa.gov/foia/FOIA-letters.html).

x. If the requester responded or you were able to clarify over the phone, confirm the modification or clarification in writing. (For template, see Confirmation of Clarification Template Appendix, Step 2).

xi. Once confirmed, go to the "Submission Details" tab in FOIAonline and click the box saying "Has Description Been Modified?"

xii. Type the modified description in the box.

xiii. Click "Save Changes" button at the bottom of the page.

xiv. Process the request according to the modified description.

Practice Tip: If you determine that the FOIA request constitutes an improper request, per EPA's regulations, you must contact the requester and ask them to clarify or modify the request. Note that under the FOIA, you have one opportunity to "stop the clock" to clarify an improper request. For more information on request parameters, see EPA regulations at 40 C.F.R. § 2.102(c) ("Procedures for making requests").

B. Evaluate the FOIA Request with your FOIA Team and Clarify, as needed

1. Who is on my FOIA team?

a. ***Simple, non-voluminous Requests:*** Generally, as the Action Office, your FOIA team will be: (1) your office's FOIA Coordinator or FOIA Officer; (2) relevant office staff; and (3) subject-matter expert(s) (SMEs) of the requested records. A SME is someone who has expertise in the subject matter of the FOIA.

Practice Tip: Be sure to coordinate with your subject-matter expert(s) (SME) early and often, even on simple requests! SMEs will be a great resource for identifying whether, where, and what records exist that may be responsive to the FOIA request.

b. ***Complex or voluminous requests****:* Generally, as the Action Office, your FOIA team will be: (1) Action Office; (2) any Contributing Office(s); (3) SMEs; (4) FOIA Coordinator(s) or FOIA Officer(s); and (5) FOIA analyst(s), where applicable.

c. ***Identifying the correct Contributing Office(s)*** at the beginning of the request will save you time and hassle later! Coordinating all Contributing Offices at the outset is critical for efficient FOIA processing across the Agency. Upfront coordination helps to avoid multiple offices reaching out to the same requester(s) and clarifying the request(s) in different ways.

d. ***The most important question*** you should keep asking as you identify the correct Contributing Office(s): *Are there any other program office(s) or custodian(s) that are likely to have responsive records?* Remember, the Action Office is responsible for clarifying the FOIA request in a way in which all affected offices agree.

2. Discuss the FOIA request with the team, See Appendix, Step 2, at 12.

a. ***Often, a request meets all the requirements of a proper request***, but the team might still be unsure of where to begin a records search, the request is very broad, or the requester uses a word or phrasing that might have certain significance within the Agency that is different from common usage. To ascertain the need for clarification, consider:

- Does the request sufficiently describe the records sought such that you or your subject matter expert know where to search for records?
- Is the following provided: date range, program office(s), custodian(s), search terms?
- Can you, as the Action Office, articulate a search plan of action for the records sought?

If the answer to any of these questions is "No" or "I'm not sure," reach out to the requester and seek clarification of the request!

b. ***Other questions for the team to consider may include****:*

- Has this information been requested through FOIA previously?
- What, if anything, could be a hurdle to efficient processing of the request?
  - Are there any sensitive issue(s)? (*e.g.*, litigation, on-going rulemaking)
  - Potential resource concerns? (Is your team in the middle of another large project?)

c. ***From these discussions, the team should have:***
- A common understanding of the request;
- A plan of action if the team determines the request is improper or requires clarification;
- A sense of any obstacles/hurdles going forward that may need to be addressed as a team; and
- An idea of what needs to be discussed with the requester.

d. ***Prepare for your communication with the requester.*** Upfront preparation is imperative regardless of whether you will make contact by email or telephone.

i. If you seek clarification on the type(s) of records sought, gather information about the types of records the custodians create, the record systems, how the records are organized, and how the records are maintained.

Practice Tip: Want to know where to find information about EPA's record systems? A great place to start is EPA's Privacy Act System of Records Notices (SORNs)! These notices are published in the Federal Register and provide information to the public about the categories of records kept in the system, the categories of information that can be searched, and the point of contact responsible for the maintenance of the Privacy Act System. If you don't feel like perusing the Federal Register, EPA's Federal Information Systems can be found here: https://www.epa.gov/privacy/epa-federal-information-systems.

ii. If you seek clarification on the topic(s) of records sought, gather information about the issue(s) on which the relevant office(s) is focused. Consider any relevant/timely issue(s) affecting the office(s), recent or upcoming projects, and similar issues.

- Sometimes the requester deliberately submits a very broad request without much direction about a topic because, while they have an idea in their mind about the topic, the requester does not know quite how to couch the request to capture the information they seek. Having current topics on hand when contacting the requester can be useful, so you can ask questions like, "You mention X in your request, but X is a very broad topic. Our office is working on a rulemaking related to issues like X, are you interested in documents about the rulemaking?"

iii. If you seek clarification regarding custodian(s), consider who are the individuals in your program office most likely to have relevant records. While the entire program office might have responsive emails, for example, helping the requester to nail down the custodian list to the primary individuals with

relevant responsive documents increases the likelihood that the requester will receive the relevant information they seek.

3. **Reaching Out to the Requester**

   a. ***Call or at least email the requester.*** Most requesters are glad to hear from the Agency about their FOIA requests, even if the discussion might require giving the requester "bad news," such as the length of time needed to process the request. Consider making a regular practice to reach out to a requester to discuss the request, even if the scope of the request seems clear.

      - Communication with the requester is very important because the Agency can help manage the requester's expectations. Most requesters are not familiar with EPA records, organizational structure, or technical capabilities. Educating requesters about EPA is often productive for the FOIA requester and helps inform the public about the Agency.

Practice Tip: If you are managing multiple requests on a similar topic, and another requester submits a narrower request or you have worked with another requester to clarify/narrow a request, consider proffering those ideas to the other requesters. The more similar you can get related requests, the more straightforward your management of the FOIA project will be.

   b. ***Engage in an open discussion with the requester***. An adversarial approach will not go far. Requesters are more likely to participate in some give and take if they trust that the Agency staff want to assist them in fulfilling their FOIA requests.

   c. ***Document your communication with the requester***. If communication occurs via email, be sure to upload all email communications to FOIAonline. If communication occurs via telephone, be sure to memorialize your discussion in an email to the requester, and upload the email to FOIAonline. You may also communicate with the requester directly through the correspondence tab in FOIAonline. If for some reason you are unable to document your communications via email with the requester, at the very least, create a comment in FOIAonline recording the details of your communication.

☆ **If you need to contact multiple requesters, make sure to reach out to the requesters with expedited FOIA requests first, and document your communication!**

Practice Tip: If at any point in processing the request, the team is unsure or feels a sense of hesitation about how to resolve a question about the scope of the request, it is best to reach out to the requester for clarification and discussion. Such an approach

will go far in establishing a positive relationship with the requester and is good customer service.

d. What if the Requester Does Not Want to Clarify?

i. The Office of Government Information Services (OGIS) provides mediation services to resolve disputes between FOIA requesters and Federal agencies. FOIA requesters and agencies may request OGIS's assistance in resolving a dispute at any point in the FOIA process. OGIS works with the parties to attempt to reach a mutually agreeable resolution.

ii. Remember, under the 2016 Amendments to FOIA, the Agency must notify requesters of their right to pursue alternative dispute resolution through OGIS at three points in the FOIA process in response to:
- Initial determination letters;
- Appeal response letters; and
- Letters regarding requests in which unusual circumstances allow for 10 additional working days to respond.

iii. Below is the language regarding OGIS to include in letters to the requester:

You may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

☆ **Remember to document the efforts you have taken to get the requester to narrow/clarify the request and to identify any aspects of the request that are improper/unclear.**

Practice Tip: We still have an obligation to respond to the parts of the request that are unambiguous! One imperfect part of a FOIA request does not permit the Agency to fail to respond to the entire request!

C. FOIA Fees and Fee Waivers

The FOIA allows agencies to charge certain fees to requesters to process their FOIA requests. Requesters are placed into one of three fee categories. Which types of fees an agency may charge is based on the fee category in which a requester falls. Further, in some circumstances, the FOIA allows for a waiver or reduction of fees. Certain restrictions apply to an agency's ability to charge fees, as discussed below.

1. Types of fees

The FOIA allows agencies to charge three types of fees for processing FOIA requests: search, review, and duplication.

a. ***Search fees:*** Search fees may be charged for the time spent looking for responsive documents. Note that search fees may be charged even if the Agency does not locate any responsive documents or if the documents are withheld under a FOIA exemption. Examples of actions that are chargeable as "search fees" include time spent for meetings to discuss search strings/how to conduct searches, time spent searching one's computer and hard copy files, and time spent looking at the records to see if they are responsive.

b. ***Review fees:*** Review fees may be charged for "direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed [under the FOIA]." This includes reviewing documents to determine which, if any, exemptions apply. Review fees may *not* be charged for subsequent levels of review.

c. ***Duplication fees:*** Duplication fees include the direct costs of making copies of the documents. They also include, if documents are scanned, the staff time spent scanning the documents. For paper copies, EPA currently charges 15 cents per page. For electronic copies, you may charge for a physical medium, such as a CD, but not for uploading documents into FOIAonline.

> **Note**: Some FOIA requesters may also ask that the records be "certified." This is a special service for which the OMB Fee Guidelines allows agencies to charge fees. EPA charges $25 to certify records. For certification requests, contact the Program Assistant in the General Law Office in the Office of General Counsel.

2. Categories of requesters

Which types of fees an agency may charge for processing a FOIA request depends on the category into which the requester falls. The FOIA provides three fee categories: (1) Commercial use requesters, (2) Educational institutions, noncommercial scientific

institutions, and representatives of the news media; and, (3) Other (requesters who do not fall into either category above). While the HQ FOIA office makes initial determinations on fee categories, you should work with your FOIA Coordinator along with the National FOIA Program Office if you believe a different fee category is more appropriate.

Category 1- Commercial Use Requesters: According to the OMB Fee Guidelines, "commercial use" requesters are those who ask for records for "a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made." The focus is how the requested information will be used, not the identity of the requester. Accordingly, the fact that a requester has been placed in a "commercial use" category in the past does not mean that the requester will be similarly placed in the future. When the intended use of the records is not clear from the wording of the request, an agency can seek additional information from the requester to make a fee category determination. Common uses of the requested records that result in a "commercial use" fee categorization include using the documents in litigation. Commercial use requesters are charged all three types of fees (search, review and duplication).

Category 2- Educational institutions, noncommercial scientific institutions, and representatives of the news media: Educational Institutions include schools such as universities and vocational institutions. The requirement is that the institution must operate a program of scholarly research. The OMB Fee Guidelines specify that to qualify for this fee category, the purpose of the request must relate to the goal of the educational institution, not the goal of the individual requester. For example, a requester asking for documents to write a term paper would not qualify for the "educational institution" fee category. However, a professor requesting records related to her field of study for use in instructing students might qualify.

Noncommercial scientific institutions are defined by the OMB Fee Guidelines as simply a noncommercial institution that is "operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry."

The FOIA defines a "representative of the news media" as "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." The FOIA also explains that this category includes news agencies as well as freelance journalists if they "can demonstrate a solid basis for expecting publication through [a news media] entity, whether or not the journalist is actually employed by the entity."

Requesters in the Category 2 fee category are only charged duplication fees, but receive the first 100 pages of paper copies for free.

Category 3- Other Requesters: The "other" category is simply a catchall category for any requester that does not fall into either of the other two categories. Requesters in

this fee category are charged search fees and duplication fees; however, they receive the first two hours of search time and the first 100 pages of paper copies for free.

The table below summarizes which fees an agency can charge for the processing of a FOIA request based on the fee category of the requester.

	Search	Review	Duplication
Commercial Use	Yes	Yes	Yes
Educational/Scientific/News	No	No	Yes*
Other	Yes**	No	Yes*

* Requesters in the "Educational/Scientific/News" category and requesters in the "Other" category receive the first 100 pages free of charge
** Requesters in the "Other" category receive the first two hours of search time free of charge.

<u>Practice Tip</u>: FOIAonline will automatically calculate the fee total when you enter the type of fee and hours spent under the "Admin Costs" tab. Note that FOIAonline will not allow a request to be closed unless time spent processing the request is accounted for in the "Admin Costs" tab. However, when entering time, you can select "No" in the "Billable?" drop down menu if such costs are not billable to the requester.

3. <u>Fee waivers</u>

The National FOIA Program Office processes initial fee waiver requests. The FOIA provides that agencies should waive or reduce fees "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."

Any FOIA requester may request that EPA waive all fees associated with the request, but the request for a waiver of fees must be submitted with the accompanying FOIA request. The initial fee waiver determination is made by the National FOIA Program Office and may be directly appealed by the requester to the Office of General Counsel by filing an administrative appeal.

Fee waiver determinations are made on a case-by-case basis using the information accompanying the FOIA request and are made based on six factors outlined by the Department of Justice in its January 1, 1987 Fee Waiver Policy Guidance. Those factors take into account the following considerations:

<u>Factor 1. The subject of the request</u>: Whether the subject of the requested records concerns "the operations or activities of the government."

Factor 2. The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records are meaningfully informative about government operations or activities and are "likely to contribute" to an increased public understanding of those operations or activities.

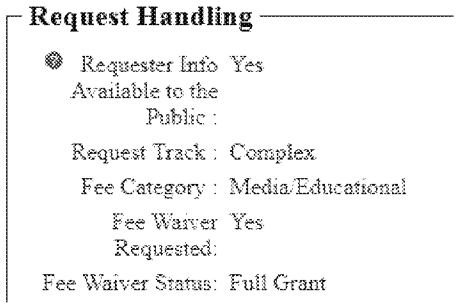
Factor 3. The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.

Factor 4. The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Factor 5. The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.

Factor 6. The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

Practice Tip: The main request page in FOIAonline indicates whether a fee waiver has been granted.



4. Advanced payments and assurances of payment

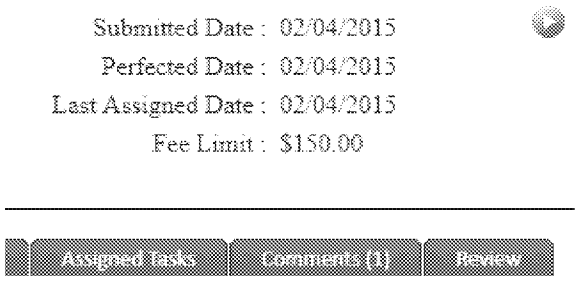
EPA can ask for an advance payment of fees from the requester in two circumstances: (1) when the fees will exceed $250, or (2) when the requester has previously failed to pay fees in a timely fashion. If you are working with a requester who has a history of prompt payment, you may simply ask for an assurance of payment, discussed below. If you are working with a requester with no history of payment, you may either ask for an assurance

of payment or an advance payment. For requesters who have failed to pay in a timely fashion in the past, you should ask for an advance payment.

Per EPA regulations, you must provide written notice to requesters of anticipated fees more than $25 if the requester did not agree to pay a higher amount in the initial FOIA request or subsequently. EPA then requires a written assurance of payment from the FOIA requester, unless an advance payment was received.

A requester can also designate a fee limit with its FOIA request. An assurance of payment is required if the estimated costs of processing the request exceeds the fee limit.

<u>Practice Tip</u>: The main request page in FOIAonline indicates whether a fee limit has been set by the requester.



☆ **Note that if a FOIA requester is delinquent in paying fees, it is placed on a "Do Not Serve" list. Your FOIA Coordinator or FOIA Officer has access to that list, which is located at the link below. Ensure that you do not process requests for any requester included on that list. The list can be found at:** https://usepa.sharepoint.com/sites/oei_Work/FOIA%20Invoices/SitePages/Home.aspx

5. <u>Changes to Fees after the 2016 Amendments to FOIA</u>

The 2016 Amendments to FOIA added a new limitation to the ability of agencies to charge search fees. Generally, agencies can no longer charge search fees if the response is beyond the 20-day deadline (or 30-day in the case of "unusual circumstances"), even with an agreement from the requester.

The exception to this rule is that agencies may charge search fees (or duplication fees for "news media" or "educational" requesters) if:

- "unusual circumstances" apply; and,
- "more than 5,000* pages are necessary to respond to the request," if:
  - timely written notice has been made to the requester; and,

- "the agency has discussed with the requester how the requester could effectively limit the scope of the request." The agency must make at least three good-faith attempts to discuss limiting the scope of the request with the requester and the communication must be by written mail, electronic mail, or telephone.

*Note: "5,000 pages" refers to the number of pages in the total universe of documents required for review (*i.e.*, "collected" documents), *not* the number of pages that will be ultimately released to the requester.

Practice Tip: If you expect the final FOIA response to occur beyond the 10-day extension and more than 5,000 pages are necessary to respond, notify the requester *before* the 10 days expires and discuss how it can limit the scope of the request.

- **If you know that unusual circumstances will apply when you receive the request, invoke the additional 10 days in your acknowledgement letter and invite the requester to narrow.**
  - **This will satisfy the "timely notice" requirement and will qualify as your first attempt to discuss with the requester how to limit the scope of the request.**
- **If a fee assurance letter is sent later, include another opportunity for the requester to discuss how to limit the scope.**
  - **This will qualify as your second attempt to discuss with the requester how to limit the scope of the request if the first attempt went unanswered. If the requester has not responded to either attempt, you will only need to make one additional attempt to contact the requester before satisfying the requirement that the Agency make three good-faith attempts.**
  - **If in response to any attempt to discuss how to limit the scope of the request, the requester refuses to limit the scope, it is not necessary to make additional attempts.**

6. Fee tips for complex FOIAs

As with processing any FOIA request, when processing complex FOIA requests, you should be aware of the requester's fee category (or whether the requester has been granted a fee waiver) when evaluating the request. When you receive the request, consider whether the fee limit is reasonable considering what's requested. If the fee limit is not reasonable, consider preparing a fee estimate and reaching out to the requester to discuss the issue.

☆ **If you have unusual circumstances and followed the steps to extend the due date an additional 10 working days, but you are not confident you can process the request within 30 working days, give notice to the requester before the 30th working day of the unusual circumstances! Otherwise, *you forfeit the ability to charge certain fees* to the requester.**

- Consequences for failing to assert unusual circumstances:
  - If a Commercial requester, Agency cannot charge search fees.
  - If a Media/Educational or Noncommercial Scientific Institution, Agency cannot charge for duplication fees.
  - If Other requester, Agency cannot charge search fees.
- For more information, see the National FOIA Program Office's FOIA Fees Decision Tree: http://intranet.epa.gov/foia/docs/Fee-decision-tree.pdf

Step 3: Plan and Conduct a Search for Responsive Records

It is important to understand the roles and responsibilities of each office in processing a FOIA request. The Action Office, which is the office that has been assigned the FOIA request, is responsible for taking the lead in developing and implementing the search plan. The Action Office needs to identify the other offices, if any, where responsive records may reasonably be located. If the Action Office determines that other offices may have potentially responsive documents, the Action Office needs to work with those Offices (called Contributing Offices), as discussed below, to develop and implement a search plan.

Throughout this section, we will refer to the Action Office and Contributing Office(s) and discuss each office's role in the search process. To ensure efficient processing and avoid duplication, the Action Office should take the lead in developing the agreed-upon search plan and disseminating clear, consistent direction to the Contributing Offices. You want to avoid situations where Contributing Offices have different interpretations of a FOIA request and thus use different search strategies or terms in processing the request. An effective search is the natural byproduct of proper planning and coordination.

A. Legal Requirements for a Search under the FOIA

The FOIA requires federal agencies to make available to a requester any agency record that is responsive to a proper request. See 5 U.S.C.§ 552(a)(3)(A). To locate responsive records, agencies must conduct a *reasonable* search for records, *i.e.* a search that is reasonably calculated to uncover all relevant documents. A "reasonably calculated" search does not require a "perfect search," and failure to produce "one specific document" does not deem a search inadequate. See e.g., Defenders of Wildlife v. Dep't of Agric., 311 F. Supp. 2d 44, 54 (D.D.C. 2004); Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003).

Rather, the adequacy of the search is examined based on the reasonableness of the search given the totality of the circumstances. Weisberg v. U.S. Dep't. of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The Action Office needs to ensure that the Agency makes a good faith effort to conduct a search through methods that can be reasonably expected to produce the information requested. See Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 67-68 (D.C. Cir. 1990).

B. Develop and Implement a Search Plan

1. Develop the Search Plan

By the time you get to Step 3 (Plan and Conduct a Search for Responsive Records), you should have already confirmed that the FOIA request is a proper request and, if it is not, sought clarification from the requester. See Step 2 above. Before you start to develop your search plan, review the request again and remind yourself what the request seeks.

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Regardless of whether your FOIA involves a request for records in a single office or multiple offices, you need to: (1) identify where to search; (2) determine who should search; and (3) determine how the search should be conducted. These three items represent the core elements of your search plan.

You might be thinking – where do I, as the lead for the Action Office, start? As always, start with the FOIA request, and any modifications. If the request seeks only Outlook emails, then your search should be focused accordingly on Outlook emails. Frequently, however, FOIA requests are broad and seek, for example, documents regarding a particular topic during a particular time-frame.

In formulating an effective search plan, the Action Office considers the following:

a. *Where to search*

i. What offices might have documents?

- Are the records requested located solely in one office?
- If not, the Action Office should identify the offices (both Headquarters and Regional offices) where responsive records may reasonably be located. If responsive documents are located in more than one office, the Action Office needs to identify those offices (Contributing Offices) and ensure that those offices understand the scope of the FOIA request.

☆ **Key Point: If multiple offices are involved, then the Action Office takes the lead in developing the search plan, in coordination with the Contributing Offices.**

ii. Where are the documents?

Once the Action Office has identified whether records are located in one or multiple offices, it next evaluates where to search for records within each office, *e.g.* repositories for paper files, emails, electronic documents. In doing this, again refer back to the FOIA request. If the FOIA request asks for documents in only one repository – *e.g.*, Outlook emails – the search can be tailored accordingly. If the request is not limited to emails but rather seeks documents on a topic in a particular time-frame, be sure to evaluate the locations where responsive records are likely to be located.

Potential locations include, for example:

- Outlook email, calendars
- Skype/Lync Chats
- Lotus Notes mailboxes or calendars, other Lotus Notes databases
- Enterprise Content Management System (ECMS or EZ-records)
- Correspondence Management System (CMS)

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- Local or shared computer drives (*e.g.*, C:, F:, G:)
- SharePoint sites
- OneDrive
- Mobile devices (*e.g.*, text messages and photographs)
- External drives and discs
- Hard-copy files
- And other locations reasonably likely to contain responsive records.

See Appendix, Step 3 at 16-18 for a list of non-Outlook search locations in the "Search Instruction Template."

b. *Who may have responsive documents*

i. Once the Action Office identifies which offices potentially have responsive documents and where to search for those documents, the Action Office next needs to identify who would have potentially responsive documents. In identifying this list of individuals (referred to as custodians or individuals likely to have responsive records), include any custodians who are specifically named in a FOIA request or whose positions at the Agency suggest that they are reasonably likely to possess responsive records. Also, consult with subject-matter experts (SMEs) to determine which other custodians may have potentially responsive documents.

ii. *Tips for working with Contributing Offices in identifying potential custodians*: To ensure efficient processing of the FOIA request, work to ensure that you have identified a complete list of custodians. Below are some practice tips that may be helpful in working with Contributing Offices:

- The Action Office, via FOIAonline, tasks the Contributing Offices and asks the Contributing Offices: (a) to identify a subject matter expert that will serve as the point of contact for the Action Office. (That individual should contact the lead for the Action Office so that they can discuss the FOIA request and ensure a common understanding of the information requested); and (b) to identify a list of potential custodians (individuals who may have potentially responsive documents).
- In issuing the task, provide information on the FOIA, including any clarifications or modifications provided by the requester.

iii. Once the Action Office has coordinated with the Contributing Offices and has received the lists of potential custodians from Contributing Offices, the Action Office should compile the complete list of custodians and document that list in the search plan.

Before moving on to the next step in developing the search plan, take a moment and document in FOIAonline: (1) which offices beyond the Action Office may contain potentially responsive documents; (2) where to search for those documents; and (3) the list of custodians (including custodians from the Action Office and all Contributing Offices).

☆ **In evaluating which custodians may have responsive documents, remember to consider <u>former employees, employees who transferred to a different office, and contractors</u> and assess whether any of these individuals would be potential custodians based on the information requested.**

<u>Practice Tip</u>: If more than one office has potentially responsive documents to a FOIA request, the Action Office and Contributing Offices should communicate regularly to ensure that the search plan is complete before moving forward with implementation of that plan.

c. ***<u>How to search</u>***

Once you identify the locations of potentially responsive documents and the custodians of those documents, it is time to evaluate how to search. The first section below addresses centralized searching in EPA's Microsoft Office 365 system. The next sections address how to search for items not located on EPA's Microsoft Office 365 system.

i. **Centralized Searching: Outlook Email, Outlook Calendar, & Skype/Lync Chats**

Searches for information in EPA's Microsoft Office 365 system are generally conducted by OEI's centralized search service. This service can centrally search for records located in: (1) Outlook email messages, (2) Outlook calendar entries, and (3) Skype/Lync Chats.[2] The Action Office should evaluate the request carefully and determine whether a centralized search is warranted. For example, if a FOIA request seeks a specific document, the document can be retrieved and produced without a centralized search. By contrast, if the FOIA request seeks all communications between two EPA individuals for a one-year period, the Action Office would pursue a centralized search request

The Action Office is responsible for submitting the centralized search request to its Search Point of Contact (SPOC), who, in turn, will submit the request to OEI's Discovery Service Division for processing. Each organization has a

[2] If there is pending litigation on a FOIA, or if the request has been referred to the FEAT, consult with OGC before initiating a centralized search for the FOIA.

SPOC, and that SPOC works directly with OEI's Discovery Services Division in processing search requests. The Contributing Offices should not submit any search requests to OEI. For each FOIA request, only one search request should be submitted to OEI, and that request should be submitted by the Action Office. If this does not occur, OEI is left in the untenable position of trying to consolidate search requests on a single FOIA. The Action Office should consult with the Discovery Services Division about the estimated timeframes for beginning and completing a requested search/collection, so other steps in the process can be planned accordingly.

- Instructions on how to submit a centralized search request through your SPOC are located at: http://intranet.epa.gov/ediscovery/MSOutlookEmailSearch/.

> ***Wait! Before the Action Office Initiates the Centralized Search…***
>
> - The Action Office should ensure that the information provided to the SPOC, who, in turn, will provide it to OEI's Discovery Services Division, includes: (1) all custodians (by name and email address) from both the Action Office and all Contributing Offices; and (2) search terms reasonably likely to yield responsive records. It is important for the Action Office to coordinate effectively with the Contributing Offices to ensure that the search terms capture the scope of records sought.

ii. **Searching Non-Outlook Document Repositories when a Centralized Search is Conducted**

OEI runs the centralized search for Outlook records for EPA, including Outlook emails, calendar entries, and Skype For Business chat messages. For routine FOIAs requests, the Discovery Services Division will **not** search Lotus Notes mailboxes or calendars, other Lotus Notes databases, the Enterprise Content Management System (ECMS), the Correspondence Management System (CMS), local or shared computer drives, SharePoint sites, OneDrive, external drives, hard-copy files, and other locations where you may find responsive records, as outlined above.[3] As a result, potential locations that are not captured by OEI's centralized search service should be searched manually by the custodian.

[3] For the Agency's most complex, high-profile FOIA requests supported by OGC's FOIA Expert Assistance Team (FEAT), the Discovery Services Division may provide searches of additional information sources, if needed (*e.g.*, Lotus Notes emails, Enterprise Content Management System, network drives, hard drives, and other external devices).

It is important for custodians to evaluate all repositories that are reasonably likely to contain responsive records. This could include a personal email account if that account was used to conduct Government business and if the email has not yet been forwarded into the Agency's system. Consistent with the Federal Records Act Amendments of 2014 and the Agency's Records Policy, any employee who uses a personal messaging system, such as email, to conduct government business has 20 days to forward that information into the Agency's Outlook system. Once forwarded into EPA's email system, the information can be captured via the centralized search.

OEI's centralized search also does not extend to data that are uniquely retained on mobile devices, such as text messages, photos, or notes that are unique to the mobile device. Custodians should be reminded of the Agency's guidance regarding forwarding text messages into the Agency's Outlook system, as such messages can be captured via the centralized search once the messages are in Outlook.[4]

- Instructions on how to forward text messages to EPA email accounts are located at: http://intranet.epa.gov/mobiledevices/pdf/Instructions-Saving-Text-Messages.pdf (See Appendix, Step 3 at 39-40)

Consistent with its search plan, the Action Office should develop an email to all custodians providing specific search instructions to be followed regarding all non-Outlook document repositories. The instructions to the custodians should explain that the Agency has received a FOIA request for which he/she may have responsive documents and that a centralized search for his/her Outlook emails is already being conducted. The instructions should further explain that the custodian should conduct a manual search for non-Outlook documents potentially responsive to the FOIA request. The search instructions should include:

- The FOIA request number;
- A clear description of the FOIA request (and any narrowing/clarification);
- A copy of the FOIA request and any relevant correspondence with the requester;
- Recommended search locations and instructions to search all non-Outlook repositories where responsive documents may be held;

[4] EPA *discourages* the use of text messages for transmitting substantive (or non-transitory) federal records. In accordance with the Agency's policy, if a substantive (or non-transitory) text message is sent or received on your mobile device, it should be forwarded into the Agency's email system within 20 days.

- Recommended search terms;
- Recommended document collection method (*i.e.,* where responsive documents should be provided); and
- Date by which documents collected are to be transferred to the Action Office.

To provide custodians ample time to search for non-Outlook documents, it is recommended that the Action Office provide custodians the search instructions for non-Outlook documents at or shortly after the Action Office submits the Outlook centralized search request. In the search instructions, ask custodians to document, with as much specificity as possible, how they conducted their search. See Appendix, Step 3, "Search Instruction Template," which can serve as a useful guide when developing search instructions.

After distributing the search instructions, and before the collection period ends, the lead contact for the Action Office should touch base with the custodians to ensure that they understand their responsibilities and how to conduct the search.

Below are tips the Action Office may want to consider as it develops search instructions to custodians to search for non-Outlook responsive records.

Lotus Notes

If a FOIA request seeks emails or information located in Lotus Notes, the Action Office should:

- Contact EZ Tech to set up a collection database. EZ Tech will send the lead contact for the Action Office a link to the database that the lead can then circulate to custodians via email. Custodians will then use this database to upload responsive documents.

- As noted above, identify in the search instructions, keywords and search terms for the custodians' use during the search of Lotus Notes.

- Provide custodians the step-by-step instructions for searching Lotus Notes. (See Appendix, Step 3, for "Instructions for Searching & Collecting Lotus Notes Email.")

EZ Email Records (Also known as the Electronic Content Management System or ECMS)

Even though emails saved through EZ Email Records are archived into ECMS as Agency records, they are not captured by OEI's centralized search. So, if a responsive outlook email message was saved to ECMS

and then deleted from the user's Outlook account, a centralized search will not retrieve that record in Outlook. Thus, it is important to remind custodians to search manually ECMS for any non-duplicative emails that may be responsive to the request.

- Detailed search instructions for ECMS are available at: http://intranet.epa.gov/ecms/guides/search/

Note: Depending on the office, the Records Liaison Officer (RLO) may be able to conduct a centralized ECMS search for the RLO's office. If there are multiple offices, you may need to coordinate with RLOs from each office. Contact your RLO or the RLO from the relevant office(s) for more information.

Correspondence Management System (CMS)

CMS is an electronic document management system that captures, stores, and tracks correspondence that is addressed to EPA or any of its employees in their official capacity. Some offices may use CMS, for example, to document correspondence received, including responses to such correspondence. If a custodian determines that CMS may contain records responsive to the request, CMS should be searched.

Custodians may not have used CMS previously and may not have access to the system. In this case, the custodian can identify the individual in the office responsible for maintaining CMS and work with that person to complete the search. All CMS records are full-text indexed and searchable by any data element.

Other Locations

For all other locations, including, for example, local or shared computer drives, OneDrive, SharePoint sites, external drives and discs, and hard-copy files, custodians should conduct a reasonable search of these locations based on the request for records, as described in the FOIA request and any subsequent communications with the requester. (See Appendix, Step 3, "Instructions for Searching & Collecting Other Electronic Files").

Access to Separated Employee Records

The Action Office and Contributing Offices should work together to ensure that custodians' files are searched, even if those custodians are on-leave and not in the office when the request is received, or if they have separated from the Agency. (See Appendix, Step 3, "Access to Absent and Separated Employee Records").

iii. **Searching Document Repositories when a Centralized Search is Not Conducted**

If a centralized search is not conducted, the custodian would need to search manually the locations where potentially responsive documents may be located. The Action Office, consistent with its search plan, should develop an email to all custodians providing specific search instructions to be followed. See Step 2 above for guidance in preparing and disseminating search instructions.

C. Tips on Documenting Search and Completing Implementation of Search

It is important to document the search that was conducted. It is recommended that the lead for the Action Office develop a memorandum or checklist to track the search. Specifically, the lead for the Action Office would note: the Contributing Offices searched; the locations within those offices and the Action Office searched; the list of custodians and whether the custodians have completed their search; and the number of responsive records. The Appendix includes a sample memorandum that offers an example of what information you may want to track and how you might consider organizing this information. (See Appendix, Step 3, "Search Tracking Memo). Once the search is complete, proceed to Step 4, which is developing and implementing the review plan.

D. Periodic updates to the requester

As a best practice, you should periodically contact the requester to provide updates on the status of the Agency's processing of the request, particularly if it will take longer than 20 working days to issue a final response. Communication with the requester is important so that the requester understands that the Agency is actively working to complete its response to the request.

Consider providing interim or partial releases to demonstrate to requesters that you are actively processing the request. Such releases also give the requester insight into the types of records responsive to the request and may result in the requester narrowing the request.

As a best practice, document your search plan and update it as you implement the search. This will enable you to track the process and build a strong administrative record, which is important if the requester appeals and/or later sues EPA challenging the adequacy of the Agency's search. Check out Appendix, Step 3, for other best practices.

Step 4 – Develop and Implement a Plan for the Review of Potentially Responsive Documents

A. Develop your Review Plan

1. Identify the levels of review

The Agency's FOIA procedures call for Division Director or equivalent approval of FOIA responses. The approval applies to both withholdings and releases. Before you begin to review the records, review your office's FOIA procedures at http://intranet.epa.gov/foia/FOIA-Procedures.html and think through who will likely need to review the records.

Depending on the size and complexity of the FOIA request, it may be just you doing first level review and your manager completing the second level review of the records, or it could involve multiple levels of review.

Practice Tip: If there are multiple offices involved or if you are working on a FEAT FOIA, individual office procedures may need to be adapted to accommodate overall processing of the request.

Regardless of the complexity of your FOIA, the review cycle of a FOIA should include consideration of all the steps below. Bear in mind that not every review will include documents that will require review at each of these steps; however, be mindful of these steps as you plan your review process.

☆ **It is imperative that you plan your review process early so reviewers at every step have adequate time to review the materials.**

a. ***During first level review***, you (and your team if you have one) take the first step to review the records. In doing so, evaluate the following:

i. **Responsiveness**: Responsive documents are those documents that match the description in the request. Be sure you clearly understand what the requester wants. Non-responsive records do not need to be produced.

ii. **Disposition:** If the record is responsive, the first level reviewer then evaluates the documents to determine what, if any, FOIA exemptions apply and based

on that analysis, whether a document should be released in full, withheld in full, or released with redactions.

iii. **Exemptions:** If the record is responsive and should be withheld or redacted, identify the exemption(s) that applies(apply) and redact the document consistent with the claimed exemption(s).

iv. **Equities of other EPA offices**: If the record is responsive and contains discussions or information from another EPA office, identify those records for internal equity review, as described below.

v. **Equities of other federal agencies or the White House**: If the record is responsive and contains discussions or information from another federal agency or involving the White House, you will need to identify those records for external equity review, as described below.

vi. **Documents that upper management should be aware of prior to release:** During first level review, you should mark for further review any documents you think management may have a specific interest of being aware of prior to release.

b. Second level review

i. Consistent with EPA's procedures, all FOIA responses in which documents are released or withheld must have approval of someone at least at the Division Director level or equivalent.

ii. For many FOIAs, particularly those that are complex or voluminous, there may be other layers of review prior to the final management review. For example, your office may decide that a particular project warrants a second level review at the staff level prior to documents going through management review. Second level review can take many forms. This should be discussed with the FOIA team in conjunction with your management.

c. Equity review

An office other than the office that conducted the first-level review may have an interest, or equity, in certain documents. Many factors go into determining when an office has "equity" in a document. In general, an office has equity in a document when the document includes information of substantive interest to that office. This includes documents that were created in that office, emails involving personnel from that office, and opinions or advice given by an attorney in a legal office. In general,

any office with equity in the document should have the opportunity to review the document, and weigh in on whether they agree with the determinations made with respect to responsiveness and FOIA exemptions.

Practice Tip: If there is another agency or EPA office involved, notify that agency or office early and find out where to send the records for review. If the request involves only a few documents, you may consider discussing the records over the phone.

The following provides some general guidelines to follow when developing instructions for reviewers on how to determine which offices may have equity in a document:

- OEX - Office of the Executive Secretariat (Administrator's Office)
  - Any document containing the Administrator's primary or secondary email address.
  - Any document generated by a senior member of the Administrator's staff: Deputy Administrator, Chief of Staff, Deputy Chief of Staff, political appointees in the AO.
  - Prior Administrators.

- Public Affairs office
  - Any document to or from a member of the press, or discussing a media or press inquiry.
  - Any document related to the drafting of press releases or other press materials.

- Congressional affairs office
  - Interactions between EPA employees and elected officials (or their staff). This includes mayors, governors, and members of Congress.
  - Interactions between congressional affairs staff and other arms of the government, including internal communications related to these interactions.
  - Congressional hearing preparation.
  - Development of responses to formal correspondence from Congress.
  - Development of responses to Questions for the Record.
  - Substantive input from an OCIR employee.

- OGC/ORC - Offices of General Counsel/ Regional Counsel
  - Any document generated by OGC/ORC attorneys, except scheduling documents.
  - Any document containing non-public information discussing litigation or legal strategy.

- Any communication between an attorney and program client containing legal advice.

- Program offices
  - Documents created or originating from that office.
  - Substantive emails involving personnel from that office.

☆ **When in doubt about another office's interest in conducting an internal equity review or reviewing a specific document, call and ask.**

Practice Tip: If your request has significant attention or you anticipate the release of records will generate media attention, reach out to your public affairs office and congressional affairs offices early in the review process to discuss what role they would like in the document review.

d. Other federal agencies

i. If another federal agency has equities in a document in an EPA FOIA review, we need to give that agency the opportunity to consult on EPA's disposition of the document or refer the document to the other agency for processing. It is ultimately the Action Office's responsibility to ensure this coordination occurs; however, when document review is tasked to a Contributing Office, the offices may agree that the Contributing Office is the one to reach out to the other agency.

ii. For assistance in determining whom to contact at another agency, please reach out to the National FOIA Program Office or the General Law Office or FEAT in OGC. Staff in those offices often have established FOIA contacts with other agencies. Other options are to check with your fellow FOIA Officers/Coordinators or to check the agency's website.

iii. Consult or referral – what is the difference?

Interagency Consult	Interagency Referral
Another agency has a significant interest in a record, like an email exchange between EPA and another agency. EPA may ask for that agency's recommendation as to how to treat the record.	A record was created by another agency but is in EPA's possession. EPA may refer the record to the relevant agency for them to process.
Communicate with other relevant agencies about your request. They may not want to review records, but they should be aware of them.	The other agency will be responsible for responding directly to the requester. Notify the requester that the documents have been referred. Provide the point of contact for the other agency.

Practice Tip: If you have a large volume of records to share with other agencies, consider using the free platform OMB Max: https://max.omb.gov/maxportal/home.do

e. ***White House***

The FEAT Office in OGC coordinates all White House equity reviews. If you have documents in which the White House has equities, you should contact the Director of the FEAT Office.

f. ***Awareness review***

Awareness review is one of the final steps before documents are released. Awareness review is a "heads up" to upper management, the press office and the congressional affairs office that documents are about to be released to the public. Whether and to what extent an awareness review may be necessary in a production should be discussed with your management.

g. Final approval

Consistent with the Agency's FOIA Procedures, after all necessary review is complete, a Division Director (or equivalent) should approve and sign off on the release and/or withholding of any documents under FOIA.

2. Identify technology options for review

The Agency has two primary tools for reviewing documents and those include:

- Relativity
- Adobe Pro DC

Adobe Pro DC is generally used only in cases where there is a small number of responsive documents. Relativity is used in most other cases.

3. Ensuring consistency in review among your review team

For complex or even straightforward requests, a memorandum with review instructions (known as a "coding memo") can help your team achieve consistency in its document review. The coding memo serves as a protocol for how reviewers make determinations on documents, whether reviewing in Adobe Pro DC or Relativity. A coding memo can include, for example:

- Responsiveness
    - Describe the scope of the FOIA request.
    - Include a list of key words and acronyms that can help reviewers identify responsive material--use this list to help develop your persistent highlighting set for Relativity.
    - Include a list of key events and/or background on the issue that can help put the documents in context.
    - Include a list of key custodians and their roles in the issue.
    - Identify names of key attorneys (for attorney-client and attorney work product designations) -- consider including these names in your Relativity persistent highlighting set as a unique color.
    - Identify names of key people outside the Agency to assist with identifying records that are internal vs. external, and records that would need consultation from the White House or other agencies.
    - Explain whether non-responsive material may be redacted. Remember, you may only redact non-responsive material contained within a responsive FOIA record if you have an agreement with the requester.

- FOIA Exemptions
  - Describe the FOIA exemptions, and provide any key information specific to the FOIA request that will benefit reviewers in applying exemptions properly.
  - If a FOIA Exemption is not applicable to the FOIA request, do not include in the memo.

- Equity Review
  - Describe the EPA offices and/or other agencies for which review is needed.

- Upper Management Review
  - Documents may need to be flagged for upper management review. Providing this review enables management to be aware of documents that will be released and that may garner public or media attention.

B. Review the potentially responsive records

Once you have collected potentially responsive records, you must review the records to determine whether they are *actually* responsive to the request and you must review the records to determine which, if any, FOIA exemptions apply.

For most FOIAs, responsiveness review and the FOIA exemption review are done concurrently during the first level review. During first level review, reviewers will determine if documents are responsive to the request (as narrowed or modified), if any FOIA exemptions apply, whether other EPA offices need to review the documents ("EPA Equity Review"), whether other Federal agencies or the White House need to review the documents ("Interagency Equity Review"), and whether any documents should be flagged for upper management awareness.

The levels of additional review beyond the first level of review will depend upon the scope of the FOIA and the need for equity reviews as set forth above. The review process should be set forth in the Review Plan, as explained in Step 4A.

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Practice Tip: Don't Forget About the Requester!

Manage expectations! Contact the requester right before you begin the Review Phase and discuss the results of your document collection. You can discuss the number of documents collected, your review process, and give candid time estimates for production. This gives the requester another opportunity to narrow their request or steer the review if they are unsatisfied with the time to complete review.

As you progress through the Review Phase, consider scheduling standing updates with the requester to discuss the status and progress of the request. For voluminous records requests, it can be very valuable to have the requester weigh in on how they would like the review of records to be prioritized. For example, perhaps the universe of documents to review includes 25,000 emails from 35 custodians. Ask the requester if there are custodians or timeframes the requester would like reviewed and released first; this is good customer service, and you know your review time is well spent.

As always, document these communications and upload any written communication with the requester into FOIAonline.

1. **Are the documents responsive to the request?**

Once you have collected documents potentially responsive to a FOIA request, you must make sure that all reviewers have a single unified interpretation of the request. This ensures consistent responsiveness calls throughout the review process. If multiple people are reviewing documents to determine whether they are responsive to the request, consider having an initial meeting to discuss the FOIA request and what constitutes a responsive document.

a. Occasionally, you may come across documents that are technically responsive (*e.g.*, one of the search terms appears in an email) but that might have little to no informative value to the requester. Under the FOIA, agencies may not make value judgments on the utility of documents to the requester. Accordingly, such documents should be considered responsive. However, you may ask the requester whether it wants certain categories of minimally-informative documents (*e.g.*, newspaper clips) to be processed. If you come across large numbers of such documents, the requester may want to narrow its request to exclude those documents, which may enable the Agency to process the FOIA more quickly with fewer fees.

b. You also may come across documents that discuss several different subjects in a single document, only some of which are responsive to the FOIA request. An example could include a staff meeting agenda addressing multiple topics. Under the

FOIA and consistent with recent case law, if a FOIA record contains information responsive to the FOIA, the entire record is responsive, including the arguably non-responsive information. Information in the record can, however, be withheld based on one of the FOIA exemptions. If you identify large portions of material that are not responsive to the FOIA, consider meeting with the requester to determine if the requester is interested in narrowing the scope of the FOIA request to remove that material.

2. Do any of the FOIA Exemptions apply to your documents?

The FOIA provides for nine exemptions that agencies may use to protect specific types of information.

Exemption 1: Classified Information
Exemption 1 applies only to information that has been properly classified according to criteria established by an Executive Order. This exemption is rarely asserted by the EPA.

Exemption 2: Personnel Rules and Practices
Exemption 2 of FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency." The Supreme Court has held that Exemption 2 covers only records "relating to issues of employee relations and human resources" and that such records must be internal and relate solely to those personnel rules and practices. Exemption 2 is narrow in scope and, thus, is rarely used.

Exemption 3: Federal Statute Prohibits Disclosure
Exemption 3 protects from disclosure information that is prohibited from disclosure by another federal statute, provided that the other federal statute explicitly requires matters to be withheld from the public. Statutes found to qualify under Exemption 3 include, for example, FIFRA, the Internal Revenue Code, and the Patent Act. Note that if you withhold information under Exemption 3, you must identify the statute under which you are withholding information in your response letter.

Exemption 4: Trade Secrets and Confidential Business Information (CBI) (also referred to as Proprietary Business Information (PBI))
Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Based on this wording, the exemption covers two distinct categories of information in federal agency records, (1) trade secrets, and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. For purposes of Exemption 4, "trade secret" is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end-product of either innovation or substantial effort."

See Subsection 3 below for further information about reviewing documents that may contain CBI.

Exemption 5: Privileged Communications

Exemption 5 protects "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." In simpler terms, Exemption 5 protects those documents that are normally privileged in the civil discovery context. This includes memoranda and letters but extends to many other types of documents as well. The three most common types of privilege asserted with Exemption 5 are the Deliberative Process Privilege, the Attorney-Client Privilege, and the Attorney Work Product Privilege.

- Deliberative Process Privilege (DPP)
  - Internal: communication must be internal to the executive branch (*e.g.*, EPA, WH, DOT);
  - Pre-decisional - prepared to assist an Agency decision maker in arriving at his decision, rather than to support a decision already made;
  - Deliberative - Reflects the give-and-take discussion of the consultative process;
  - Privilege exists to: (1) encourage open, frank discussions; (2) protect against premature disclosure of proposed polices; and (3) protect against public confusion;
  - Apply DPP redaction "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption."

  - Some common examples include:
    - Draft documents, staff analysis, recommendations, advice, or opinions, internal e-mail discussions of potential courses of action, internal discussions about how to respond to a public inquiry, comments on draft rule-making documents, and e-mails or memos discussing Agency options.

- Attorney-Client Privilege (ACP)
  - Internal: communication must be internal to the executive branch (EPA, WH, DOT, etc.);
  - Legal advice is sought or relates to legal advice;
  - Communication between an attorney(s) and client(s);
  - Made in confidence; and
  - May have to show disclosure restricted to those who need to know within the Agency/Executive branch.

- Attorney Client Work Product (AWP)
  - Internal to the executive branch (EPA, WH, DOT, etc.);
  - Prepared or obtained by or at the direction of an attorney;
  - In reasonable anticipation of litigation or active litigation; and

- Extends to documents prepared by or for a representative of a party, including an agent

Exemption 6: Personal Privacy
Exemption 6 protects information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." When considering whether to assert Exemption 6, balance the privacy interest of the individual against the public interest in disclosure. Common examples of content to withhold include private home addresses, personal phone numbers, personal email addresses, and medical information.

Exemption 7: Law Enforcement
Exemption 7 protects from disclosure certain types of "records or information compiled for law enforcement purposes." This exemption is comprised of six subsections, as described below. When asserting Exemption 7, remember to specify which subsection you are using.

Exemption 7(A) protects records that "could reasonably be expected to interfere with enforcement proceedings." This includes information that would hinder the government's ability to control or shape the investigation, enable targets of the investigation to elude enforcement or suppress or fabricate evidence, or prematurely reveal the government's evidence or strategy. Note that this exemption is "temporary" because it is applicable only for the duration of the investigation.

Exemption 7(B) is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding, protects "records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication."

Exemption 7(C) protects information that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption is like Exemption 6 except that it requires EPA to meet a lower standard ("reasonably expected to" under exemption 7(C) vs "clearly unwarranted" for Exemption 6) and is applicable only in the law enforcement context. For example, Exemption 7(C) is sometimes used to protect identities of employees working on sensitive cases.

Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes [which] 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 a 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."

Exemption 7(E) affords protection to law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

Exemption 7(F) protects law enforcement information that "could reasonably be expected to endanger the life or physical safety of any individual." Courts have routinely upheld the use of Exemption 7(F) to protect the identities of law enforcement agents. EPA has also used this exemption to protect the identities of members of security details and to withhold schematics detailing drinking water sources.

Exemption 8: Financial Institutions
Exemption 8 protects certain information related to financial institutions, but is only applicable for agencies responsible for regulating or supervising financial institutions. Accordingly, EPA does not assert Exemption 8.

Exemption 9: Wells
Exemption 9 exempts from disclosure "geological and geophysical information and data, including maps, concerning wells." This exemption can be applied to any type of well, including gas or water. An example of information withheld under Exemption 9 would be maps showing the exact locations of wells.

3. Do your documents contain Confidential Business Information or Trade Secrets?

FOIA Exemption 4 covers two categories of information, (1) trade secrets and (2) confidential Business information (CBI).

CBI is commercial or financial information obtained from a person that is privileged or confidential. (See 5 U.S.C § 552(b)(4)).

Trade secrets are a "secret, commercially valuable plan, formula, process, or device that is used in making, preparing, compounding or processing of a trade commodity, and that can be said to be the end product of either innovation, or substantial effort." (See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983)).

- Trade secret data may be found in contracts, manufacturing descriptions, schematics, product formulas, software, or quality control data/quality assurance procedures.

A business may explicitly assert a CBI claim, such as by marking or stamping a document with a confidential or proprietary business information label. Even if no explicit claim was made, the information can still be potential CBI. If no claim was made,

EPA regulations require the reviewer to apply the following standard to the business information: "[A]lthough [the business] has not asserted a claim, [it] might be expected to assert a claim if it knew EPA proposed to disclose the information." (See 40 C.F.R. § 2.204(c)(2)(i)). If you have identified potential CBI, you must ask the affected business if they claim the information as CBI, via telephone, email, or letter. The affected business has three working days to respond to your inquiry pursuant to EPA's regulations. (See 40 C.F.R. § 2.204(c)(2)(ii)). Please note that this standard does not apply in some circumstances. Specifically, if EPA follows the notice requirements of 40 C.F.R. § 2.203(b) when it collects the information (such as including the required notice on a form), EPA may make the information available to the public without further notice to the business. (See 40 C.F.R. §§ 2.203(b), 2.204(c)); see also Appendix, Step 4 (relevant template letters relating to CBI).

Practice Tip: Look for labels on documents that indicate that a business intended for information to remain confidential, such as "trade secret," "proprietary," or "confidential." Also, a coversheet may contain a CBI claim for the attached material. Examples of information typically determined to be CBI include pricing information, information related to production, volume, and the manufacturing process, and customer lists.

Note that an affected business may waive its right to assert a CBI claim in which case you may release the information. You may always check with an affected business to see if the business will waive its claim.

If an affected business claims, or waives, confidentiality verbally, follow up in writing.

When potential CBI is identified, the Action Office must include the appropriate language in the initial denial letter and follow the proper procedures for tracking and processing a request for CBI as outlined in PBI Case Tracking Procedures. After the creation of the PBI case in FOIAonline, the Action Office works with OGC/ORC to send affected businesses substantiation requests, draft program recommendations, and revise the treatment of responsive records where necessary due to the final confidentiality determination. See Appendix, Step 3.

☆ EPA's CBI Regulations are accessible at https://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=40:1.0.1.1.2.

- **Class Determination 1-95.** If you have documents containing contractors' information, consult with an attorney in OGC or ORC regarding the potential applicability of Class Determination 1-95.

4. **Segregate non-exempt information and redact exempt information**

The FOIA requires that "any reasonably segregable portion of a record" must be released "after deletion of the portions which are exempt" under the Act's nine exemptions. This requires you to redact the exempt information while producing the non-exempt information.

The FOIA states "[t]he amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made." Redaction marks should be visible and the exemption under which you are withholding information should be indicated. Note that judgment calls about what may be "helpful" to the requester are inappropriate when analyzing what, if any, information in a document can be segregated and released. If information does not fall within one of the nine exemptions, it should be released.

Once you have determined which FOIA exemptions apply to a document and what information needs to be redacted, use the redaction tools in Adobe Pro DC or Relativity to "black out" the content subject to a FOIA exemption, as discussed below.

Practice Tip: Redact the exempt information in the document and release the remainder.

☆ **The two most commonly-used review platforms at EPA are Relativity and Adobe Pro DC. See Appendix, Step 4, FEAT Relativity Guidance, which includes instructions on how to redact in Relativity and the Instructions on How to Redact in Adobe Pro DC.**

5. **Quality Assurance/Quality Control (QA/QC)**

Throughout the review process, you will need to ensure that responsiveness determinations, FOIA exemption determinations, and redactions are made consistently. This is called quality assurance/quality control (QA/QC). Below are some Adobe and Relativity Practice Tips for smoother, more efficient QA/QC process.

Practice tips: Review QA/QC in Adobe Pro DC

By using the "Create Comment Summary" option in the Comment tool, you can more easily spot redaction issues such as redactions with improper or missing exemption or overlay text.

You can also use the search tool to conduct searches using relevant search terms to locate pages in responsive documents that may require review by other EPA offices

or other agencies. You can even export the results to PDF or CSV. Some examples of search terms are below:

- White House equities
  - "WH" or "POTUS" or "White House" or "EOP" or "CEQ" or "OMB"
- Congressional relations equities
  - "Senate" or "Senator" or "Congress" or "Representative" or "Congressional" or "Hill"
- Union equities
  - "Union" or "NTEU" or "AFGE" or "280" + any union officials or topic words that may be relevant.
- OEX equities
  - Include current administrator's name and e-mail domains and any other relevant people in the Administrator's office.

Note that these search terms can also be used for "batch-tagging" in Relativity, as discussed below.

Practice tips: Review QA/QC in Relativity

Saved Searches: In Relativity, saved searches can be set up to capture common coding inconsistencies and/or missed equities. The documents can be batched for review and errors corrected. Contact the Discovery Services Division at ediscovery@epa.gov for help with setting up saved searches.

When setting up a search to catch coding inconsistencies, the search should capture documents in the following categories:

- Release with redaction and no exemption selected
- Release with redaction and no redactions applied
- Release in full and exemption selected
- Release in full and redactions applied
- No disposition and exemption selected
- Withhold in full and no exemption selected
- Responsive and no disposition selected
- Not responsive and exemption selected
- Not responsive and has disposition selected
- Anything marked "additional review required" or similar

Batch Tagging: Additionally, you can "batch tag" items in Relativity for easy retrieval when handling equities. Batch tagging, or "mass coding," allows you to apply a specific coding choice to an entire set of documents that share a common term. Examples of terms that should be batch tagged are the same as those that should be searched for in Adobe, as mentioned above.

6. Awareness Reviews

For many FOIA requests, the last step in the document review process prior to final approval for production is an "awareness review" for upper Agency management. This final step is for upper management, including public affairs and congressional relations staff, to have a "heads up" as to what is being released to the public. This allows the public affairs staff to be prepared for any media inquiries that may be received following the release of documents. It also ensures coordination between productions of documents under FOIA and congressional oversight requests received by the Agency. You should always discuss with your management as to the appropriate awareness reviews for a particular FOIA request.

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Step 5: Production of Responsive Records

A. Interim Release

1. Importance of Interim Releases

Requesters are less likely to seek litigation to get the records they want if they know you are actively working on their FOIA request. In addition to regular contact and a relationship with your requester, interim or partial releases demonstrate progress to the requesters because actions (disclosing records) speak louder than words ("We are actively working on your request.").

Interim responses can also be a valuable tool for narrowing requests. When requesters receive a partial release of records, they will have an opportunity to review them and identify the records or types of records in which they are not interested. You can then narrow the request to exclude those records going forward. In some cases, you may produce the record or records in an interim production, and the requester may determine, after review of the documents, that it needs nothing further from the Agency and that the request can be closed. It is sometimes helpful to ask the requester if there are particular records or custodians in which he/she is most interested to increase the possibility that the requester may be satisfied with an interim production as a conclusion to the request.

2. Required Elements of Interim Release Letter

When making an interim production, it is important to accompany the records you are producing with correspondence that clearly explains to the requester what is being delivered and the status of the request. Below are five key elements to include in an email or letter to the requester when making an interim production.

a. ***Information about the Request***
Make sure to reference the request by number and provide a brief summary of what is sought. If the requester has clarified the request or you have had other significant communication, note it in the summary of the request.

b. ***Description of the Records***
Provide information about the records themselves. This will vary depending on the records, it may make sense to provider the total number of documents, the total number of pages, the total file size, or some other description.

c. ***Schedule Going Forward***
Include the anticipated date that the request will be closed out, and if you will be making additional interim productions, inform the requester as to when it can expect the next interim production(s).

d. ***Appeal information***
Make clear that the request is not being closed now. Inform the requester that when the request is closed, information will be provided about appeal rights for any part of EPA's response, including all interim productions. The goal is to make sure the requester understands that this is an initial release and that the clock does not start on the appeal period until after the request is closed.

e. ***Contact Information***
In addition to the FOIA Public Liaison, make sure the requester has the direct contact information for someone who knows substantively about the request, such as the project lead or the FOIA Coordinator or FOIA Officer. The requester may be confused or have questions about the interim production or the status of the request going forward and should be provided with an Agency point of contact.

B. Final Release and Response to Requester

When all responsive records have been uploaded to FOIAonline, you will be ready to close out your request. It is important to follow your office's FOIA procedures which can be found on the intranet: http://intranet.epa.gov/foia/FOIA-Procedures.html.

1. Required Elements of Final Release Letter

The closeout letter for a request should clearly inform the requester of the Agency's response and the requester's appeal rights. There is no one way to write a closeout letter. The best letters should be tailored to the particular request. Each letter should contain the following elements:

a. ***Information about the Request***
Make sure to reference the request by number and provide a brief summary of what is sought. If the requester has clarified the request or you have had other significant communication, describe it. It is particularly important to describe any agreed-upon modification or other narrowing of the FOIA request. The closeout letter memorializes the Agency's actions and serves as an important piece of the FOIA record if an administrative appeal or litigation is filed.

b. ***Disposition***
There are four possible responses the Agency may provide. Inform the requester which applies to the request.

- *Full Grant*. The records, in their entirety, are released to the requester.
- *Partial Grant/Partial Denial*. Portions of the record are withheld from the requester if covered by one or more FOIA exemptions. The portions of the record that are not redacted are released to the requester.
- *Denial*. The records, in their entirety, are withheld from the requester if covered by one or more FOIA exemptions.

- *No Records*. If, after a reasonable search likely to uncover all responsive documents, no records are located that are responsive to the request, the requester must be informed in writing to that effect.

c. ***Identification of Withheld Records***

If any records are being withheld in whole or in part, provide the requester with (1) an index or description of the records being withheld and (2) a summary of the FOIA exemptions that are being applied.

d. ***Final Appeal Rights***

The following paragraph includes the information required to be conveyed to the requester regarding its appeal rights:

> *This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90 calendar day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.*

e. ***Contact Information***

The requester should be informed of a contact who can help if there are questions about the request. Additionally, consistent with the 2016 Amendments to FOIA, the requester should be provided contact information for the FOIA Public Liaison

and the Office of Government Information Services. See the sample language below:

> *Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or call (202) 566-1667. You may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.*

f. ***Final Bill***
Inform the requester what fees are being assessed and how they should be paid.

g. ***Signature***
Final closeout letters must be signed by the Action Office at the Division Director level or higher.

2. Disclosure through FOIAonline

FOIAonline is more than a convenient way to disclose records to a requester. Disclosure of records through FOIAonline is required under EPA policy and procedures. See EPA FOIA Policy, CIA 2157.1, and EPA FOIA Procedures, CIO 2157-P-01.1.

3. Recordkeeping Requirements for FOIA Requests

FOIAonline is used to maintain records related to a FOIA request in accordance with records management requirements and as a record of how a request was processed should it be appealed or litigated. Before closing a request, upload (1) all key correspondence and (2) all responsive records.

Uploading key correspondence is vital to preserving the record of how a FOIA request was processed. Any interactions with the requester that did not occur through FOIAonline should be documented and uploaded. For email correspondence, create a PDF of the email and upload it as "other" correspondence. Key internal correspondence such as communications requesting electronic searches or describing document collection should be uploaded as "other" correspondence as well.

It is important to upload all responsive records to FOIAonline, including those that are not releasable. Uploading records that will be withheld preserves the entire record so that it can be reviewed in full on appeal or during litigation. Be sure when uploading records to designate the proper release type for each record.

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Practice Tips for Complex FOIAs

- **When multiple requesters are seeking the same or similar records, use a single FOIA tracking number as a repository for the records and direct other requesters to that account.**
- **When a particular topic is expected to generate many requests, make use of proactive disclosures.**
- **When closing out many requests on the same topic, be mindful of expedited processing and the order in which requests were submitted.**
- **Communication is important. If you are having technical problems that may delay a production or closing out a request, let your requesters know.**
- **Be sure when uploading records to FOIAonline to designate the proper release type for each record.**

Step 6 –Administrative Appeals

A. What is an Administrative Appeal?

The FOIA and EPA's implementing regulations provide FOIA requesters the right to appeal any "adverse determination" that the Agency makes regarding a FOIA request. EPA's FOIA regulations, at 40 C.F.R. § 2.104(g), include the following list of "adverse determinations" that are subject to appeal:

- a determination to withhold any requested record in whole or in part;
- a determination that a requested record does not exist or cannot be located;
- a determination that what has been requested is not a record subject to the FOIA;
- a determination on any disputed fee matter, including a denial of a request for a fee waiver; and
- a denial of a request for expedited treatment.

Within 90 days of an adverse determination by the Agency, requesters may submit appeals, in writing, either through FOIAonline, by email to hq.foia@epa.gov, or by U.S. Mail to EPA Headquarters, National FOIA Program Office. An appeal should identify the Agency determinations being appealed and include the assigned FOIA request number.

B. What happens if the Agency's final FOIA response is appealed?

Administrative appeals are routed, via FOIAonline, to EPA's Information Law Practice Group, General Law Office, Office of General Counsel. Shortly after receipt, the requester is sent an acknowledgement letter and the appeal is assigned to an OGC attorney for processing. The OGC attorney will then contact the relevant program or regional staff to address any questions concerning the record.

EPA has 20 working days by statute to process an appeal, but this deadline can be extended for "unusual circumstances" pursuant to the same rules applicable to extension of FOIA request deadlines. Once the appeal determination is completed, the OGC attorney contacts the relevant office(s) that processed the request, notifies the office(s) of the decision, and issues the decision to the requester through FOIAonline.

C. What is your role in the administrative appeal process?

You may be notified by your FOIA Officer that an appeal relating to the FOIA request you handled has been received. As noted above, you will be contacted by the OGC attorney handling the appeal, as the attorney will likely have questions relating to the file and/or need additional information. Your FOIA Coordinator or Officer should also be able to review in FOIAonline who in OGC is assigned to an appeal so you can always reach out to the attorney to provide any context or other information that may be helpful for processing the appeal.

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Please follow the instructions provided by the attorney concerning what action or information is needed. When contacted by OGC, please be sure to have the following information available:

- A complete set of the documents withheld in full, in unredacted form;
- A complete set of documents withheld in part (redacted documents) (ideally a markup copy of the redactions not yet applied, to review what material was redacted);
- The complete organized file relevant to the FOIA, including communications with the requester;
- Points of contact for staff in the Contributing Offices who worked on the request; and
- All communication regarding the processing of the FOIA, as well as all documents responsive to the FOIA (released, withheld in full and withheld in part), should be included in FOIAonline.

Pursuant to the 2016 Amendments to FOIA, the period to appeal an adverse determination is 90 days from the date of issuance of the adverse determination. As such, it is important to keep the above-noted information readily accessible in case an appeal is filed.

- For large volume responses, keep an organized electronic copy of the relevant materials to provide to OGC in the event of an appeal. FOIAonline currently does not permit bulk downloads of large volumes of documents, which complicates an expeditious review of a file.

Common issues on appeal relate to the adequacy of the Agency's search, the propriety of the Agency's withholdings, the propriety of denying a fee waiver, and the adequacy of the Agency's description of withholdings.

D. <u>What are the potential outcomes in resolving an administrative appeal</u>?

- <u>Appeal is Denied in Full</u>: OGC determines that all challenged actions were performed in compliance with statutory and regulatory requirements. No further action is needed.
- <u>Appeal is Granted in Full or In Part</u>: OGC determines that one or more challenged actions were not performed in full compliance with statutory and regulatory requirements in all aspects of the response.
    - *Without Remand*: OGC determination will complete the corrective action by attaching the releasable records or portions of records, or otherwise complete the corrective action for the Agency.
    - *With Remand*: Pursuant to 40 C.F.R. § 2.104(k), OGC determination will provide instructions for completing corrective action by remanding the request to the Action Office (the program office assigned to the request). That office should then address the instructions on remand.
        - Timing on remand: the instructions will either include a) a timeframe for completing the corrective action(s), or b) a timeframe for the program office to communicate a schedule for completion to the requester.

- If you are instructed to release additional information to the requester, OGC advises that you re-open the FOIAonline case file for the request and upload the new responsive information to that case file.
- In most cases, you should issue a new determination letter. OGC recommends that you do not include appeal rights if you were directed to re-review withholdings or to conduct a new search and no additional material was withheld. Please contact OGC if you have questions about whether to include appeal rights after a remand. Be sure to upload any correspondence to the requester to FOIAonline before closing the request again.

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Step 7 – Litigation

FOIA requesters can initiate litigation if the Agency denies their administrative appeal, or if the Agency fails to respond to their FOIA request within the statutory time frame. The attorneys in OGC's General Law Office handle all FOIA litigation filed against EPA. These attorneys work directly with Department of Justice (DOJ) attorneys to litigate the cases.

For a court to have jurisdiction to hear a case, the FOIA requester must allege that the agency has improperly withheld records. Allegations that an agency "improperly withheld records" may include:

1. Failing to respond to a FOIA request within the statutory timeframe;
2. Improperly withholding records, or portions of records, under a FOIA exemption;
3. Not conducting a reasonable search for records;
4. Denying a fee waiver or expedited processing; or
5. Challenging a fee category designation.

A. General Overview of the Litigation Process

If the Agency is sued over a FOIA request, an attorney from OGC's General Law Office will reach out to the lead contact for the Action Office to discuss the administrative record supporting the FOIA action. If EPA has not provided a response to the FOIA requester, the OGC attorney will discuss with the lead contact for the Action Office where the Action Office is in the search and collection process and develop a production schedule.

The following provides a general overview of the primary steps in litigation:

1. **The Complaint:** A FOIA requester initiates litigation by filing a Complaint. In the Complaint, the plaintiff (FOIA requester) will identify the FOIA request(s) at issue and the bases for filing suit (*e.g.*, agency's failure to respond to the FOIA, or a challenge to the agency's search and/or withholdings).

2. **The Answer:** EPA has 30 days (from the date the plaintiff serves the United States Attorney's Office) to respond to the Complaint in the form of an Answer. An Answer is generally EPA's first pleading and it responds, point by point, to the allegations in the Complaint. The Answer also includes any affirmative defenses or counterclaims EPA may have.

3. **Schedule for the Production of Documents (failure to respond cases):** If the case concerns EPA's failure to respond to a FOIA request, OGC and DOJ will initiate discussions with the plaintiff regarding a production schedule for any documents remaining to be produced. Once documents are produced, the plaintiff has an opportunity to review the documents to determine if the case can be resolved without

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further briefing. If the plaintiff reviews the documents and seeks to litigate any issue, such as the Agency's withholdings, the case proceeds to substantive briefing.

4. **Substantive Briefing:** If the plaintiff challenges the Agency's search or withholdings or raises any other issues, the case will proceed to briefing. Generally, FOIA cases are resolved when one or both parties file Motions for Summary Judgment. A Motion for Summary Judgment is a motion whereby the party filing the motion (the movant) asks the court to rule in its favor and dismiss all, or part, of the litigation. A Motion for Summary Judgment includes a motion asking the court to rule in the moving party's favor and a brief called a Memorandum in Support of the Motion for Summary Judgment. The Memorandum in Support of the Motion for Summary Judgment is the Agency's opportunity to make its case and explain why the Agency met the relevant requirements in processing the FOIA request in dispute. In support of a Motion for Summary Judgment, EPA will file a declaration and *Vaughn* Index.

   a. ***Declaration:*** The content of the declaration depends on the issues plaintiff has raised. A declaration contains factual statements and the declarant attests to the facts in the declaration under **penalty of perjury**. For example, in a case challenging the Agency's search, the declaration would address how the Agency searched for responsive records. The Agency's brief would, in turn, cite to the declaration and explain why the Agency's search was reasonable. In a case challenging the application of the FOIA exemptions to certain documents, the declaration would explain the nature of the documents at issue and the basis for the claimed exemption(s). The declaration assists the court in resolving the case without the need to review the documents in question in the underlying FOIA. (See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)).

      Who can be a declarant? The declarant must have "personal knowledge" of the facts presented. (See Fed. R. Civ. P. 56(e)(1)). Personal knowledge includes information provided to the declarant by co-workers or subordinates. Generally, the declarant is an individual in management who has personal knowledge of the processing of the FOIA request at issue.

      Briefing in a FOIA case may occur several months after the case is filed, especially in cases alleging a failure by EPA to respond to the FOIA request. It is important to maintain a well-documented case file, as that file will be useful in preparing the declaration.

   b. ***Vaughn Index:*** Generally, the declaration references the Agency's *Vaughn* Index. A *Vaughn* Index is an index that describes the records withheld and the basis for the withholdings. There are different formats for a *Vaughn* Index, including, for example, an itemized description of each document, and a categorical approach, where similar documents are described together (as opposed to the itemized document-by-document approach).

      An example of an excerpt from a *Vaughn* Index is below.

345OneDrive2_00013175	ED_000434	Withhold in Entirety				Ex. 5 - Deliberative Process

Document 345OneDrive2_00013175 is a draft contract document for a statement of work between EPA and an unidentified contractor. This draft contract document was withheld in full under FOIA Exemption 5.

Exemption 5, Deliberative Process Privilege

The withheld information is protected under Exemption 5's deliberative process privilege because it is a draft of a statement of work between to SwRI and EPA. The document was circulated for review within OTAQ/ASD. The draft statement of work reflects pre-decisional deliberations between EPA employees about the work required under an EPA contract with SwRI who conducting testing for the EPAct Study/V2/E-89 Tier 2 Gasoline Fuel Effects Study. At the time the document was created, EPA had not finalized the statement of work, and EPA was still deliberating on the best approach to the contract. The withheld draft statement of work does not reflect an official Agency decision. The withheld information is deliberative because EPA employees and managers were still internally discussing issues related to contract requirements and testing parameters. This draft statement of work was circulated for review and comment, and it was not the final document. The document reflects recommendations and opinions that are considered as part of the EPA's decision-making process for finalizing contract documents. The draft statement of work does not represent a final agency action. Release of this information would discourage open and frank discussions among its staff and would also have a chilling effect on agency decision-making processes, and on the EPA's ability to have internal discussions and consultations concerning EPA's contracts. Furthermore, release would cause public confusion by disclosing rationales and reasons that were not in fact ultimately incorporated into the final statement of work and the final contract.

Segregability

There is no reasonably segregable information in this draft contract document, no meaningful portion could reasonably be released. To the extent there are facts in this document, the selection of those facts are an integral part of the deliberations in developing the final contract document and the facts selected may have varied between the draft and the final document, and the factual information contained therein is inextricably intertwined with the deliberative discussion concerning this document.

B. What is the role of the Action Office and Contributing Offices in Litigation?

The Action Office and Contributing Offices are responsible for:

1. Ensuring that the OGC attorney assigned to the case has a copy of the entire FOIA file, including information about the search (*e.g.,* dates, terms, custodians, repositories, scope etc.); information related to the Agency's collection efforts; emails and other correspondence with the FOIA requester; and copies of the responsive records (both with and without redactions applied);
2. Responding to any questions OGC has regarding the record;
3. Completing the document production, which is relevant in cases involving a failure to produce records; and
4. Reviewing all draft pleadings in the case and preparing the declaration in support of the Motion for Summary Judgment.

☆ **Litigation is time-consuming. EPA is also under court-ordered deadlines to submit briefs. As such, it is important that the FOIA team works together closely to ensure the deadlines are met.**

C. Potential Outcomes

Courts generally dispose of FOIA cases based on Motions for Summary Judgment. If a court rules for EPA by granting the Agency's Motion for Summary Judgment, in full, the case will be dismissed. If the Court rules against EPA, in whole, or in part, there are different potential outcomes. For example, the court could ask EPA to submit the documents withheld under FOIA for *in camera* inspection so the court can assess the Agency's withholdings. EPA would then submit the documents at issue for the court to review. *In camera* inspection is not common. During *in camera* inspection, plaintiff and plaintiff's counsel are not allowed to view the records; only the court views the records. If the court rules against EPA, another potential outcome is for the court to order the Agency to release some or all of the withheld records. If the court finds that the Agency failed to conduct a reasonable search, it could order the Agency to conduct a new search.

D. Attorney's Fees – What you need to know

A party seeking attorney's fees and costs in a FOIA action must show that it is both eligible for, and entitled to, such fees. The plaintiff also bears the burden of demonstrating the reasonableness of its fees. In assessing whether a plaintiff is eligible for attorney fees, the evaluates whether the plaintiff "substantially prevailed." If a plaintiff is eligible for attorney's fees, the court must then determine if the plaintiff is entitled to fees by evaluating four factors:

i. the public benefit derived from the case;
ii. the commercial benefit to the plaintiff;
iii. the nature of the plaintiff's interest in the records sought; and
iv. whether the government's withholding had a reasonable basis in law.

Under FOIA, if payment of attorney's fees is required, those fees are paid by EPA. See OCFO's Procedure 3 (http://intranet.epa.gov/fmdvally/policies/direct/2540/2540-08-p3_payment_of_eaja.pdf), which provides that payment of FOIA attorney's fees is made from funds appropriated to the Responsible Planning and Implementation Office (RPIO) involved in the FOIA judgment. The RPIO is generally the regional or program office designated by the FOIA Coordinator or FOIA Officer as the lead office (Action Office) for the FOIA request.

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Initial Short FOIA Response Template

This template is a short initial note that you can send via FOIAonline, letting the requester know your contact information, that you are reviewing the request and that you will be back in touch promptly once you have had a chance to review fully the request. This can be accomplished by clicking the "Create Correspondence" tab in FOIAonline or by sending via e-mail and then uploading into FOIAonline.

Subject: [FOIA ID # XXX-XXXX]
Dear [FOIA Requester]:

My office has received your FOIA request. I will contact you again after we have had an opportunity to review the request fully. I will be your point of contact. Please feel free to contact me directly with any questions or concerns. Additionally, at any point in time, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[Your Name]
[Your Phone Number]

Initial Detailed Response Template

This template provides optional sections and language to fit the circumstances of any particular request. If the requester provides telephone contact information, it is always a ***best practice*** *to accompany the initial response letter with a telephone call to the requester. When using this template, read the sections below carefully and edit the bracketed portions consistent with the request at issue. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.*

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*, Initial Response

Dear Mr./Ms. *[Last name]*:

Thank you for your Freedom of Information Act request. This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on *[MONTH DAY, YEAR]*, in which you requested

> *[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].*

Opportunity to Discuss and Modify *(if needed)*

> *[Edit as appropriate]*

Your request is *[too broad to be completed within 20 days and/or does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them.]*

For example, we would like to discuss the types of records you are interested in, and the possible locations of these records. We would like to further understand the specific subject matter of the records so that we are able to craft a search and provide you with the records you seek. *[EXPLAIN WHY YOU CANNOT IDENTIFY AND LOCATE THE RECORDS].*

In addition, requests phrased as legal discovery, e.g., for all records "including but not limited to" and "pertaining to" a subject with no further limitation, do not provide adequate information to allow a professional employee to determine which records you wish EPA to provide.

EPA's FOIA regulations state:

> "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." 40 C.F.R. § 2.102(c).

We would like to provide you the opportunity to discuss the request with us and clarify the records that you are seeking so that EPA can process your request. As indicated in 40 C.F.R. § 2.102(c), please include or be prepared to discuss any specific information about the records you seek, including time period, authors, or a more detailed description of the records' subject matter.

Unusual Circumstances and Extension of Time *(if needed)*

[Edit as appropriate]

Pursuant to 40 C.F.R. § 2.104(d), an extension of time to respond to your request is necessary. Given the scope of the request, EPA anticipates that

[...the response will require significant amount of EPA's resources and time to search for, and appropriately examine the voluminous amount of records to complete this request and/or

...to search for and collect the requested records from multiple EPA offices that are separate from the office processing the request" and/or

...the need for consultation with another agency having a substantial interest in the determination of the request."]

EPA has initiated the coordination of and search for responsive records in our files. Because of the circumstances described above, it is difficult to predict with certainty how many records may be involved. [Optional: *Nonetheless, at this time, EPA estimates the Agency will be able to complete this request by [DATE, MONTH, YEAR]. We appreciate your patience.*]

[*Only if Relevant: Since the time of your request and as of today's date, EPA has received additional FOIA requests about [Topic] including several requests that were approved for expedited processing. These expedited requests will be processed before your request. However, many of the documents that are responsive to those requests will also be responsive to your request. These documents will be made publicly available on a rolling basis as they are produced.]*

Processing Fees *(if needed)*

[Edit as appropriate]

[Option 1: On [DATE], the EPA's National Freedom of Information Office granted the fee waiver request that accompanied the FOIA request. Therefore, you will not be assessed fees.

Option 2: On [DATE], the EPA's National Freedom of Information Office denied the fee waiver request that accompanied the FOIA request. Therefore, we must receive an assurance of payment before processing the request.

Option 3: You were placed in the "other" fee category, which means you will be charged for search, and duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A. Therefore, we must receive an assurance of payment before processing the request.

Option 4: You were placed in the commercial fee category, which means you will be charged for search, review, and duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A. Therefore, we must receive an assurance of payment before processing the request.

Option 5: You were placed in the "media/educational" fee category, which means you may be charged for duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A.]

Publicly Available Information *(if needed)*

The following are sources of publicly available information that you can access immediately:
[Edit as appropriate to your request. You may include fire links to other relevant FOIA responses, your Program specific website, and any of the links below]:

- Our website: https://www.epa.gov/home/advanced-search
- FOIAonline for records previously released through FOIA requests: https://foiaonline.regulations.gov/foia/action/public/search/
- Frequently requested records: https://www.epa.gov/foia/national-online-foia-library#request
- Environmental Topics Information repositories: https://www.epa.gov/environmental-topics/z-index
- Technical/scientific/educational publications: https://www.epa.gov/nscep
- Administrative and Environmental Appeals Board cases: https://www.epa.gov/foia/national-online-foia-library#opinions
- Staff Manuals and Guidance: https://www.epa.gov/foia/national-online-foia-library#admin
- Policy Statements: https://www.epa.gov/foia/national-online-foia-library#statement
- Superfund sites and data: https://www.epa.gov/foia/national-online-foia-library#superfund

Next Steps

[Edit as appropriate]

The processing clock is stopped for your FOIA request until we receive *[your assurance of payment [and/or] your clarification or modification.]*

Please respond within ten calendar days from the date of this letter to arrange a time to discuss your [*request and fees]*.

You may contact *[Program Contact]* at (*email address)* or at *(telephone number)* with your response or if you have any further questions. If we do not receive a response from you *[By X Date (at least 20 days from date of letter)]*, we will consider your request to be voluntarily withdrawn. [*Edit as appropriate: Once the request is clarified and we receive a written assurance of payment, we will continue processing your FOIA request*] and provide you with an estimated timeframe for completion. If you wish to request information connected to this request in the future, please reference the FOIA request number.

Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[NAME]
[TITLE]

Closure for Failure to Modify FOIA Request Template

This template is for correspondence to a requester who has failed to modify an improper request. This should be used only after it is clear that the requester will not modify a request. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*, Closure For Failure to Modify

Dear Mr./Ms. *[Last name]*:

Thank you for your Freedom of Information Act request. This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on *[MONTH DAY, YEAR]*, in which you requested

[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].

Your request does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them. The EPA's FOIA regulations explain:

"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." 40 C.F.R. § 2.102(c).

We sent you a letter dated *[DATE]* providing you the opportunity to clarify the records that you are seeking so that EPA can process your request. We asked that you contact us by *[DATE]*, with your clarification, and we have not received additional information from you, so we are administratively closing your request.

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are

submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[NAME]
[TITLE]

Requests Seeking Only Information Publicly Available on EPA's Website Template

This template can be used for responding to requests that seek only information publicly available on EPA's website. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.

Subject: *[FOIA ID # XXX-XXXX]*

Dear *Mr./Ms. [Last name]:*

This is in response to your Freedom of Information Act (FOIA) request, identified above, dated *[Month, Day, Year],* that you submitted to the U.S. Environmental Protection Agency (EPA). Your request seeks the following documents:

> *[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].*

The information that you are seeking is publicly available on EPA's website at *[describe where on EPA's website material can be found and insert link to that location].* Because this information is publicly available, your FOIA request for this information is being administratively closed, in accordance with EPA's FOIA regulations. See 40 C.F.R. Part 2, Subpart A.

If you consider this response to be a denial of your request, you may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, N.W. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

Thank you for your interest in this information.

Sincerely,

[NAME]
[TITLE]

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Checklist for Clarifying Requests

This checklist is a quick reference for things to consider when attempting to identify components of a request that may be missing or ambiguous and for which clarification is needed.
While EPA's regulations cite the categories below as items that should be included in a request, failure to include one or more of these categories ***does not*** *automatically make the request improper or not reasonably described.*

Categories of Information to Discuss with Requester for Clarification:

The more categories on which you and the requester can agree, the more straightforward processing the request will be.

- ☐ **Type(s) of Records**: Emails, Documents, Memoranda, Notes, Presentations, Text Messages, Schedule, Voicemail, Data, Logs, etc.
- ☐ **Subject Matter/Topic/Search Terms**
- ☐ **Date Range**
- ☐ **Specific Departments/Custodians/Positions**

New Complex FOIA Project: Initial Meeting with Team Checklist

This checklist may assist the Action Office in coordinating the initial meeting with the Contributing Offices and any other necessary parties and begin meaningful collaboration on the FOIA request. This checklist assumes the request has been clarified with the requester.

Participants for an initial discussion: Lead contact and Subject Matter Experts from Action Office and FOIA Coordinator and Subject Matter Experts from Contributing Office(s).

- ☐ Identify and Clarify the following roles:
  - FOIA Coordinator for each office; and
  - Lead contact in the Action Office and any other lead contact(s) from Contributing Office(s) to include on all internal correspondence.

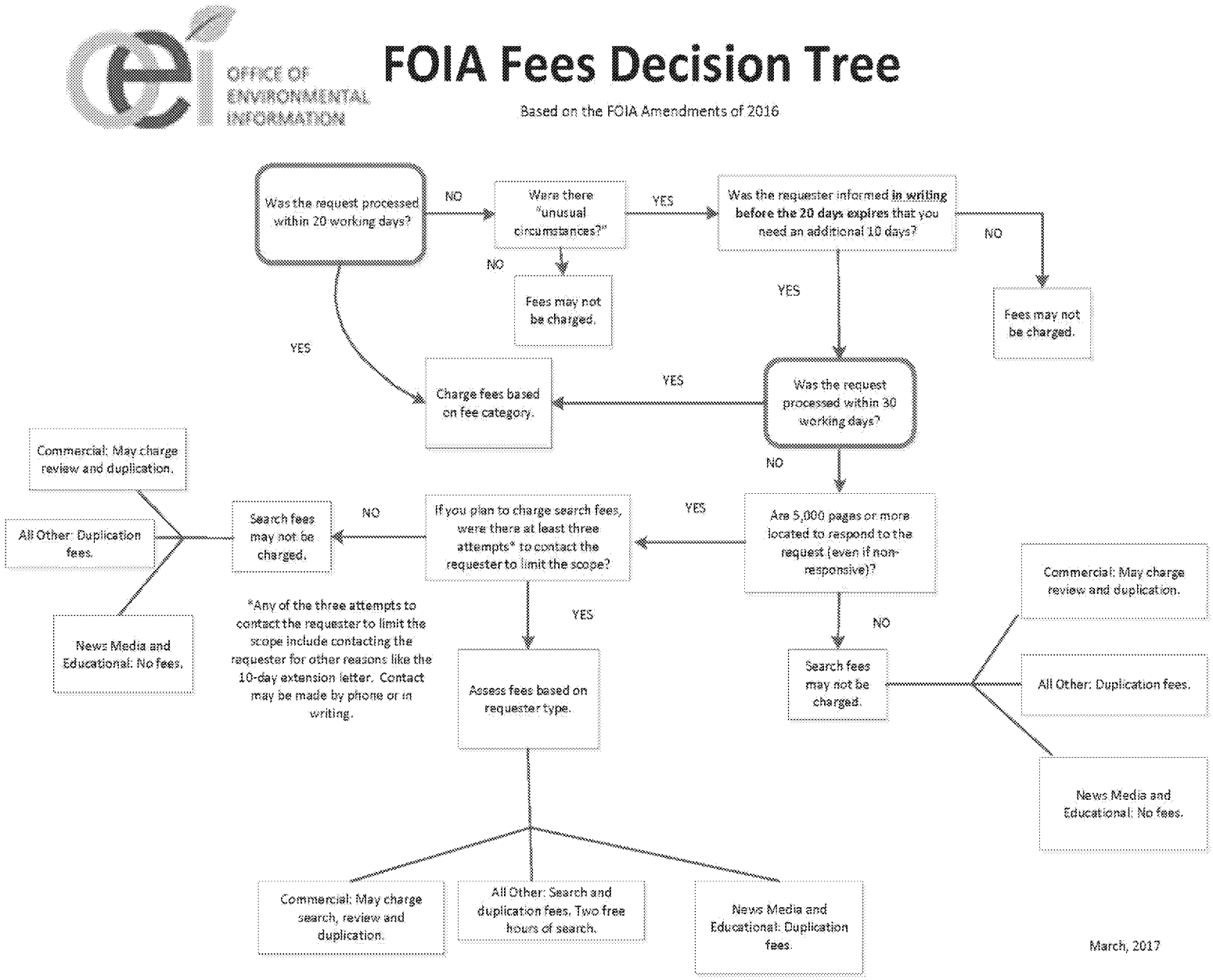
- ☐ Listen carefully and ask questions. Think through:
  - Scope;
  - Time Period;
  - Potential Custodians;
  - Record Types, Locations, and Systems; and
  - Potential Search Terms.

- ☐ Timing
  - FOIA Clock
    - How many days remain on the FOIA clock? and
    - Are there unusual circumstances permitting the Agency to extend the due date?

  - Potential Resource Concerns
    - What do the team's resources look like?
    - Any upcoming large projects?
    - Emergency Project or anticipated resource issues?
    - Familiarity with Relativity?

FOIA Fees Decision Tree

The following flow chart can assist with determining which fees should be charged to the requester.



Confirmation of Clarification Template

This template is to document any clarification that the requester has made regarding a pending FOIA request. It is a best practice to document any modification of the request in writing. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*, Confirmation of Clarification

Dear Mr./Ms. *[Last name]*:

Thank you for your Freedom of Information Act request. This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on *[MONTH DAY, YEAR]*, in which you requested

[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].

Clarification

On *[DATE]* you spoke to *[CONTACT]* regarding the scope of your request. During the conversation you clarified your request as follows:

[*Edit as appropriate to reflect your conversation and the needs of the request… you may wish to include information about:*

Type(s) of Records: *Emails, Documents, Memoranda, Notes, Presentations, Text Messages, Schedule, Voicemail, Data, Logs, etc.*
Subject Matter/Topic/Search Terms:
Date Range:
Specific Departments/Custodians/Positions:

Estimated Date of Completion and Fee Estimate

*[Provide an estimated date of completion and appropriate information regarding fees]***Next Steps**

[Edit as appropriate]

EPA has initiated the coordination of and search for responsive records in our files. During the call, we agreed to set up regular check-in calls to keep you updated. **Our next call is scheduled for *[insert date]*.**

Please contact [Contact] if you have any questions about your request. Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (301) 837-1996 or (877) 684-6448; or fax, (301) 837-0348.

If you wish to request information connected to this request in the future, please reference the FOIA request number.

Sincerely,

[NAME]
[TITLE]

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FOIA Search Guide: Best Practices 41

Search Instruction Template for Potential Custodians

These are model search instructions for the Action Office to provide to potential record custodians, both in the Action Office and Contributing Offices. These instructions should be customized to reflect the search plan that the Action Office and Contributing Office develop to search for and collect all non-Outlook records.

As part of the Search Plan, the Action Office should identify a Point of Contact (POC) who will collect all responsive and nonresponsive records and upload releasable, responsive records to FOIAonline. Each Contributing Office should also identify a POC who will collect records from Contributing Office custodians, propose redactions where appropriate, and transfer both unresponsive records and responsive records to the Action Office POC through an agreed-upon method of transfer.

Search Instructions

You have been identified as a potential custodian of responsive records to a Freedom of Information Act (FOIA) request. The request ***[FOIA Request Number]*** concerns ***[describe the request and any modification agreed upon with the requestor].*** A copy of the request and any relevant communication with the requester is attached for your reference.

Reminder: In accordance with EPA's FOIA Procedures, you should track and record the time spent searching for responsive records.

STEP 1: CONDUCT THE SEARCH

Please search the following locations for responsive records: [*The Action Office should select the appropriate locations from the list below.]*

- Lotus Notes mailboxes or calendars, other Lotus Notes databases*
- Enterprise Content Management System (ECMS)
- Local or shared computer drives (C:, F:, G:, etc.);
- SharePoint sites
- OneDrive
- Mobile devices (e.g., text messages and photographs)
- Voicemail
- External drives and discs
- Hard-copy files
- Other

* Please use the following key words in your Lotus Notes search or other non-Outlook electronic search:

- *[The Action Office should provide search terms here.]*

Attached for your reference are step-by-step instructions for conducting a search of *[Lotus Notes]/ [ECMS]/ [Other Electronic Files]. The Action Office should select and attach applicable instructions.*

STEP 2: CONFIRM THE SEARCH IS COMPLETE

When you have completed your search, please send an email, with the subject line: "Search Response for [FOIA Request Number]" to Action Office Point of Contact@epa.gov. In your email, including the following information:

- The number of records located each search location [If you did not locate any records, please note this in your email];
- The time spent searching for responsive records

STEP 3: TRANSFER SEARCH RESULTS FOR REVIEW

***[For Action Office Custodians]*:** Once you have completed your search of all non-Outlook records, in accordance with Step 1, above, and confirmed that your search is completed (Step 2), you will need to review those records for responsiveness. For both responsive and nonresponsive records, please collect the records in accordance with the instructions below. You may also be asked to review the responsive records for potential FOIA exemptions, once all responsive records are collected.

***[For Contributing Office Custodians]*:** Once you have completed your search of all non-Outlook records, in accordance with Step 1, above, and confirmed that your search is completed (Step 2), you will need to review those records for responsiveness. For both responsive and nonresponsive records, please collect the records in accordance with the instructions below. Contributing Office POC will review responsive records for potential redactions and may seek your input before providing both responsive records and nonresponsive records to the Action Office.

[For Lotus Notes]: As described in the attached Lotus Notes Search Instructions, all Lotus Notes records should be uploaded to the Lotus Notes Collection Database. You will receive an email with a hyperlink that allows you to access the database.

All other records: *[The Action Office Point of Contact (POC) should select from sample instructions provided below]*

For collection via Lotus Notes Collection Database: Please include all other electronic files in the Lotus Notes Collection Database as described in Step 6 of the Lotus Notes Search Instructions.

For collection via email: Consolidate all responsive records in a folder on your computer, labelled as "Your Name, FOIA Request Number, Folder # of #_Responsive" and all non-responsive records in a folder labelled "Your Name, FOIA Request Number, Folder # of #_Nonresponsive." You will send these folders via email to [For Action Office custodians: Action Office POC@epa.gov] or [For Contributing Office custodians: Contributing Office POC@epa.gov]. Due to limitations on file size, you may need to compress the folder(s) and/or send multiple emails. For each email, use the folder label as the subject line.

For collection via OneDrive: Action Office POC and/or Contributing Office POCs will need to create "responsive" and "unresponsive" folders for each custodian on OneDrive. Using the following link: [link to OneDrive folder], upload all responsive and unresponsive records into the corresponding folders.

For collection via thumb drive: Create a folder on the thumb drive titled "Your Name, FOIA Request Number" and separate subfolders for responsive and nonresponsive records. Upload all responsive records and nonresponsive records to corresponding subfolders and save on a thumb drive. Please deliver this drive to Action Office POC or Contributing Office POC.

Note: All hardcopy documents should be scanned into an electronic document and transferred to Action Office POC or Contributing Office POC in accordance with the instructions above.

Search Tracking Memo

This memo provides an example of how the Action Office may document the search plan and track the search process.

Action Office:
Point of Contact:

Contributing Offices or Regions:
Point(s) of Contact:

Requester:

FOIAonline Number(s):

Subject of Request:

Date Range:

Custodians:

Name	Office (If separated N/A)	Tasked (Date)	Completed (Date)

The following databases were searched:

Repository	Repository
□ Outlook	□ SharePoint Sites
□ Lotus Notes	□ OneDrive
□ ECMS	□ Mobile Devices
□ CMS	□ Voicemail
□ Local or shared computer drives	□ External Drives and Discs
□ Hard-copy files	□ Other:

Search Terms Used:

_____

_____

Total Number Responsive Records: _____

Instructions for Searching & Collecting Other Electronic Files

These instructions are for custodians who may be searching and collecting electronic files. If applicable, please include this as an attachment to your Search Instructions for custodians.

Using the search terms provided in the Search Instructions, search for responsive records located in the other computer drives to which you have access. This includes, but is not limited to, your C: drive and your F: drive on your EPA computer. Unless you are designated by the Action Office/ Contributing Office Point of Contact to search a shared drive, such as the G: drive, you should limit your search to those drives to which you have sole access.

Note: Computer drives cannot be collectively searched. For each search term, you will need to conduct a separate search within each drive that you have identified as containing potentially responsive records.

Below are detailed instructions that will guide you through the following steps:

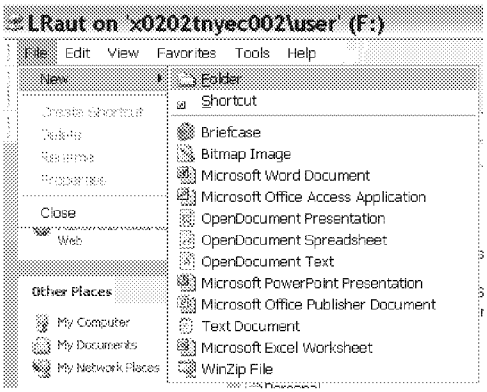
(1) Create search folders to collect search results and final collection folders for responsive and nonresponsive records
(2) Conduct term-specific searches of a single drive, and repeat for each drive
(3) Copy search results into a search folder
(4) Consolidate all search results into the final collection folders and search for duplicates
(5) Review files for responsiveness and sort into subfolders
(6) Optional: upload files to the Lotus Notes Collection Database.

Step 1. Create Search Folders

Before you begin your search for records, you will need to create folders to store the records from each search. You will then consolidate these folders into a "Final Collection" folders for responsive and nonresponsive records. To create and name the "Search Results" folders and "Final Collection" folder, do the following:

- ✓ Select the "**File Explorer**" located on your desktop or on the task bar at the bottom of your screen.

- ✓ Create a folder either by selecting *Home > New Folder* or *File > New > Folder* as shown below. [How to create the folder may vary depending on the computer system]



- ✓ Name the folder using a simple convention, such as "Search Results [insert # of search]." Do NOT use the case name or any search term in the folder name.

- ✓ Repeat this process for each search, and to create a "Final Collection" folder where you will copy all of the records from the search folders.

- ✓ In the "Final Collection" folder, create two subfolders, one for "responsive" records and the other for "nonresponsive" records.

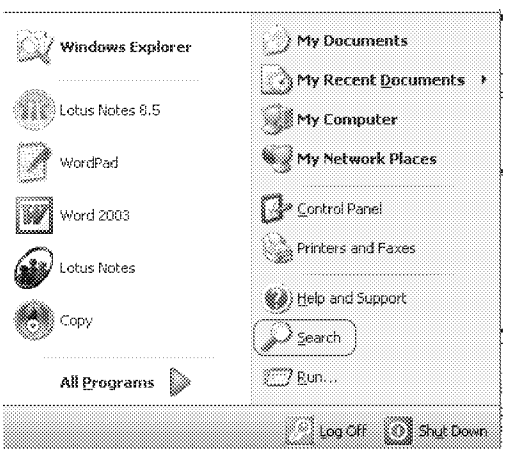
Step 2. Conduct the Search

Below are some tips to assist with your electronic document search. These tips would apply to searches for files located, for example, in Word, Excel, PowerPoint, WordPerfect, Adobe, and .tif documents, saved in your C:drive, F:drive, and G:drive (if applicable).

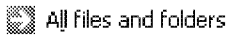
One place to start is with a Windows Search of an entire drive, such as the C:Drive. To perform such a search, follow the steps below.

Windows Explorer Search for Entire Drive

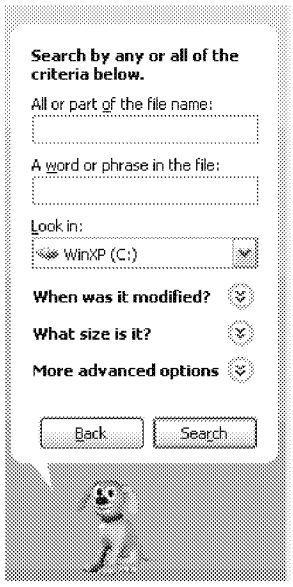
- ✓ From the "Start" menu, select "Search." *Start > Search*



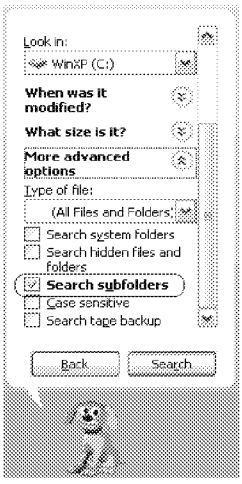
- ✓ Select "**Files and Folders**" (3rd option from the top) from the list at the left side of the screen.



- ✓ Identify the drive that you want to search (C:, F:, etc.).
- ✓ Type the search term in the box entitled "**A word or phrase in the file.**"



- ✓ Click on "**More Advanced Options**" at the bottom of the search menu. Make sure that only "**Search Subfolders**" is checked.
- ✓ Click "**Search.**"



Depending upon the number of files, the search may take anywhere from 5 minutes to 40

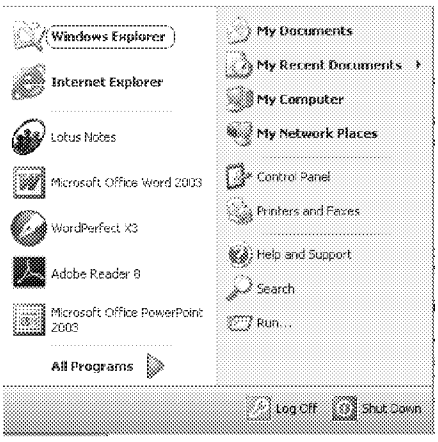
minutes. If the search completes successfully, the search companion will indicate that the search is done and that the search has found a specific number of documents.

- ✓ Record this number for later reference.

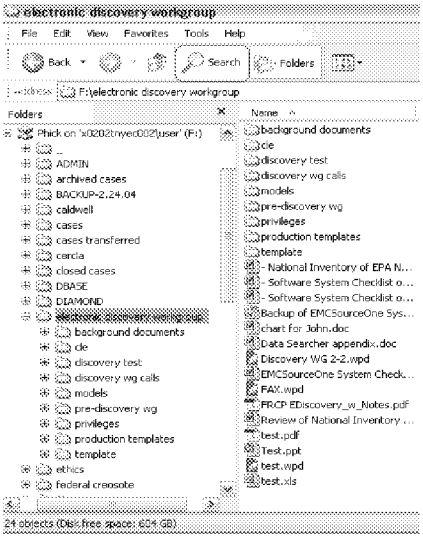
If when searching, the search unexpectedly stops running, the green "progress" bar stops moving, or the search gets stuck in one folder, consider searching each subfolder within a drive separately per the instructions below.

Windows Explorer Search for Subfolders within a Drive

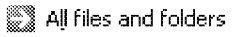
- ✓ Select *Start > Windows Explorer*



- ✓ Highlight the subfolder that you would like to search and click "Search."



- ✓ Select "**All Files and Folders**,"



- ✓ Type the search term into the box entitled "**A word or phrase in the file**"
- ✓ Select "**More Advanced Options**" and select *only* "**Search Subfolders**"
- ✓ Click "**Search**"

Depending upon the number of files, the search may take anywhere from 5 minutes to 40 minutes. If the search completes successfully, the search companion will indicate that the search is done and that the search has found a specific number of documents.

- ✓ Record this number for later reference.

If when searching, the search unexpectedly stops running, the green "progress" bar stops moving, or the search gets stuck in one folder, proceed with a manual search. The instructions below may assist you with performing that search.

Manual Search

In conducting a manual search, review those locations in the drive that are reasonably likely to contain responsive records.

Step 3. Copy Records to Search Folders

- ✓ As you complete each search, go to the Toolbar, click *Edit > Select All*. Right click and drop down to **Copy**.
- ✓ Go to the Search folder created to hold documents pulled from that specific search, open it, right click, and select "**Paste**" from the drop-down menu. The documents will appear in that folder.

Repeat Steps 1 through 3 for each of the drives to which you have sole access.

Step 4. Copy Records from the Search Results Folders to the "Final Collection" Folder

- ✓ Once you have completed your search, you should consolidate all documents collected in your Search Results folders into a Final Collection Folder. Open one Search Folder so that you can see all of the files inside the folder. Go to the Toolbar, click *Edit > Select All*. Right click and drop down to **Copy**.
- ✓ Go to the Final Collection folder created to hold all documents. Open the folder, right click, and select "**Paste**" from the drop-down menu.

- ✓ Repeat for all Search Folders until all files are located in the Final Collection Folder.

Because you will need to search each drive for every search term, it is likely that a file will respond to more than one search and that you will have the same file saved in more than one Search Folder. To eliminate duplicates in your Final Collection Folder, do the following:

- ✓ When you open the Final Collection folder and paste the highlighted documents into that folder, if the document is a duplicate of a document already in the folder you will get a dialog box "**Confirm File Replace**." Click "**No**" for each document for which such a box appears because it is a duplicate.

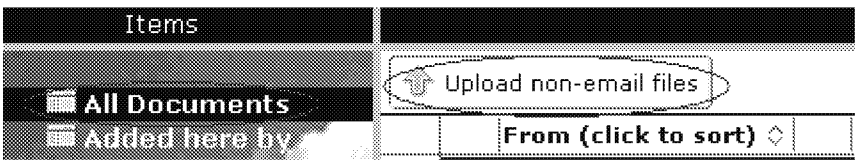
Step 5. Sort Responsive Records from Nonresponsive Records

Review documents in the Final Collection folder for each drive to make sure that they are actually responsive to the FOIA request and were not captured because of the presence of a search term used in another context. All responsive records should be separated into a "Responsive" Subfolder; all nonresponsive records should be separated into a "Nonresponsive" Subfolder.

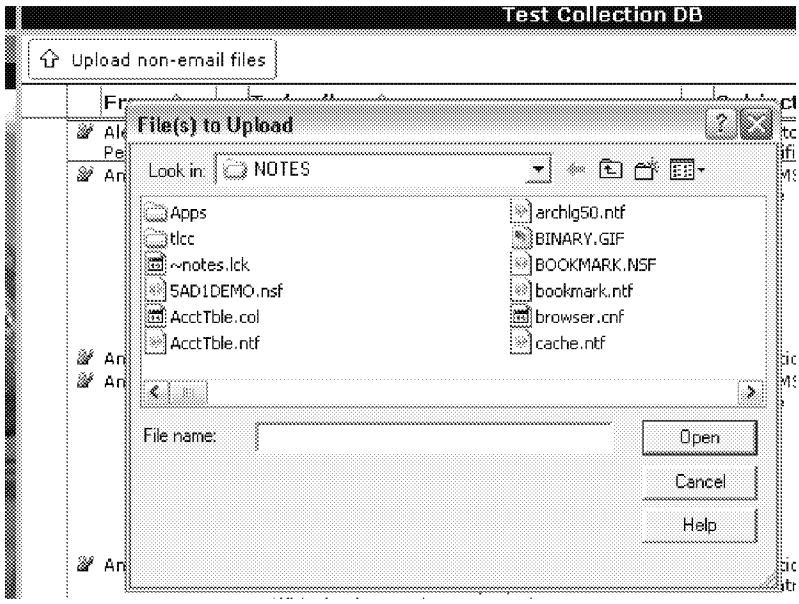
OPTIONAL: Step 6. Upload Documents to Collection Database

Please refer to the Search Instructions for guidance on how to transmit your files to the Action Office/Contributing Office Point of Contact. If the Search Instructions direct you to use the Lotus Collection Database to receive all electronic files, please follow the instructions below.

- ✓ Open the All Documents view of the Collection Database and click on the green button at the top of the view labeled "**Upload non-email files**".



A new box will appear from which you must select your file.



- ✓ Go to the location where you have saved the search results and open that folder.
- ✓ To select more than one file, simply hold down the <Shift> key and click on the first desired filename and then click on the last one. All the files between those will automatically be chosen.
- ✓ If the desired files are not sequential, press <Ctrl> and click on each filename that you wish to include.

<u>If you receive an execution security alert, click on the third option under the "What to Do" heading that says: Start Trusting the Signer to execute this action.</u>

After the files are uploaded you will get the following notice:

Please make note of the confirmed number of items since default setup for a collection database is a "ballot box" style collection where you cannot see any items in the collection, including your own. Refer to Step 3 of the Search Instructions for details on how to transfer your results to the appropriate Point of Contact.

Instructions for Searching & Collecting Lotus Notes Email

These are instructions for custodians who may be searching and collecting electronic Lotus Notes files. If applicable, please include this as an attachment to your Search Instructions for custodians. Note that any request seeking emails sent/received prior to February 2013 require a Lotus Notes search.

Note: These instructions are subject to change as of January 2018. OEI will provide additional guidance on searching Lotus Notes at that time.

To fulfill your responsibility under the FOIA, you will need to manually search your Lotus Notes Email for any potentially responsive records and collect these records in the Collection Database(s). Search terms have been provided to you in the Search Instructions, and you have received an email with the link(s) to the Collection Database(s). If you have not received the link(s) or misplaced the email that includes the link(s), please contact the Action Office/Contributing Office Point of Contact responsible for overseeing this FOIA request in your office.

Below are detailed instructions to guide you through the following steps:

(1) Index your Inbox emails
(2) Access the Collection Database(s)
(3) Create a folder to organize your search results by responsiveness
(4) Perform the search for emails
(5) Review the search for responsiveness and sort into subfolders
(6) Upload records to the Collection Database(s)
(7) Repeat Search, Review, and Collection for Archived emails
(8) Search and print ECMS (EZ Record) emails
(9) Delete indexes

Step 1. Index Your E-mail

Before you search for and collect emails, you *must* index your emails. Indexing your emails ensures that e-mail attachments are included in the search.

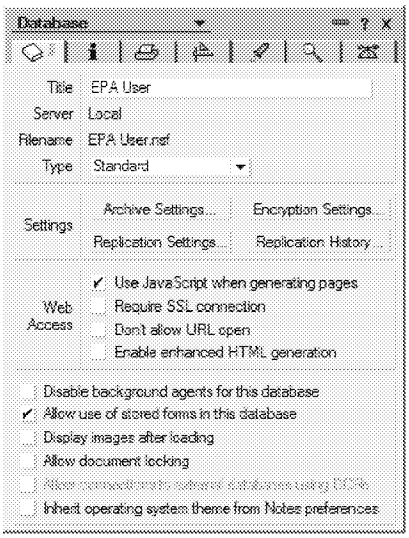
Indexing a large mail file will take several hours. (Most e-mail files are large!)

However, you can continue to use your email normally while the indexing process is running. You may also close your email and/or turn off your computer. This will not interrupt the indexing. Here's how it works:

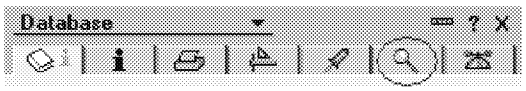
- ✓ Open your Lotus Notes Email Inbox

✓ On the menu bar in the upper left corner of your Notes screen select:

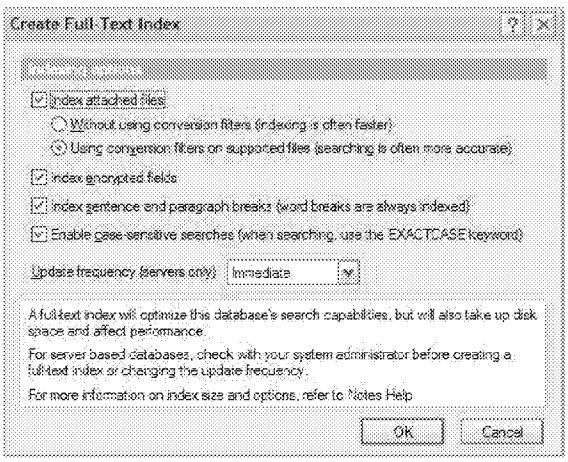
File > Application > Properties in Notes 8



✓ Select the tab with the magnifying glass icon.



✓ Click the **Create Index** button, make the selections below (or follow local instructions), and click **OK.**



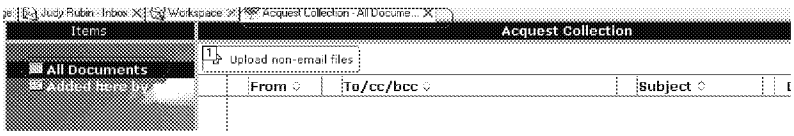
✓ Close the Database Properties box

Step 2. Open the Collection Database(s)

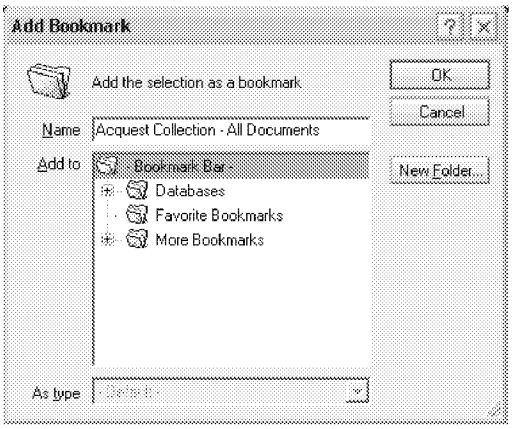
By this point, you should have received an email containing a link to the Collection Database. Follow the instructions below:

- ✓ Click on the link to open the database. For easy access to the database, you will create a bookmark by following the steps below.

- ✓ Right click on the database tab at the top of your screen



- ✓ Select **Create Bookmark.** The following screen will appear:



- ✓ Make sure that "Bookmark Bar" is highlighted and press **OK**. The "Tree" icon will now appear at the bottom of your bookmark bar on the left side of your email Inbox screen.

Both your Email Inbox and the Collection Database(s) are now open, so you can easily switch between your mailbox and the database(s) by selecting the desired tab.

Step 3. Create a "Search Results" Folder and Final Collection Folder

Before you upload emails to the Collection Database, you will transfer the emails from your inbox into a separate "search results" folder and into "responsive" and "nonresponsive" subfolders. To create these folders, do the following:

- ✓ In your Inbox select *Actions > Folder > Create Folder*

- ✓ Name the Folder "Search Results," and click **OK**

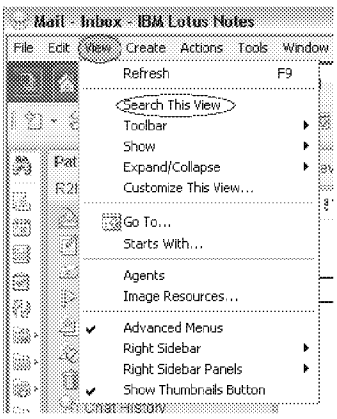
- ✓ Within the "Search Results" Folder, select *Actions > Folder > Create Folder* to create "Responsive" and "Nonresponsive" subfolders.

Step 4. Perform Search for Emails

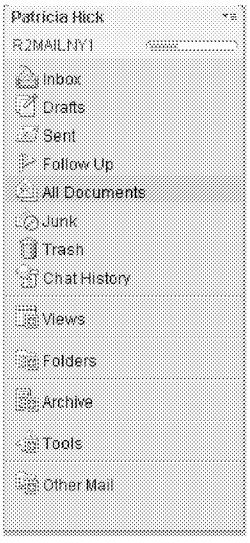
NOTE: Make sure that your e-mail is indexed prior to conducting the search. When indexing has completed, you should see a green ball ● and "Indexed" to the right of the search function.

If you do not see the search box:

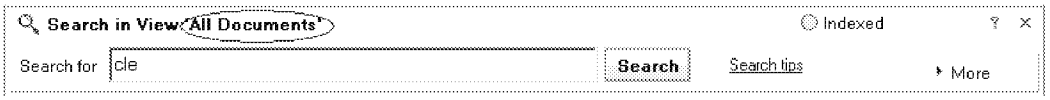
- ✓ Click *View > Search this View* from the menu bar at the top of your Notes screen.



- ✓ On the listings at the left side of your Inbox select *All Documents*. This will capture all potentially responsive documents, even if emails are stored in folders.

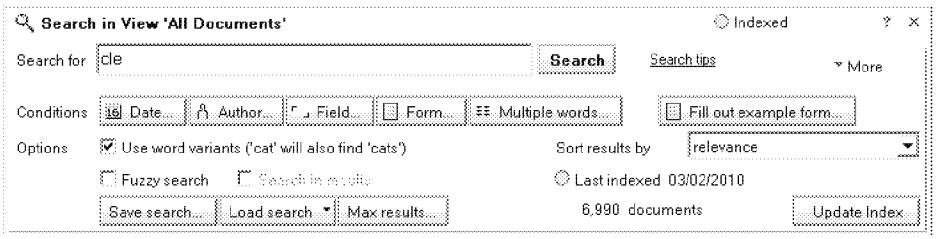


The "Search in View" will now indicate that the search will consider "All Documents."



✓ Click on **More** at the right side of the screen to reveal additional options.

The screen should now look like the snapshot below:



Clicking on the **Multiple words** box will allow you to choose up to eight words for your search.

✓ Enter the search terms provided in the Search Instructions and click **Search**. Your search results will appear below the Search window.

> Note: Lotus Notes has a search limit of 5,000 documents. If your search returns "5,000" documents, there are probably more potentially responsive emails that were not captured. You will need to do one of the following to address this issue:
>
> - Refine your research terms (talk with your POC prior to doing this)
> - Conduct multiple searches using fewer terms
> - Contact your local help desk to request removal of the search limit.

✓ Select *Edit > Select All*, then click *Actions > Folder > Move to Folder* and select the "Search Results" Folder and click the **Add** button.

Do NOT copy and paste search results into the folder. This creates duplicates and will overwhelm future searches.

Repeat these steps above until you have searched for all relevant search terms and have deposited potentially responsive emails in the "Search Results" folder.

✓ Click **<Ctrl A>** to reveal the number of documents collected in the "Search Results" folder in the lower left of the Notes screen. Tip: Record this number so that you can later verify that you have transferred all documents from your Notes to the Collection Database.

Note: The "Search Results" folder will only contain an unduplicated collection of documents. Even if an email responded to multiple searches, it will only appear once in the folder.

Step 5. Review Search Results for Responsiveness

Once you have completed the search, you should review emails and attachments to make sure that they are actually responsive to the FOIA request. It is possible for a search to collect documents that use a search term in context that is outside the scope of the request and are therefore not responsive.

- ✓ On the left side of your in-box in Notes select *Folders > Search Results*
- ✓ If an item is clearly not responsive, select the document and sort into "Nonresponsive" subfolder. Sort responsive records into the "Responsive" subfolder. You will upload all search results into the collection database, but indicate to the document reviewer which records are nonresponsive.

  Do NOT delete any items from folders. Either follow the instruction above or drag and drop documents between folders.

Step 6. Upload Responsive Search Results into Collection Database(s)

After you have reviewed the records in Lotus Notes, you will need to copy them into the Collection Database(s). Depending on the number of records, you may need to copy them in several batches (of no more than 100); copying and pasting a large batch may also take several minutes.

- ✓ Open the "Responsive" and "Nonresponsive" subfolders in the "Search Results" folder and select *Edit > Select All* from the menu bar (at the very top left of your Notes screen)
- ✓ Select *Edit > Copy* from the menu bar
- ✓ Select *Edit > Deselect All* from the menu bar. Do NOT skip this step.
- ✓ Open the Collection Database by selecting the bookmark that you created in Step 2.
- ✓ Open the "**All Documents**" folder
- ✓ Select *Edit > Paste* from the menu bar at the very top left of your Notes screen

Repeat these steps until you have copied all of your search results from your e-mail to the Collection Database.

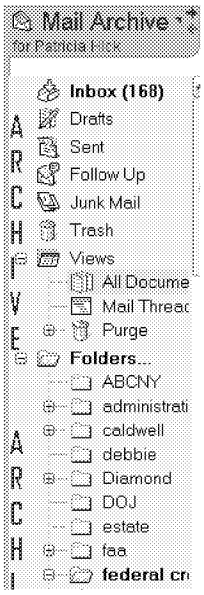
You will receive a dialog box confirming the number of items you pasted. This number should match the number of search results recorded in Step 4.

Step 7. Repeat Search, Review, and Collection for Archived Emails

The search described above will not capture emails that were archived and deleted from the inbox. You will need to repeat Steps 1-5 for emails that you have saved in your Lotus Notes Archive.

- ✓ Access your Archive from your Notes inbox by clicking *Archive > R2 etc. Archive.*
- ✓ Repeat Step 1 to index your Archive.
- ✓ Repeat Step 2 to open the Collection Database.
- ✓ Repeat Step 3 to create a "Search Results" folder.

Before you begin the search, make sure that you are in the All Documents view in Archive, as shown below:



- ✓ Follow the directions in Step 4 to conduct the search(es) using the search terms provided.
- ✓ Repeat Step 5 to review the search results, if applicable.
- ✓ Repeat Step 6 to upload records to the Collection Database(s)

Step 8. Search and Print EZ Record Emails

You will need to manually search ECMS for responsive emails that are not already captured in your Inbox and Archive search. Please visit the following site for further instructions: http://intranet.epa.gov/ecms/guides/search/

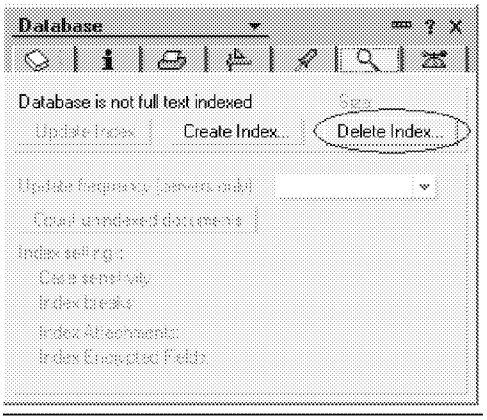
Any responsive emails should be printed and either provided to your FOIA coordinator in hard-copy form or scanned and uploaded/emailed in accordance with Search Instructions.

Step 9. Delete Indexes

Mailboxes that are indexed use substantially more space than an un-indexed mailbox, so you should remove the index once you have completed your search for records.

- ✓ Open your Lotus Notes Email Inbox
- ✓ On the menu bar in the upper left corner of your Notes screen select:

File > Application > Properties in Notes 8 > *Delete Index*



Your Lotus Notes Email Collection is now complete. Please notify the Action Office/Contributing Office Point of Contact.

Access to Absent and Separated Employee Records

This document provides additional guidance for the Action Office for custodians who have departed the agency or who are otherwise unable to conduct their own search.

Access to an Absent or Separated Employee's Email and Data

If a potential custodian of responsive records is on scheduled leave from the Action Office or a Contributing Office during the time of the search, the Action Office must ensure that the employee's records are searched in their absence. The Office of Environmental Information has a procedure on accessing the email and electronic records of separated or absent employees.

To request access, the Action Office processing the request must send an email, requesting access, to the custodian's manager (or former manager, in the case of separated personnel). If the manager approves the request, they then forward the request, via email, to their Information Resources Management Branch Chief (IRM BC) or Information Management Official (IMO). If the IRM BC or IMO approves the request, they forward the request to OEI FILE ACCESS REQUEST@epa.gov.

The email requesting access should include the information in the table below. The email subject line should include the nature of the request (i.e. Access to email). Please note that access to the OEI File Access Request mailbox includes federal and contractor email staff necessary to support the request.

Table must be completed by the Approver (IRM BC or IMO) and submitted in the Email to OEI FILE ACCESS. Email Subject must include the nature of the request (i.e. email access)	
Role	Name
Approver	John Doe (IMO, IRM BCs or their designee whose name has been provided as authorized approvers)
Mail Box Name Employee's full name Employee's LAN ID Telephone number	Doe.Jane@epa.gov Jane Any Doe Jdoe 111-222-3333
Person Receiving Access (Include email address)	Steven Jones (Jones.StevenT@epa.gov)

Access Needed for the Following Applications (as applicable):	o Legacy Notes o Office 365 (Including OneDrive) o Data Files (network drives, (F: and/or G:)(EZ Tech) o HQ Voice mail files o HQ VoIP Call logs o Mobile device data o Login Events (EZ Tech)

Managers may request access to an absent or separated employee's email files (Legacy Notes and Office 365), data files contained on OneDrive or network drives, voice mail files, call logs, and mobile devices by contacting the Office of Environmental Information (OEI). Once the manager has received access to these files, the manager is responsible for manually searching these files. OEI will not perform searches, nor is OEI responsible for data contents of any files. Moreover, OEI will not sign affidavits pertaining to the search or acquisition of files.

The table below depicts the type of information available and the time limit for requesting access to the related data.

Electronic Activities	**Content**	**Request Time Limit**
Legacy Notes	Emails, Calendars	Unlimited
Office 365	Email, Calendar, OneDrive	2/29/2013 - Forward
Data Files (network drives, (F: and/or G:) – EZ Tech Users	File and Folders	Unlimited
HQ Voice mail files	Voice mails	20 days
HQ VoIP Call logs	Outbound call/inbound calls	01/01/2014 - Forward
Mobile device data	Call Detail Reports (including text messages logs)	7 years
Login Events – EZ Tech Users	Login activities	30 days

As each access request is completed, the Action Office requesting the information will be notified and any instructions, if necessary, provided through the IRM BC or IMO. A list of IRM BCs and IMOs, by office, is available at the "SIO Corner" Sharepoint site, accessible through the EPA Intranet.

Quick Reference Guide: How to Save Text Messages

This document offers guidance on how to forward text messages from a mobile device to the EPA email system. These instructions are originally located at: http://intranet.epa.gov/mobiledevices/pdf/Instructions-Saving-Text-Messages.pdf.

EPA discourages the use of text messages for transmitting substantive (or non-transitory) federal records. (Wait, what is a "non-transitory" or "substantive" record?) If a substantive (or non-transitory) text message is sent or received on your government-issued mobile device, it must be saved into an EPA-approved records management system. If you follow the steps below, you can forward the text message into the EPA email system and then later save it as a record using EZ Email Records or another approved recordkeeping system. When forwarding the text message from the mobile device to the EPA email system, you must include contextual information such as the time, date, subject, and sender/recipient of the message. Please follow the instructions below to manage text messages that are substantive (or non-transitory) records.

How to Forward Text Messages to Email from an iPhone

1. Tap the "***Messages***" icon on the device.
2. Find the text message conversation that you need to save as a record.
3. Tap and hold one of the text messages in the conversation.
4. Tap the "***More***" option that appears above the text message.
5. Put a check mark in the circle beside any or all of the text messages that you want to save as records.
6. Tap the blue arrow icon in the lower right corner of the screen.
7. Type your EPA email address in the "***To***" field.
8. After the text message, enter contextual information about the message including: to, from, date, time, and a relevant subject, then tap "Send." For example, add "(To: Susan Employee, From John Worker, Date: 01.01.15, Time: 6:35 PM, Subject: Project Y)." Press ***"Send".***
9. After receiving the email containing the text message, follow the EZ Email Records process in Outlook to save the email as a record. After following these instructions, you may also notice that a copy of the message containing the contextual information created in step 8, appears in your list of messages in the Messages app on your phone.

Note: If you have problems forwarding text messages to email using the above instructions, please try the below options, starting with Option 1, below.

Option 1:

1. Tap the Settings App > Messages > Send & Receive
2. If your email address is listed with a checkmark next to it, tap on it to uncheck.
3. Exit out of Settings and try to forward a text message to your email. If you don't have an email listed or it still doesn't work, try Option 2.
   **Be sure to check your Junk Email folder to ensure it did not route there.*

Option 2:

1. Tap the Settings App > iTunes & App Store > Apple ID > Sign Out
2. Re-enter your Apple ID (work email address) and Apple ID password.
3. Exit out of Settings and try to forward a text message to your email.

How to Forward Text Messages to Email from a Windows Phone

1. On ***Start***, tap "***Messaging***", then tap the thread that contains the text message you want to save as a record.
2. Open the text message, press and hold the message to be forwarded, then click "***Forward***".
3. Type your EPA email address in the "***To***" field.
4. After the text message, enter contextual information about the message including: to, from, date, time, and a relevant subject, then tap . For example, add "(To: Susan Employee, From John Worker, Date: 01.01.15, Time: 6:35 PM, Subject: Project Y)."
5. After receiving the email containing the text message, follow the EZ Email Records process in Outlook to save the email as a record.

Note: This approach for saving text messages on a Windows phone can only be used for forwarding individual text messages. If multiple messages need to be stored as records, forward each message and the related contextual information to EPA's email system individually.

Technical Assistance

If you have questions about managing records on your mobile or portable devices, contact the Records Help Desk, and refer to the Frequent Questions about Mobile and Portable Devices, and Records for more information.

FOIA Search Guide: Best Practices

This document offers simple, take-away tips for conducting a search.

As you oversee the search for records responsive to a FOIA request, keep in mind the following recommended best practices:

- ✓ Do NOT conduct a search for an improper request.
  Before you plan your search, make sure that the request "reasonably describes the records sought." If the request is overly broad, poses questions, or seeks records not yet in existence, contact the requester to modify the request.
- ✓ Document the process from start to finish.
  Any external communications that you have with the requester, as well as any notable intra-agency communication pertaining to the request, should be memorialized in writing. Documented changes to the request and any correspondence that you have with the requester should be uploaded to FOIAonline.
- ✓ Keep an eye on the clock.
  Unless you can identify "unusual circumstances," you will have 20 working-days to conduct a reasonable search and provide the requester with responsive records. Remember, you can stop the clock ***once*** to seek clarification from the requester, but remember to re-start the clock once the request is clarified and keep track of the amended due date on FOIAonline.
- ✓ Planning your search is essential.
  Before you begin your search, you should compile a search plan that identifies the relevant offices, repositories, and custodians. Do not forget about absent or former employees!
- ✓ Maximize the Centralized Search.
  OEI's Centralized Search will only capture records in EPA's Microsoft Office 365 system, including Outlook email/calendar and Skype/Lync Chats. As soon as you distribute the Search Instructions, remind custodians to transfer any potentially responsive records from, for example, mobile devices (e.g. text messages and photos) to Outlook Email so that they will be captured in the centralized search.
- ✓ Remember to Conduct a Defensible Search.
  Remind Custodians to search all locations where they are reasonably likely to find responsive records. This may include lesser-used locations, including CMS and external drives.
- ✓ Prepare for Collection.
  Once custodians complete their search, you will need to collect and review records. Consider using a cloud-based collection option, such as OneDrive, for the collection of documents that are not sourced from Lotus Notes and not captured in OEI's centralized search.

✓ When in Doubt, Ask.

The General Law Office's Information Law Practice Group, the FOIA Expert Assistance Team within the Office of General Counsel, the Office of Regional Counsel, if the matter concerns a Regional FOIA, and the National FOIA Program Office are available to assist you.

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Proprietary Business Information (PBI) Case Tracking Standard Operating Procedures (SOP)

PROPRIETARY BUSINESS INFORMATION CASE TRACKING

A. Purpose:

a. Ensure proper tracking in FOIA Online of all Freedom of Information Act (FOIA) requests for records containing PBI.

B. Procedures:

Headquarters Request where program withholds information under FOIA Ex. 4:

1. Include the following language in the initial denial letter:

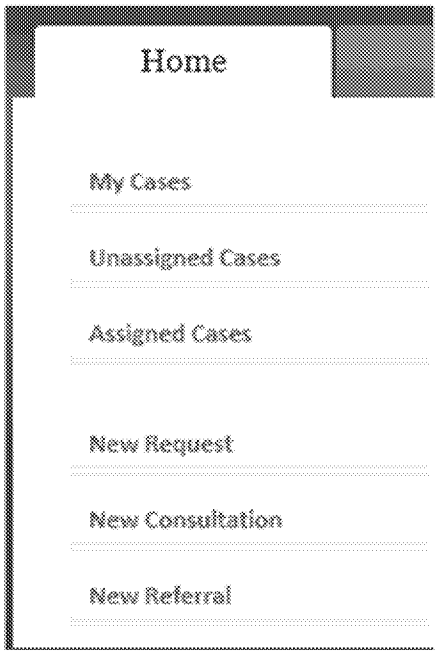
> The information withheld under Exemption 4 will be sent to the appropriate legal office to issue a final confidentiality determination. The appropriate legal office will contact you to confirm your continued interest in receiving a final confidentiality determination and provide you with a fee estimate, where appropriate. Therefore, you do not need to appeal the information withheld pursuant to Exemption 4. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholding, you may appeal this response… [FOLLOWED BY APPEAL LANGUAGE]

2. Notify the National FOIA Office to create a PBI tracking number in FOIAonline:

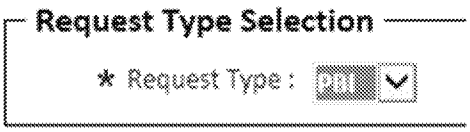
a. Email FOIA_HQ@epa.gov
b. Email Template:
Subject: PBI Case Tracking number for **[EPA-HQ-20XX-XXXXXX]**
Please create a PBI case tracking number for the following initial FOIA request:
Initial Request Number: **[EPA-HQ-20XX-XXXXXX]**
Requester Name: **[NAME]**
Requester Address: **[ADDRESS]**
Requester Email Address: **[EMAIL]**

3. National FOIA Office creates PBI case and assigns to OGC/GLO:

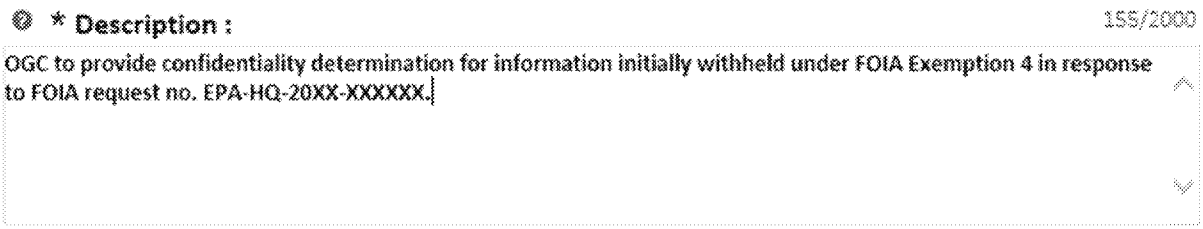
   a. Select "New Request"



   b. Agency and Submitted Date is pre-populated -> Select "Headquarters" as Sub-Agency
   c. Select "PBI" as Request Type:



   d. Fill in contact information as provided by program
   e. Processing Fees information pre-populated
   f. Fill in Description (OGC to provide confidentiality determination for information initially withheld under FOIA Exemption 4 in response to FOIA request no. EPA-HQ-20XX-XXXXXX.):



   g. Select Preview -> Submit

4. National FOIA Office assigns PBI Case to OGC

5. ILPG Appeal Team Leader or Assistant General Counsel will assign PBI Case to ILPG Attorney

6. ILPG Attorney is responsible for:

a. Contacting requester to:

1. Confirm continued interest in receiving a final confidentiality determination;
2. Closing out PBI request if requester fails to confirm interest or is not interested in receiving a final confidentiality determination;
3. Providing an estimate of fees where appropriate;
4. Closing our PBI request if requester fails to assure payment of fees;
5. Notifying program office of need to request substantiation from affected business(es) and provide program recommendation where appropriate;
6. Issue final confidentiality determination;
7. Provide updated response/records to requester;
8. Close our PBI appeal.

Regional Request where regional program withholds information under FOIA Ex. 4:

1. Include Initial Denial language in decision:

   The information withheld under Exemption 4 will be sent to the appropriate legal office to issue a final confidentiality determination. The appropriate legal office will contact you to confirm your continued interest in receiving a final confidentiality determination and provide you with a fee estimate, where appropriate. Therefore, you do not need to appeal the information withheld pursuant to Exemption 4. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholding, you may appeal this response… [FOLLOWED BY APPEAL LANGUAGE]

2. Notify the Region FOIA Coordinator to create a PBI tracking number in FOIAonline:

   a. Email FOIA_HQ@epa.gov

   b. Email Template:

   Subject: PBI Case Tracking number for **[EPA-RX-20XX-XXXXXX]**

   Please create a PBI case tracking number for the following initial FOIA request:

   Initial Request Number: **[EPA-RX-20XX-XXXXXX]**

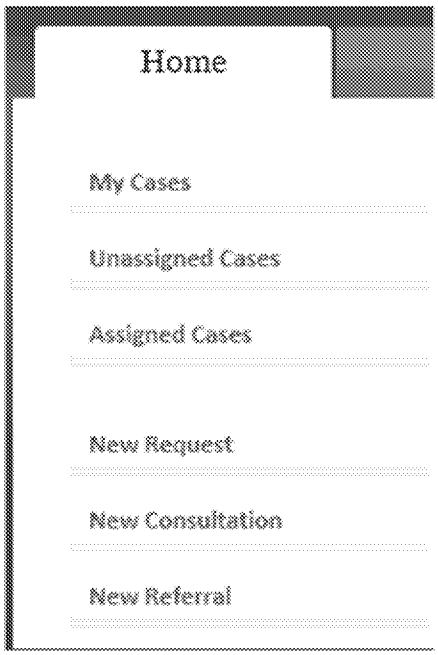
   Requester Name: **[NAME]**

   Requester Address: **[ADDRESS]**

Requester Email Address: **[EMAIL]**

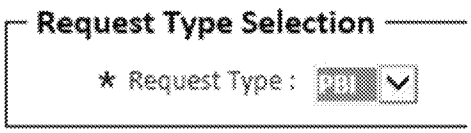
3. Region FOIA Coordinator creates PBI case and assigns to appropriate ORC contact

   a. Select "New Request"



   b. Agency and Submitted Date is pre-populated -> Select appropriate Region as Sub-Agency

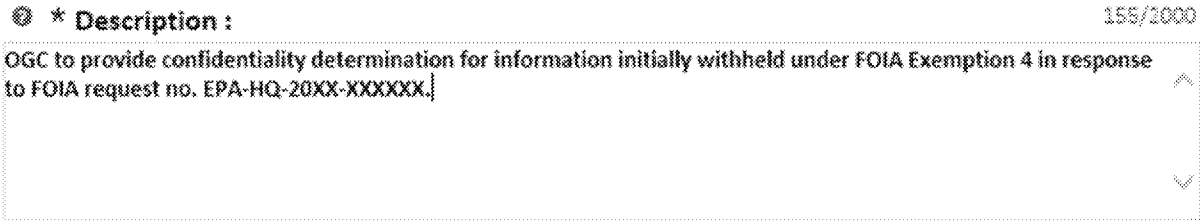
   c. Select "PBI" as Request Type



   d. Fill in contact information as provided by program

   e. Processing Fees information pre-populated

f. Fill in Description (ORC to provide confidentiality determination for information initially withheld under FOIA Exemption 4 in response to FOIA request no. EPA-RX-20XX-XXXXXX.)



g. Select Preview -> Submit

Substantiation Request Letter Sample A- Generic CBI Substantiation, FOIA

Approved OMB 2020-0003
Approval expires 05-31-2020

Request for Substantiation in Response to a Request Under the Freedom of Information Act

By Certified U.S. Mail; Return Receipt Requested

(*Name, title, and address of the [designated] representative of the affected business*)

Re: Freedom of Information Act (FOIA) Request [INSERT FOIA #]

Dear [*Addressee*]:

The U.S. Environmental Protection Agency ("EPA" or "Agency") has received a request under the FOIA for certain records [*if submitted by the business whose information it is:* that you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* in EPA's possession] pertaining to [*a detailed description of the information or specific list of documents that is/are the subject of the advance or final confidentiality determination*]. [*If information has been claimed as CBI:* You have claimed (all *or* part) of this information as confidential business information ("CBI").] [*If no claim has been made:* In accordance with applicable EPA regulations, 40 C.F.R. Part 2, Subpart B, the EPA has determined that you might be expected to assert a claim that some or all of [*if submitted by the business whose information it is:* the information you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* this information in EPA's possession] is confidential business information ("CBI").] Under the EPA regulations at 40 C.F.R. Part 2, Subpart B, the FOIA request has been initially denied to afford you an opportunity to provide comments to [*If no claim has been made:* claim this information as CBI and] substantiate your claim(s) as described below.

The purpose of this letter is to notify you that the EPA (*appropriate legal office*) will be making a(n) (*advance* or *final*) confidentiality determination concerning the information you have claimed as CBI. If you feel that some or all of the information is entitled to confidential treatment, you must make the showings below with specific reference to those portions of the information you consider confidential.

Please be specific by page (including Bates Stamp, if applicable), paragraph, and sentence when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that

you claim to be CBI. Please note that if a page, document, group, or class of documents claimed by you to be CBI contains a significant amount of information which (*appropriate legal office*) determines is not CBI, your CBI claim regarding that page, document, group, or class of documents may be denied. Any information not specifically identified as subject to a confidentiality claim and substantiated as such in your response to this letter may be disclosed to the requester without further notice to you.

For each item or class of information that you continue to claim as CBI, please answer the following questions, giving as much detail as possible. Your comments in response to these questions will be used by the EPA to determine whether the information has been shown to be entitled to confidential treatment:

1. For what period of time do you request that the information be maintained as confidential, e.g., until a certain date, until the occurrence of a specified event, or permanently? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

2. Information submitted to the EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question #1?

3. What measures have you taken to protect the information claimed as confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information be considered confidential?

4. Is the information contained in any publicly available material such as the Internet, publicly available databases, promotional publications, annual reports, or articles? If so, specify which.

5. Is there any means by which a member of the public could obtain access to the information? Is the information of a kind that you would customarily not release to the public?

6. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

7. For each item or category of information claimed as confidential, *explain with specificity* why release of the information is likely to cause substantial harm to your competitive position. Explain the specific nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

8. Do you assert that the information is submitted on a voluntary or a mandatory basis? Please explain the reason for your assertion. If you assert that the information is

voluntarily submitted information, please explain whether the information is the kind that would customarily not be released to the public.

9. Whether you assert the information as voluntary or involuntary, please address why disclosure of the information would tend to lessen the availability to the EPA of similar information in the future.

10. If you believe any information to be (a) trade secret (s), please so state and explain the reason for your belief. Please attach copies of those pages containing such information with brackets around the text that you claim to be (a) trade secret (s).

11. Explain any other issue you deem relevant (including, if pertinent, reasons why you believe that the information you claim to be CBI is not emission data or effluent data).

[*For contract-related CBI:* Enclosed is the EPA Class Determination 1-95 entitled, Confidentiality *of Certain Business Information Submitted by Contractors and Prospective Contractors,* which addresses the treatment of different types of information related to contracts. You may consider reviewing Class Determination 1-95 as you develop your response.]

[*If applicable to another EPA class determination*: Enclosed is the EPA Class Determination [*class determination number*] entitled, [*name of the class determination*], which addresses the treatment of [*description of class determination*]. You may consider reviewing Class Determination [#] as you develop your response.]

Please note that *you bear the burden of substantiating your confidentiality and trade secret claim(s).* Generalized or conclusory statements will be given little or no weight in EPA's determination on the confidentiality of the information you claim to be CBI.

Your comments must be postmarked or hand delivered to this office, or emailed to [*email address*], by the 15th working day after your receipt of this letter. You may seek an extension of time to submit your comments to this office, but the request must be made before the end of the 15-day period. Except in extraordinary circumstances, no extension will be approved without the consent of the FOIA requester. Failure to submit your comments within that time will be regarded as a waiver of your confidentiality claim or claims, and the EPA may release the information.

If you wish to claim any information that you provide in your response to this letter to itself be confidential, you must mark the response "**CONFIDENTIAL**" or with a similar designation, and must bracket all text in the response that you so claim. Information so designated will be disclosed by the EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2, Subpart B. If you fail to claim the information provided in your response as confidential, it may be made available to the public without further notice to you.

Should you have any questions concerning this matter, please call me at [*telephone number*].

Sincerely,

[NAME]
[Title]
[Office Name and Address]

[Enclosure]

Substantiation Request Letter Sample B-Generic CBI Substantiation, Non-FOIA

Approved OMB 2020-0003
Approval expires 05-31-2020

Request for Substantiation from an Affected Business

By Certified U.S. Mail; Return Receipt Requested

[*Name, title, and address of the [designated] representative of the affected business*]

Re: _____

Dear [*Addressee*]:

The U.S. Environmental Protection Agency ("EPA" or "Agency") is seeking to determine the entitlement to confidentiality of [*description of the information that is the subject of the advance or final confidentiality determination*] [*if submitted by the business whose information it is:* that you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* in EPA's possession.] [*If information has been claimed as CBI:* You have claimed (all *or* part) of this information as confidential business information ("CBI").] [*If no claim has been made:* In accordance with applicable EPA regulations, 40 C.F.R. Part 2, Subpart B, the EPA has determined that you might be expected to assert a claim that some or all of [*if submitted by the business whose information it is:* the information you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* this information in EPA's possession] is confidential business information ("CBI").]

The purpose of this letter is to notify you that the EPA [*appropriate legal office*] will be making a(n) [advance *or* final] confidentiality determination concerning the information you have claimed as CBI. If you feel that some or all of the information is entitled to confidential treatment, you must make the showings below with specific reference to those portions of the information you consider confidential.

Please be specific by page (including Bates Stamp, if applicable), paragraph, and sentence when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that you claim to be CBI. Please note that if a page, document, group or class of documents claimed by you to be CBI contains a significant amount of information which our [*appropriate legal office*] determines is not CBI, your CBI claim regarding that page, document, group, or class of documents may be denied. Any information not specifically identified as subject to a confidentiality claim and substantiated as such in your response to this letter may be disclosed without further notice to you.

For each item or class of information that you continue to claim as CBI, please answer the following questions, giving as much detail as possible. Your comments in response to these questions will be used by the EPA to determine whether the information has been shown to be entitled to confidential treatment:

1. For what period of time do you request that the information be maintained as confidential, e.g., until a certain date, until the occurrence of a specified event, or permanently? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

2. Information submitted to the EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question #1?

3. What measures have you taken to protect the information claimed as confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information be considered confidential?

4. Is the information contained in any publicly available material such as the Internet, publicly available databases, promotional publications, annual reports, or articles? If so, specify which.

5. Is there any means by which a member of the public could obtain access to the information? Is the information of a kind that you would customarily not release to the public?

6. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

7. For each item or category of information claimed as confidential, *explain with specificity* why release of the information is likely to cause substantial harm to your competitive position. Explain the specific nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

8. Do you assert that the information is submitted on a voluntary or a mandatory basis? Please explain the reason for your assertion. If you assert that the information is voluntarily submitted information, please explain whether the information is the kind that would customarily not be released to the public.

9. Whether you assert the information as voluntary or involuntary, please address why disclosure of the information would tend to lessen the availability to the EPA of similar information in the future.

10. If you believe any information to be (a) trade secret(s), please so state and explain the reason for your belief. Please attach copies of those pages containing such information with brackets around the text that you claim to be (a) trade secret(s).

11. Explain any other issue you deem relevant (including, if pertinent, reasons why you believe that the information you claim to be CBI is not emission data or effluent data).

[*For contract-related CBI:* Enclosed is the EPA Class Determination 1-95 entitled, Confidentiality *of Certain Business Information Submitted by Contractors and Prospective Contractors,* which addresses the treatment of different types of information related to contracts.

You may consider reviewing Class Determination 1-95 as you develop your response.]

[*If applicable to another EPA class determination*: Enclosed is the EPA Class Determination [*class determination number*] entitled, [*name of the class determination*], which addresses the treatment of [*description of class determination*]. You may consider reviewing Class Determination [#] as you develop your response.]

Please note that *you bear the burden of substantiating your confidentiality and trade secret claim(s).* Generalized or conclusory statements will be given little or no weight in EPA's determination on the confidentiality of the information you claim to be CBI.

Your comments must be postmarked or hand delivered to this office, or emailed to [*email address*], by the 15th working day after your receipt of this letter. You may seek an extension of time to submit your comments to this office, but the request must be made before the end of the 15-day period. Except in extraordinary circumstances, no extension will be approved. Failure to submit your comments within that time will be regarded as a waiver of your confidentiality claim or claims, and the EPA may release the information.

If you wish to claim any information that you provide in your response to this letter to itself be confidential, you must mark the response "**CONFIDENTIAL**" or with a similar designation, and must bracket all text in the response that you so claim. Information so designated will be disclosed by the EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2, Subpart B. If you fail to claim the information provided in your response as confidential, it may be made available to the public without further notice to you.

Should you have any questions concerning this matter, please call me at [*telephone number*].

Sincerely,

[NAME]
[TITLE]
[Office Name and Address]

[Enclosure]

CBI Substantiation Request Letter Sample C- FIFRA, FOIA

OMB 2020-0003
Expires: 05-31-2020
Inert Ingredients

Request for Substantiation from an Affected Business

By Certified U.S. Mail; Return Receipt Requested

[*Name, title, and address of the [designated] representative of the affected business*]

RE: Confidential Business Information Determination

Dear [*Addressee*]:

The U.S. Environmental Protection Agency ("EPA") Office of Pesticide Programs has received a request under the FOIA for certain records [*if submitted by the business whose information it is:* that you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* in EPA's possession] pertaining to [*a detailed description of the information or specific list of documents that is/are the subject of the advance or final confidentiality determination*]. [*If information has been claimed as CBI:* You have claimed (all *or* part) of this information as confidential business information ("CBI").] [*If no claim has been made:* In accordance with applicable EPA regulations, 40 C.F.R. Part 2, Subpart B, the EPA has determined that you might be expected to assert a claim that some or all of [*if submitted by the business whose information it is:* the information you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* this information in EPA's possession] is confidential business information ("CBI").] Under the EPA regulations at 40 C.F.R. Part 2, Subpart B, the FOIA request has been initially denied to afford you an opportunity to provide comments to [*If no claim has been made:* claim this information as CBI and] substantiate your claim(s) as described below.

The purpose of this letter is to notify you that the EPA Office of General Counsel will be making a(n) [advance *or* final] confidentiality determination concerning the information you have claimed as CBI. If you feel that some or all of the information is entitled to confidential treatment, you must make the showings below with specific reference to those portions of the information you consider confidential.

Please be specific by page (including Bates Stamp, if applicable), paragraph, and sentence when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that

you claim to be CBI. Please note that if a page, document, group, or class of documents claimed by you to be CBI contains a significant amount of information which the Office of General Counsel determines is not CBI, your CBI claim regarding that page, document, group, or class of documents may be denied. Any information not specifically identified as subject to a confidentiality claim and substantiated as such in your response to this letter may be disclosed to the requester without further notice to you.

1. For what period of time do you request that the information be maintained as confidential? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

2. Information submitted to EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question #1?

3. What measures have you taken to protect the information claimed as confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information still be considered confidential?

4. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

5. Is the information contained in any publicly available material such as promotional publications, annual reports, articles, etc.? Is there any means by which a member of the public could obtain access to the information?

6. For each category of information claimed as confidential, discuss with specificity why release of the information is likely to cause substantial harm to your competitive position. Explain the nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

7. Do you assert that the information is "voluntarily submitted" as defined at 40 C.F.R. § 2.201(i)? If so, explain why and how disclosure would tend to lessen EP A's ability to obtain similar information in the future.

8. Any other issue you deem relevant.

Please note that you bear the burden of substantiating your confidentiality and trade secret claim(s) pursuant to 40 CFR § 2.208(e). Generalize or conclusory allegations will be given little or no weight in EPA's determination on the confidentiality of information you claim to be CBI.

If you wish to claim any information that you provide in your response to this letter to itself be confidential, you must mark the response "**CONFIDENTIAL**" or with a similar

designation, and must bracket all text in the response that you so claim. Information so designated will be disclosed by the EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2, Subpart B. If you fail to claim the information provided in your response as confidential, it may be made available to the public without further notice to you.

Your reply can be mailed to the following address:

Or your reply can be delivered to the following address:

Your comments must be postmarked or hand-delivered by the 15th working day after your receipt of this letter. If you intend to submit timely comments, please notify by phone at [TELEPHONE NUMBER], by email at or by mail at the address above. Failure to submit timely comments will be regarded as a waiver of your confidentiality claim and EPA will release the information. You may request an extension of the 15-day deadline. Except in extraordinary circumstances, no extension will be granted without the permission of the requestor.

Should you have any questions in this matter, please contact [CONTACT NAME].

Sincerely,

[NAME]
[TITLE]

Enclosures

CBI Substantiation Request Letter Sample D- FIFRA, Non-FOIA

OMB 2020-0003
Expires 05-31-2020

Request for Substantiation from an Affected Business

By Certified U.S. Mail; Return Receipt Requested

[*Name, title, and address of the [designated] representative of the affected business*]

Re: Freedom of Information Act Request [INSERT NUMBER]

Dear [*Addressee*]:

The U.S. Environmental Protection Agency ("EPA") Office of Pesticide Programs is seeking to determine the entitlement to confidentiality of [*description of the information that is the subject of the advance or final confidentiality determination*] [*if submitted by the business whose information it is:* that you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* in EPA's possession.] [*If information has been claimed as CBI:* You have claimed (all *or* part) of this information as confidential business information ("CBI").] [*If no claim has been made:* In accordance with applicable EPA regulations, 40 C.F.R. Part 2, Subpart B, the EPA has determined that you might be expected to assert a claim that some or all of [*if submitted by the business whose information it is:* the information you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* this information in EPA's possession] is confidential business information ("CBI").]

The purpose of this letter is to notify you that the EPA Office of General Counsel will be making a(n) [advance *or* final] confidentiality determination concerning the information you have claimed as CBI. If you feel that some or all of the information is entitled to confidential treatment, you must make the showings below with specific reference to those portions of the information you consider confidential.

Please be specific by page (including Bates Stamp, if applicable), paragraph, and sentence when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that you claim to be CBI. Please note that if a page, document, group, or class of documents claimed by you to be CBI contains a significant amount of information which the Office of General Counsel determines is not CBI, your CBI claim regarding that page, document, group, or class of documents may be denied. Any information not specifically identified as subject to a

confidentiality claim and substantiated as such in your response to this letter may be disclosed to the requester without further notice to you.

Questions 1-7 must be answered with respect to any confidentiality claims pertaining to the enclosed product chemistry information.

1. What value can your competitors derive from knowing the identity, percent by weight, certified limits, or parent process of each impurity? Is this impurity unique to your manufacturing process? Why would your competitors find this impurity preferable over whatever impurity results from their equivalent process?

2. Does published analytical methodology exist that could identify and quantify this impurity? If so, why do you believe that your competitors have not already performed such analysis?

3. What value can your competitors derive from knowing the description of materials used to produce the product, the description of the production process, or the preliminary production analysis? Why would your competitors find these processes preferable over their equivalent processes?

Questions 4-7 must be answered with respect to any confidentiality claims pertaining to the inert ingredients. Each question must be answered separately with respect to each inert ingredient:

4. What is the value that this inert ingredient brings to the product formulation? What characteristics of this ingredient are unique such that competitors might prefer it over whatever ingredients perform the equivalent function in their formulations? Is the use of this ingredient limited to your product, or does it have broader applications?

5. Why is it unlikely that your competitors have not already discovered the value of this ingredient? Are you aware of the use of this ingredient as an inert by your competitors?

6. To your knowledge, has the use of this inert ingredient in a pesticide been disclosed in a patent? If so, how would disclosure of the identity of the ingredient assist your competitors beyond what is already available through a patent?
7. Can the identity of this inert ingredient be determined by product sample analysis? If so, why do you believe that your competitors have not already performed such analysis?

Question 8 must be answered with respect to any confidentiality claims pertaining to the enclosed records:

8. For each category of information claimed as confidential, discuss with specificity why release of the information is likely to cause substantial harm to your competitive position. Explain the nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

Questions 9 through 15 must be answered for each type of information that you claimed as confidential:

9. For what period of time do you request that the information be maintained as confidential? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

10. Information submitted to EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question number 9?

11. What measures have you taken to protect the information? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose it further? If so, why should it still be considered confidential?

12. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

13. Is the presence of this information disclosed in any publicly available material such as Material Safety Data Sheets, promotional publications, annual reports, articles, etc.? Is there any means by which a member of the public could obtain access to the information?

14. Do you assert that the information is "voluntarily submitted" as defined at 40 CFR § 2.201(i)? If so, explain why, and how disclosure would tend to lessen EPA's ability to obtain similar information in the future.

15. Any other issue you deem relevant.

Please note that you bear the burden of substantiating your confidentiality and trade secret claim(s) pursuant to 40 CFR § 2.208(e). Generalize or conclusory allegations will be given little or no weight in EPA's determination on the confidentiality of information you claim to be CBI.

If you wish to claim any information that you provide in your response to this letter to itself be confidential, you must mark the response "**CONFIDENTIAL**" or with a similar designation, and must bracket all text in the response that you so claim. Information so designated will be disclosed by the EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2, Subpart B. If you fail to claim the information provided in your response as confidential, it may be made available to the public without further notice to you.

Be advised that information described by Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") section 10(d)(l)(A), (B), and (C) is not automatically entitled to confidential treatment. Disclosure of such information would only be prohibited, by FIFRA section (b), if the information is eligible for confidential treatment as described by 40 CFR 2.208.

Your reply can be mailed to the following address:

Or your reply can be delivered to my attention at the following address:

Your comments must be postmarked or hand-delivered by the 15th working day after your receipt of this letter. If you intend to submit timely comments, please notify by phone: [TELEPHONE], by email: [EMAIL ADDRESS], or by mail at the address above. Failure to submit timely comments will be regarded as a waiver of your confidentiality claim and EPA will release the information. You may request an extension of the 15-day deadline. Except in extraordinary circumstances, no extension will be granted without the permission of the requester.

Should you have any questions in this matter, please contact [CONTACT PERSON].

Sincerely,

[NAME]
[TITLE]

Enclosures

CBI Substantiation Request Letter Sample E- TSCA

OMB 2020-0003
Approval expires 05-31-2020

By Certified U.S. Mail; Return Receipt Requested

MAY CONTAIN CONFIDENTIAL BUSINESS INFORMATION

[*Technical Contact Name, title, Company, and Address*]

Re: Notice of Review and Request for Substantiation of Confidential Business Information Claim(s)

Document Type:
Document Identifying Number:
Date of Submission:
Type of claim(s) to be reviewed: ☐ specific chemical identity
☐ all other CBI claims

Dear [*Addressee*]:

Under the Toxic Substance Control Act (TSCA) most confidential business information (CBI) claims for chemical identity and at least 25% of other CBI claims are subject to a review and final determination. TSCA section 14(g). 15 U.S.C. § 2613(g).

This letter is to notify you that the U.S. Environmental Protection Agency (EPA) Office of General Counsel will be making a final confidentiality determination concerning information you have claimed as CBI, as identified above. All non-exempt CBI claims must be substantiated.

If you feel that some or all of the information checked above is entitled to confidential treatment, you must substantiate as described below with specific reference to those portions of the information you consider confidential.

Note that TSCA section 14(c)(2) generally exempts certain information types from the requirement to substantiate. 15 U.S.C. § 2613(c)(2). *See* EPA webpage [INSERT WEBPAGE] for more guidance on information exempt from substantiation. To the extent that you believe the information that you have claimed as CBI is one of these exempt information types, you may make this assertion in your response by identifying the specific section 14(c)(2) exemption, in lieu of substantiating the CBI claim for that information. If the Agency disagrees with this assertion, you may be asked to provide additional information to support your claim.

Substantiating a CBI Claim.

There are two different sets of substantiation questions for CBI claims: (I) questions for all CBI claims in the submission; and (II) questions for chemical identity CBI claims. Please use the appropriate question set. In some instances, your TSCA submission may contain both types of CBI claims or a CBI claim may require completing both sets of substantiation questions. For example, if you assert a CBI claim to protect a chemical substance's identity, then you must answer both question sets. EPA has identified the appropriate question set(s) via the checkboxes at the top of this letter. In some instances, for example TSCA section 8(a) Chemical Data Reporting (CDR) Rule submissions, you may have already provided up-front substantiations for some of the CBI claims. If you have already substantiated your CBI claim at the time of submission, please refer to or preferably physically attach your substantiation to your response to this letter.

Note also that the providing of incorrect information in this substantiation request may be a failure to comply with TSCA, specifically 15 U.S.C. § 2614.

I. REQUIRED FOR ALL CBI CLAIMS.

If you are asserting ANY information in the submission as CBI, please answer the following questions.

In supporting your CBI claim(s), please be specific by page, paragraph, sentence, or by data element when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that you claim to be CBI.

In some cases, it may be appropriate to group the information into a class of information rather than responding to each item claimed as CBI. *See* EPA webpage [INSERT WEBPAGE] for suggested approaches to providing substantiations of materials grouped. For any information that is not specifically identified as subject to a confidentiality claim and substantiated as such in your response to this letter, it shall be determined that you have waived your CBI claim, pursuant to 40 C.F.R. § 2.205(d).

For each item or class of information that you continue to claim as CBI, please answer the following questions, giving as much detail as possible. Your substantiation response to these questions will be used by the EPA to determine whether the information has been shown to be entitled to confidential treatment:

A. Do you believe that any of the information claimed as CBI is exempt from substantiation pursuant to TSCA section 14(c)(2)[1]? Yes/No.

---

[1] TSCA Section 14(c)(2) states:

If you answered yes, please identify the information, provide the specific exemption and answer no further questions related to that information.

If you answered no, please respond to the questions below.

B. Will disclosure of the information likely result in substantial harm to your business competitive position? Yes/No.

If you answered yes, please describe with specificity the substantial harmful effects that would result to your competitive position if the CBI information is made available to the public. In your answer, explain the causal relationship between disclosure and any resulting substantial harmful effects. Consider in your answer such constraints as capital and marketing cost, specialized technical expertise, or unusual processes and your competitor's access to your customers.

C. To the extent you have disclosed information to others (both internally and externally), what precautions has your business taken? Please identify any measures or internal controls your business has taken to protect the information claimed as confidential.

1. Non-disclosure agreement required prior to access. Yes/No
2. Access is limited to individuals with a need-to-know. Yes/No
3. Information is physically secured (e.g. locked in room or cabinet) or electronically secured (encrypted, password protected, etc.). Yes/No
4. Other internal control measure(s). If so, please explain.

D. Does the information claimed as confidential appear in any public documents, including (but not limited to) safety data sheet, advertising or promotional material, professional or

---

(2) Information generally not subject to substantiation requirements

Subject to subsection (f), the following information shall not be subject to substantiation requirements under paragraph (3):

(A) Specific information describing the processes used in manufacture or processing of a chemical substance, mixture, or article.

(B) Marketing and sales information.

(C) Information identifying a supplier or customer.

(D) In the case of a mixture, details of the full composition of the mixture and the respective percentages of constituents.

(E) Specific information regarding the use, function, or application of a chemical substance or mixture in a process, mixture, or article.

(F) Specific production or import volumes of the manufacturer or processor.

(G) Prior to the date on which a chemical substance is first offered for commercial distribution, the specific chemical identity of the chemical substance, including the chemical name, molecular formula, Chemical Abstracts Service number, and other information that would identify the specific chemical substance, if the specific chemical identity was claimed as confidential at the time it was submitted in a notice under section 2604 of this title.

trade publication, or any other media or publications available to the general public? Yes/No.

If you answered yes, please explain why the information should nonetheless be treated as confidential.

E. Does the information claimed to be CBI contain (a) trade secret(s)[2] ? Yes/No

If yes, please explain the reason for your belief. Please attach copies of those pages containing such information with brackets around the text that you claim to be (a) trade secret(s).

F. If you assert a claim of confidentiality that is less than 10 years (see TSCA section 14(e)(1)(B)), then please indicate the number of years (between 1-10 years) or specific date of which the claim is withdrawn.[3]

G. Has EPA, another federal agency, or court made any confidentiality determination regarding information associated with this substance? Yes/No.

If yes, please explain the outcome of that determination and provide EPA with a copy of the previous confidentiality determination or any information that will assist the Agency in identifying the prior determination.

II. REQUIRED FOR ONLY CHEMICAL IDENTITY CBI CLAIMS.

If you are claiming a specific chemical identity as CBI, please answer the additional following questions. If you are not substantiating a chemical identity CBI claim, then you do not need to respond to the questions below.

A. Is the chemical substance on the confidential portion of the TSCA Inventory? Yes/No.

B. Commerce:
   1. Has the chemical substance (or mixture) been offered for commercial distribution? Yes/No.

   2. Is the chemical substance known to be in U.S. commerce? Yes/No.

   If you answered yes, please explain why the information should nonetheless be treated as confidential.

C. Disclosure of the specific chemical name would release:

[2] "Trade secret" is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[3] Information with withdrawn CBI claims will be made available to the public without further notice.

1. Confidential process information. Yes/No.
2. Confidential portion of a mixture information. Yes/No.

If you answered yes to either question, please explain

Asserting a CBI claim in your substantiation response.

Businesses may claim their substantiation response as CBI. Information claimed as confidential should be clearly marked by bracketing, circling, or underlining. All pages containing such information must also be stamped "CONFIDENTIAL BUSINESS INFORMATION" or with similar designation in order to assert a confidentiality claim. Care should be taken to ensure that these markings do not obscure the text.

If you claim your substantiation response as CBI, you must include the following statement in the submission.

> I hereby certify to the best of my knowledge and belief that all information entered on this form is complete and accurate.
> I further certify that, pursuant to 15 U.S.C. § 2613(c), for all claims for confidentiality made with this submission, all information submitted to substantiate such claims is true and correct, and that it is true and correct that
> (i) My company has taken reasonable measures to protect the confidentiality of the information;
> (ii) I have determined that the information is not required to be disclosed or otherwise made available to the public under any other Federal law;
> (iii) I have a reasonable basis to conclude that disclosure of the information is likely to cause substantial harm to the competitive position of my company; and
> (iv) I have a reasonable basis to believe that the information is not readily discoverable through reverse engineering.
>
> Any knowing and willful misrepresentation is subject to criminal penalty pursuant to 18 U.S.C. § 1001.

Timely Responses and Postal Requirements

Your substantiation response must be postmarked or hand delivered to this office **by the 15th working day after your receipt of this letter**. While it is anticipated that there will be a means for sending these to the Agency electronically in the future, at this point substantiations should be sent via US Mail or courier.

Filings should be directed to the below address.

TSCA Confidential Business Information Center (7407M)
WJC East; Room 6428; Attn: TSCA CBI Substantiations
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0001

Courier Deliveries:

U.S. EPA
Office of Pollution Prevention and Toxics
Confidential Business Information Center (CBIC)
Attn: TSCA CBI Substantiations
1201 Constitution Avenue, NW
WJC East; Room 6428
Washington, DC 20004-3302
(202) 564-8930

You may seek an extension of time to submit your substantiation response to this office, but the request must be made before the end of the 15-day period. Requests for an extension may be directed to Ms. Quoc Nguyen, Office of General Counsel, Nguyen.Quoc@epa.gov.

Failure to timely submit your substantiation response will be regarded as a waiver of your confidentiality claim or claims, and the EPA may release the information.

Should you have any questions concerning this matter, please contact Mr. Scott Sherlock at (202) 564-8257 or Sherlock.Scott@epa.gov; or Ms. Jessica Barkas at (202) 250-8880 or Barkas.Jessica@epa.gov.

Sincerely,

[NAME]
[TITLE]
[OfficeName and Address]

OGC Relativity Guidance

Use this guidance to familiarize yourself with the Relativity platform, including how to redact documents. Remember that before you can use Relativity for the first time, you need to contact EZ-tech (or technical support for your office) to install the Relativity Web Viewer Plugin.

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ONLINE RESOURCES

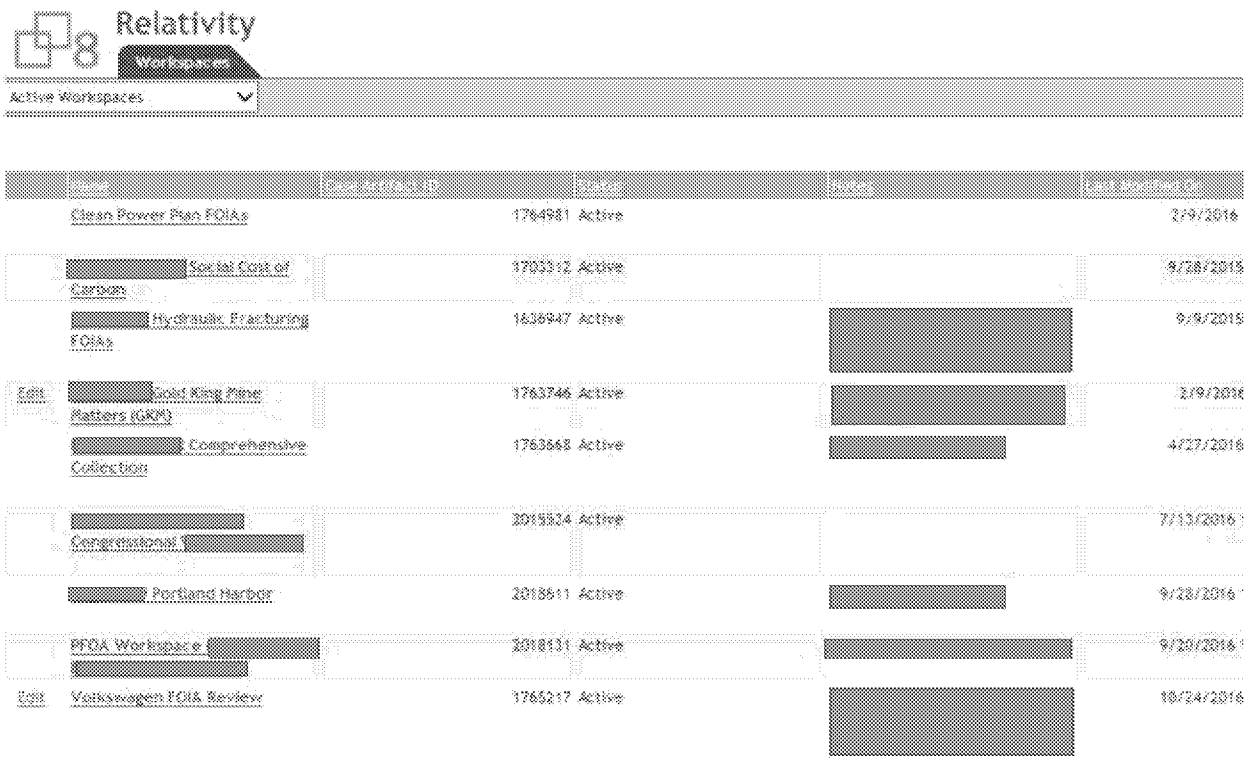
EPA uses Relativity version 8.2. There are a number of video trainings and other resources available here: https://www.kcura.com/relativity/ediscovery-resources/training/. Below are some tutorials that you may find useful.

1. Getting Started (3:41): https://www.kcura.com/relativity/ediscovery-resources/training/on- demand/getting-started/
2. Redactions and Annotations (6:46): https://www.kcura.com/relativity/ediscovery- resources/training/on-demand/adding-redactions-and-annotations-8-2/
3. Coding and Tagging Documents (5:15): https://www.kcura.com/relativity/ediscovery- resources/training/on-demand/coding-and-tagging-documents/

4. Reviewer Training (36:33): https://www.kcura.com/relativity/ediscovery-resources/training/on- demand/reviewer-training/

SIGNING IN, FINDING YOUR WORKSPACE

If you are a first-time user, your sign in credentials will be emailed to you along with a link to EPA's Relativity viewer. It is a good idea to save or bookmark this link. If you have password issues or cannot find the link, email your case manager. Once you sign in, you will see the workspace list. Click on the name of your case to enter your workspace.



(sample screenshot of a Workspace List, some information removed)

BATCHES

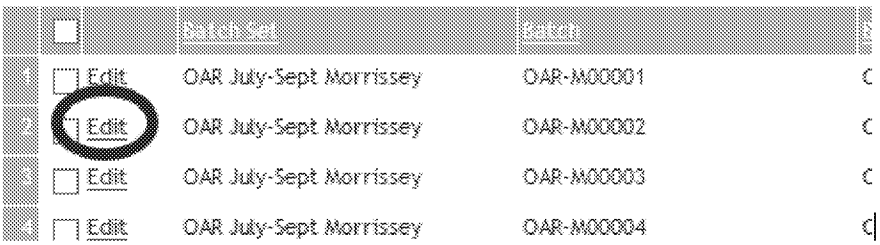
Documents are organized into groups called batches. To review documents, you must have a batch assigned to you. No one else will work on documents in your batch while they are assigned to you. To check out a batch, follow the instructions below. If you are done working, your batch will remain assigned to you unless you check it back in, even if you sign out of Relativity and sign back in later.

1. At the top of your screen, you will see tabs. Every database is different, but you will likely have a *Documents* tab and a *Review Batches* tab. Click the *Review Batches* tab.

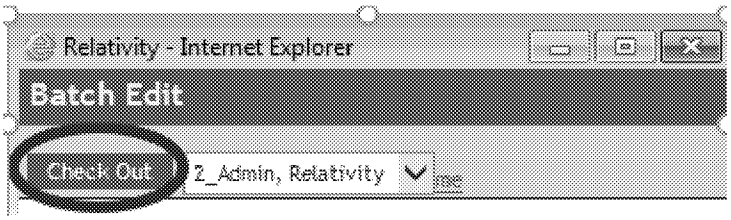
2. This will bring you to a list of batches. There will be several fields of information displayed in the columns.

    a. The *Batch Status* column will tell you whether a batch has been completed, is in progress, or if the field is blank, the batch is open and may be checked out.
    b. If a batch is assigned to a reviewer, their name will be displayed in the *Assigned To* column.
    c. The columns should display how many documents have been reviewed in a batch as well as the total size of the batch.

3. To check a batch out, look to the left of the screen. Next to the batch names, there will be a blue hyperlink *Edit* button. Once you have selected your batch, click this edit button to begin the checkout process.

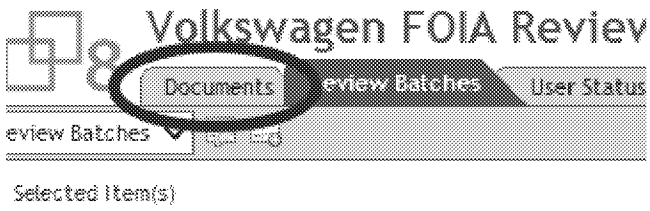


4. Click the "Check Out" button to check the batch out to yourself.

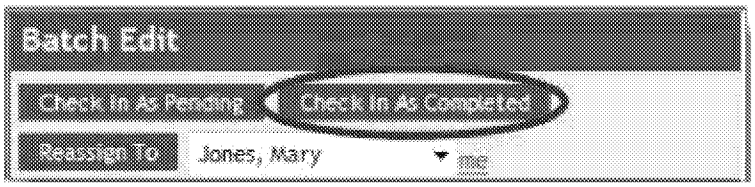


5. Once a batch is checked out, you will notice that it is assigned to you in the *Assigned To* column.

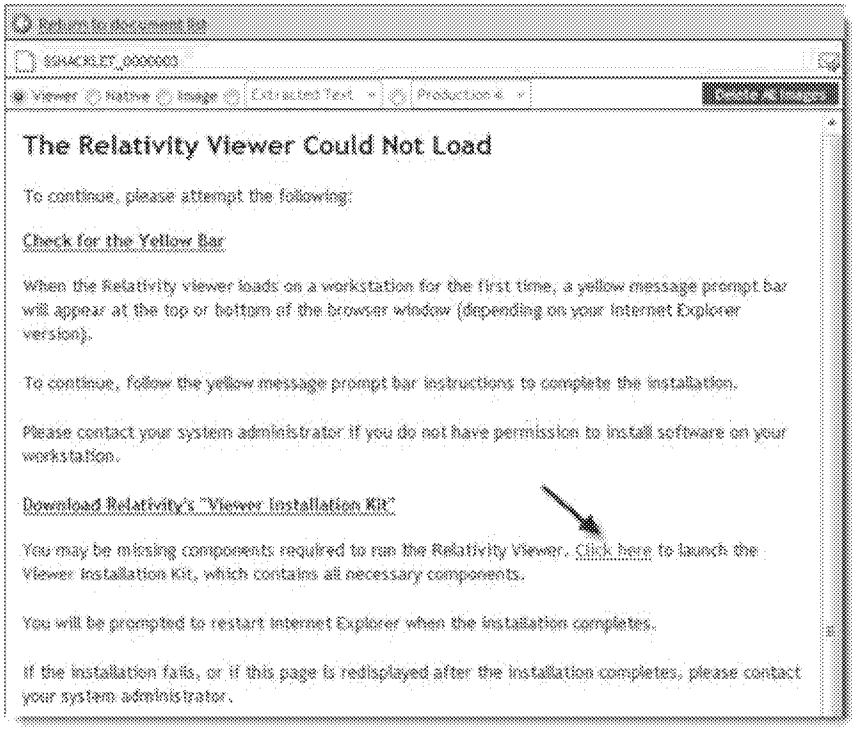
6. To view the documents in the batch you have checked out, you must look again to the tabs at the upper left of your screen. Click back to the documents tab to view the documents.



7. Follow the same steps to check a batch back in. (Go to the batches tab, find your batch, press the *Edit* button). You may check the batch back in as *Pending* if it is not complete. But if all documents have been reviewed, check it back in as *Completed*.



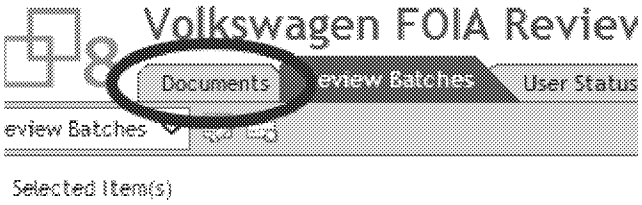
INSTALLING THE WEB VIEWER



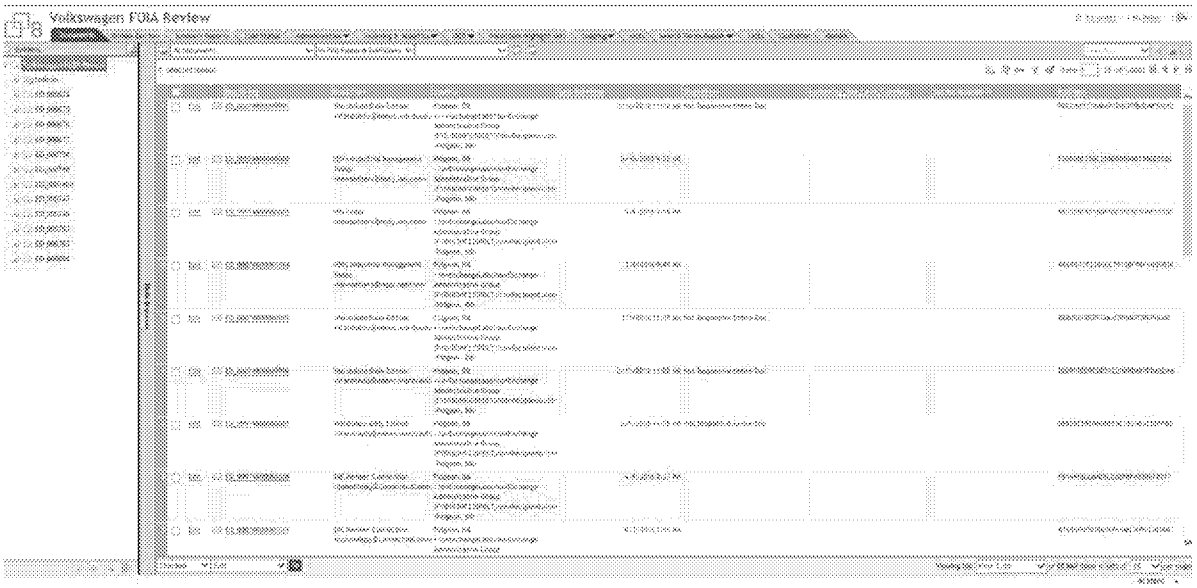
If this is the first time you are using Relativity on your machine, you will likely need to install a plugin before being able to view documents. If you are prompted with the below error or a similar message when you try to open a document, then you will need someone with administrator rights to download the Relativity Viewer and install it. Call your technical support line and ask for assistance installing the Relativity Viewer plugin. Your technician will be able to remotely download and install the plugin, usually in a matter of minutes. This should only need to be done once.

OPENING AND VIEWING A DOCUMENT

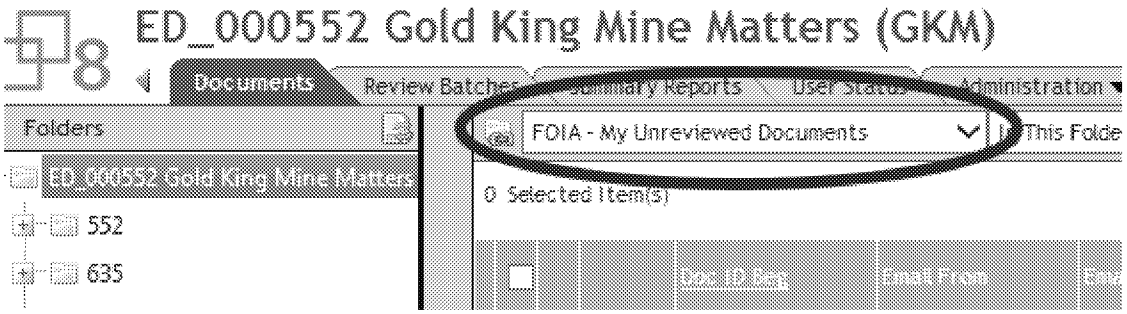
1. Make sure you are in the *Documents* tab.



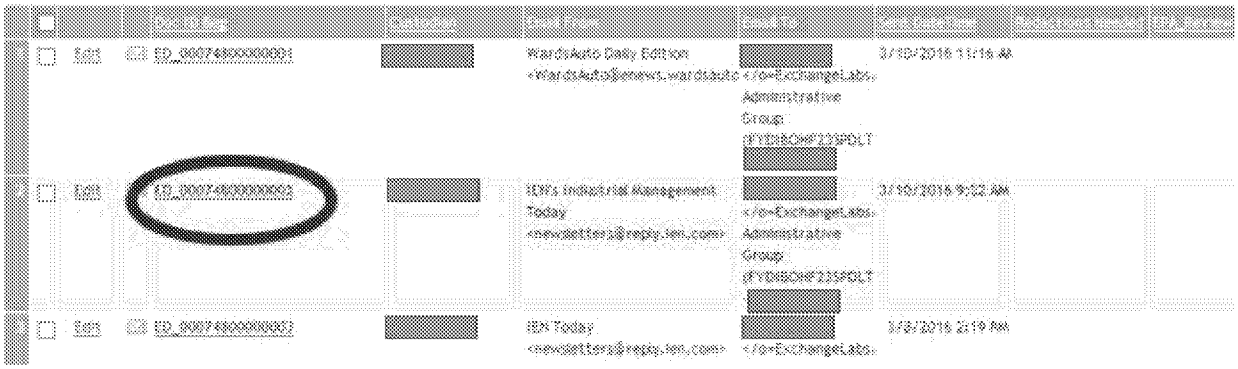
2. Your screen should look something like this:



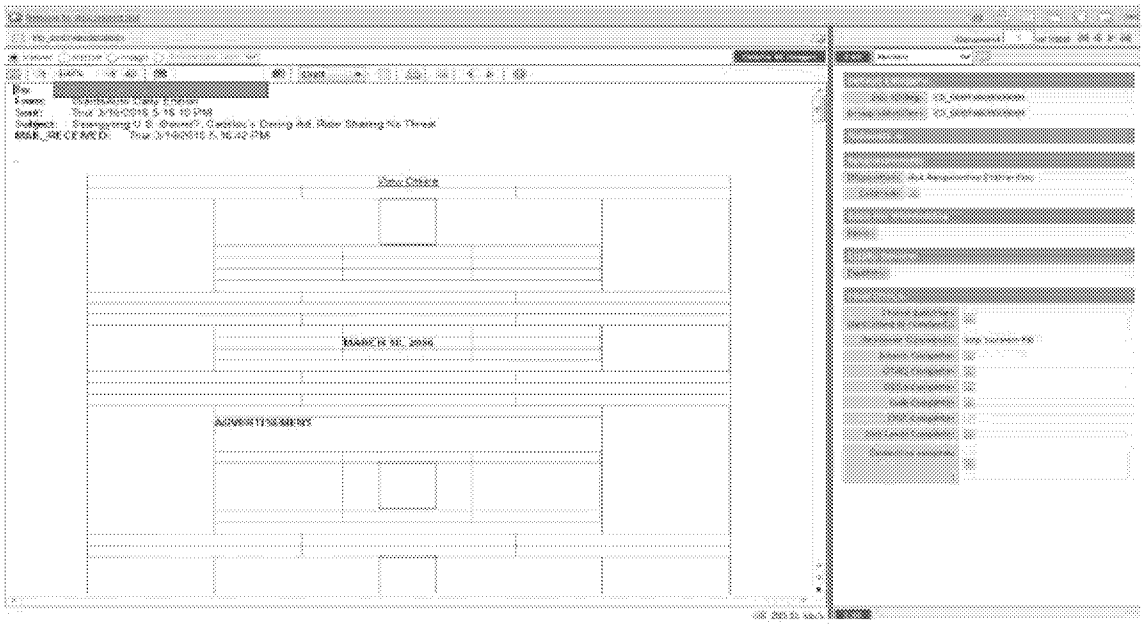
3. Look at the drop down menu towards the upper left of your screen. It will likely say "All Documents" or "unreviewed documents" or have similar choices. Your case manager should give you guidance as to what view to use, or they may limit your access to a single useful view.



4. You will see a list of documents with columns of information. One of the leftmost columns will contain links to the documents themselves. Click the blue hyperlink Doc ID number of the document you would like to open.



5. Opening a document will take you to the reviewer interface, it should look like this:



6. You should have access to three views depending on the type of document you are looking at and how it has been processed. To change to a different view, click the radial button.

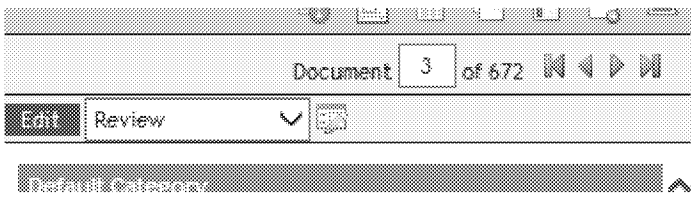
   a. Viewer Mode: Default view which contains the rendered version of the native file. This view will display the entire content of the document in one continuous view. If persistent highlighting is used, certain terms may be

highlighted to aid in your review.

b. Native Mode: Clicking on the native viewer will open the file in a separate window in its native form. If you are looking at an email, it will open the file in outlook, if you are looking at a spreadsheet, excel will open. This can be useful for certain file types, but should generally be avoided.

c. Image Mode: This view will only be available if the document set you are working with has been processed to be "imaged." If you need to use image mode but your documents are not imaged, talk to your case manager. Image mode shows you the document as it will be produced to the requester. The document may contain several pages that you will need to click through. This is the view you will use to make redactions.

7. To move on to the next document in your list automatically, or back to a previous document, use the navigation arrows in the upper right corner of your screen.

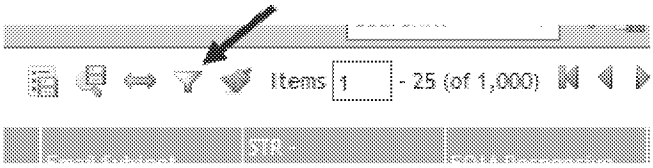


8. To return to your document list from a document view, look to the upper left of your screen and select *Return to document list*.

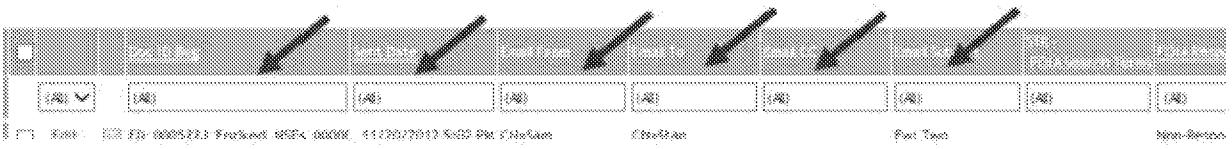
SORTING AND FILTERING DOCUMENTS

1. Your document list should have several columns. If a column title is underlined, like *Sent Date* is in the image below, you can slick on the title and your documents will be sorted by that column.

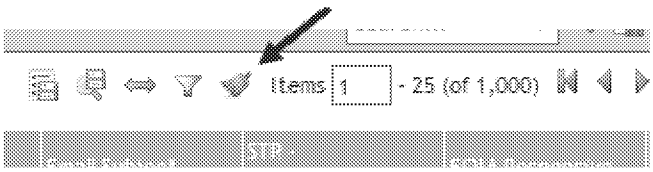
2. Clicking on the filter icon above your document list will allow you to filter the documents you are viewing. For example, you could limit your view to only documents from a particular sender.



3. Text boxes will appear below the headings of each column. Type the terms you want to use to filter in the text box of the relevant column.

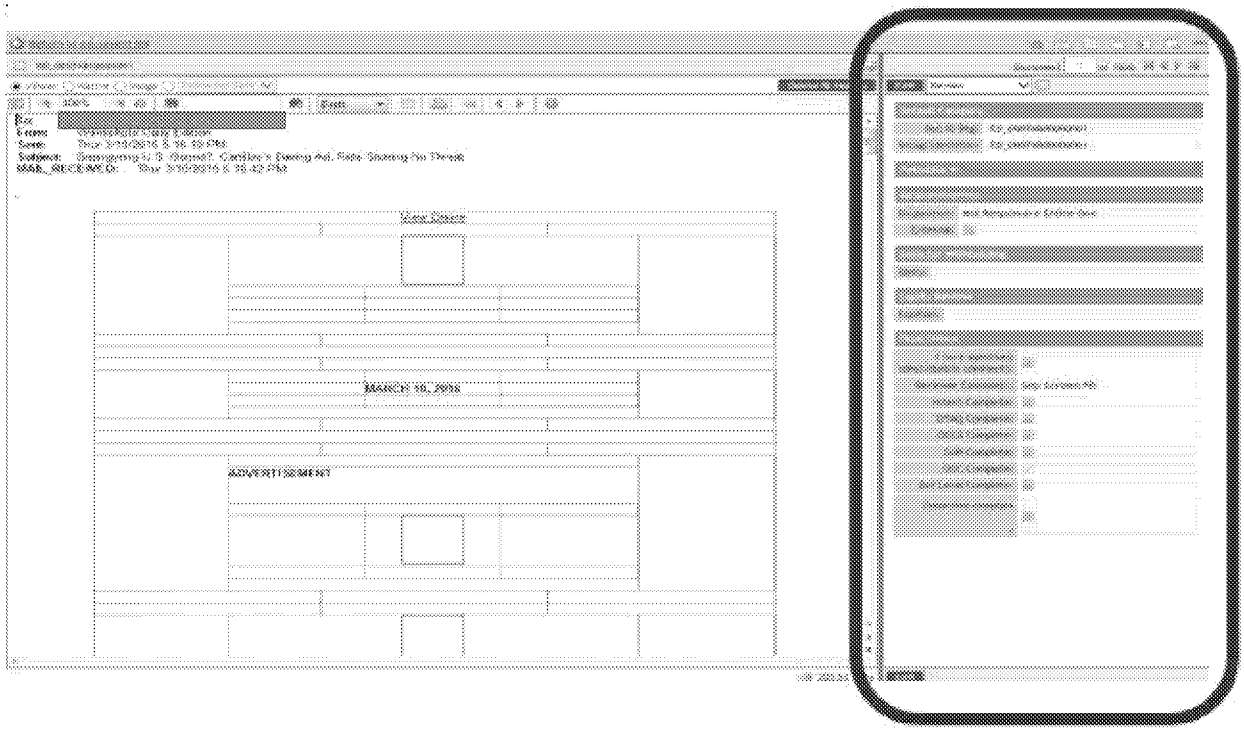


4. To clear your filters, click the sweep icon next to the filter icon.

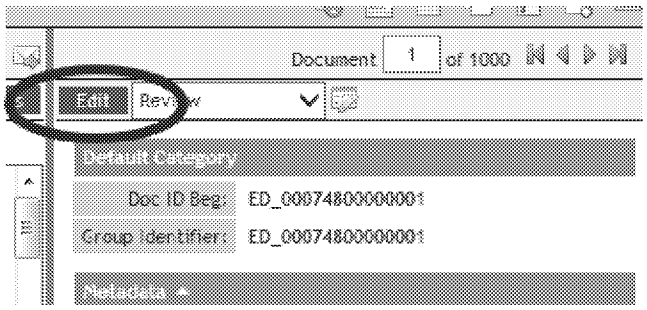


CODING A DOCUMENT

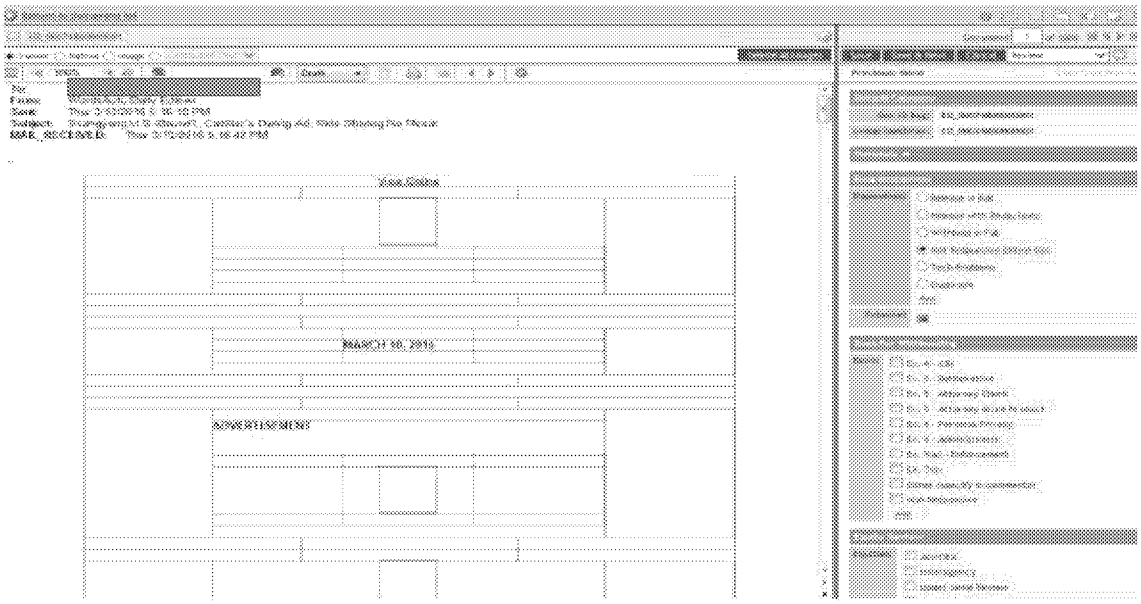
"Coding" is a term we use to describe the process of adding information to the documents that you review. To do this, when viewing a document, use the coding pane on the right side of your reviewer interface.



1. To begin coding, you must select the edit button in the upper left of your coding pane.

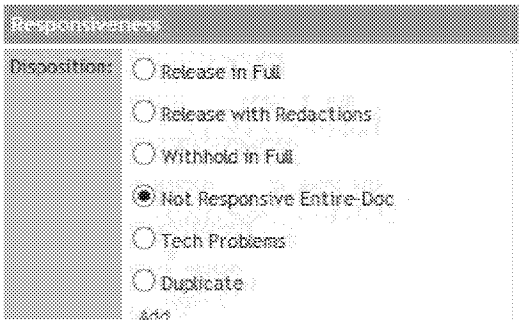


2. This will bring your coding pane to life and allow you to make edits. Your reviewer interface should now look like this:



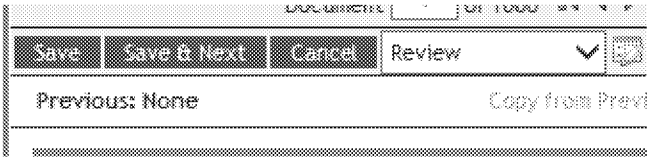
3. Follow the instructions provided by your case manager for coding your documents. You will find that some fields of information use radial buttons that only allow you to make one choice, and other fields use check boxes which allow you to select more than one item.

Radial Buttons:



Check Boxes:

4. After you have finished coding a document, remember to save. If you plan to move on to the next document in your set, clicking "Save and Next" will save and take you there automatically. The save buttons are located above and below your coding pane.

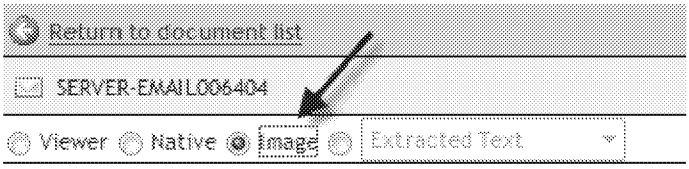


5. When you move onto another document, your coding pane will remain in edit mode, and you should be able to begin coding right away.

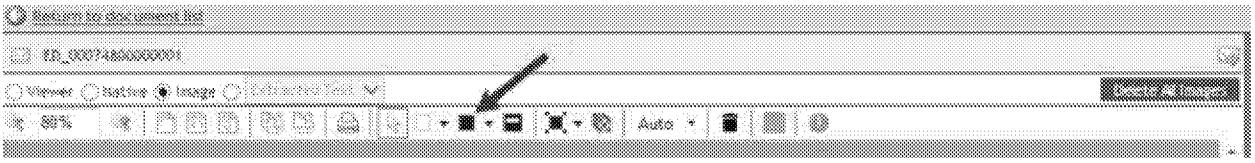
REDACTING

In general, when a FOIA exemption applies to part of a document, we have an obligation to release reasonably segregable material within that document. This is accomplished by redacting the exempt part of the document. You should redact as needed according to the instructions below. Redactions are automatically saved.

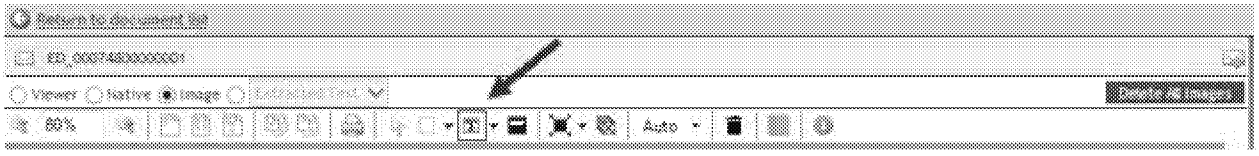
1. To create a redaction, make sure you are in Image mode in the Document viewer.



2. Look to the toolbar at the top of your screen. See the solid black square with the drop down menu. If you hover your cursor over it, it will display "*Redact*".



3. The drop down options when you click on the down arrow will be *Black, Cross, Text, or White*. Always select *Text*. When you have *Text* selected, the icon will look like below. Once this is selected, it will remain in *Text* mode unless you change it or sign out.



4. To make a redaction, click on your document and drag to create a square text

box. You will be able to resize or move this text box so that it conceals the information that is exempt from disclosure.

5. To change the text that is displayed in the box, right click on the box. This will allow you to select the appropriate basis for withholding from a series of drop down choices.

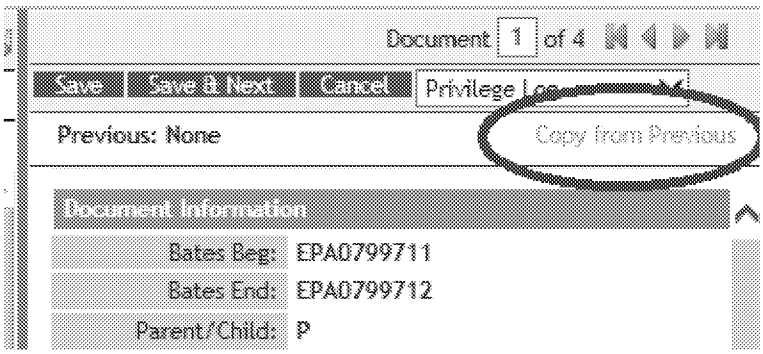
6. To delete a redaction, right click on the redaction and select delete.

7. Remember that the coding pane will not be automatically updated when you make a redaction. Be sure to code which exemptions you are asserting.

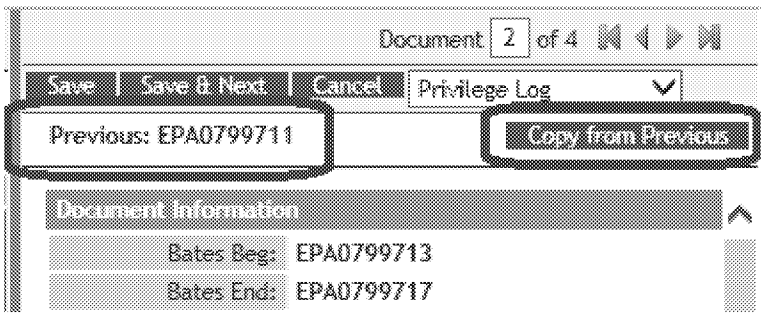
COPY FROM PREVIOUS

At the top right-hand side of the coding pane, there is a "Copy from Previous" button on the Relativity review screen, which will allow you to copy the coding from the most recently coded document in your current review session. This button may save time if you are working in a sequence of similar documents.

1. To use Copy from Previous, you must first code at least one document. If you have not yet coded a document in your current session, or if you click Save (as opposed to Save & Next) or Cancel after reviewing a document, the layout is displayed as read-only and the Copy from Previous button is disabled:



2. Once you have coded a document in the current session and hit Save & Next, the Previous field will show the document identifier of the document that you last coded, and the Copy from Previous button will be enabled:



3. Relativity will also display a gray arrow icon next to the fields with values that will be copied from the previous document when you use Copy from Previous (Document Status, Privilege Basis, and Reviewer Comments). After you click Copy from Previous, the gray arrow icon will be replaced with a green arrow icon. The icon redisplays next to a copied field that you have modified. You must still click Save or Save & Next to apply the changes that you have copied into the document.

How to effectively use Copy from Previous

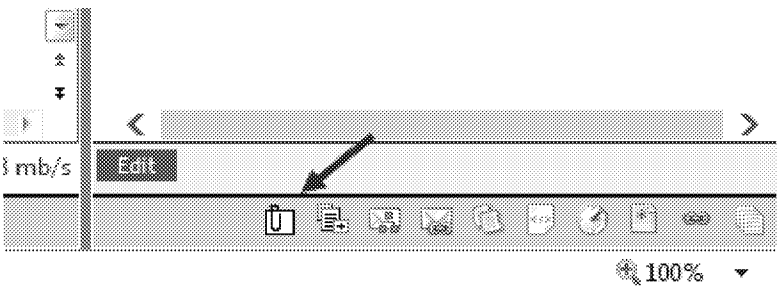
Use the Copy from Previous function when you want to copy the coding values of the designated fields from the last-saved document to the current one, like in cases where you have a series of similar documents one after another. After Relativity populates the layout with these coding values, you can still modify them (as you might need to, for instance, when copying a Privilege Basis description from an email into one of its attachments). After making any necessary changes, click the Save & Next button to save your changes and review a new document.

REVIEWING FAMILY MEMBERS AND DUPLICATES

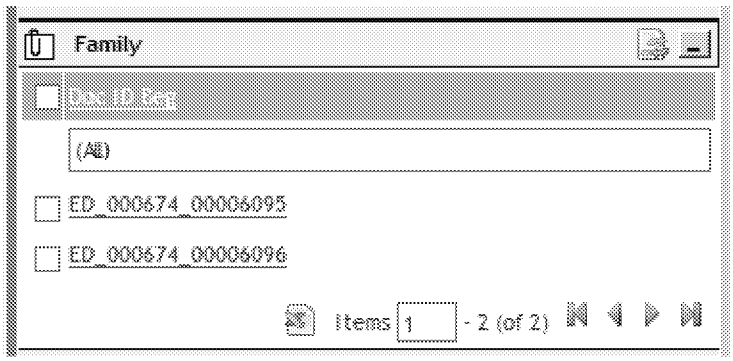
When looking at an attachment, it can be helpful to view the parent email to gain important context. When looking at an email communication, it may be helpful to view the attachments that are referenced. To view a document's family, follow the steps below.

1. FAMILY MEMBERS

    a. Find the paperclip icon in the bottom right corner of your screen. Click it.



b. This will provide you with a small viewing pane that contains list of documents, likely titled with a series of Doc ID numbers. Each number is a hyperlink to a document.

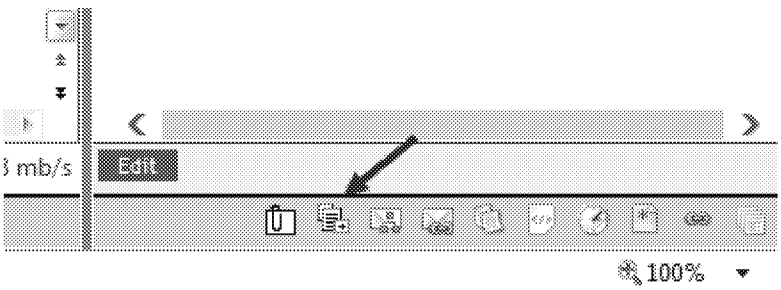


c. The uppermost document will be the parent email. The descending documents are attachments.

d. After clicking through the family and making coding changes or gathering information, to return to your original document, look to the upper left of your screen and click *Return to review queue*.

2. DUPLICATES

a. The Duplicates Icon should be located next to the paperclip icon,



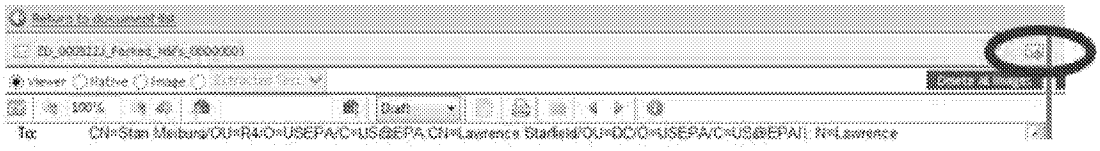
b. Just like with family members, you will see a small viewing pane that will display any duplicates. It can be navigated similarly, and when you are finished coding any duplicates, you can return to your initial document by selecting return to review queue.

EMAILING A DOCUMENT TO YOUR CASE MANAGER

If you have a question about a document, it is often easiest to send a link to the case manager.

Relativity has an easy tool to help with this.

1. Locate the email icon with the green arrow in the upper right of your viewing pane



2. Click the icon, this will open up an outlook message with a direct link to the document. Send the document to your case manager with a note about your question and they will be able to open up the document themselves to help with your issue.

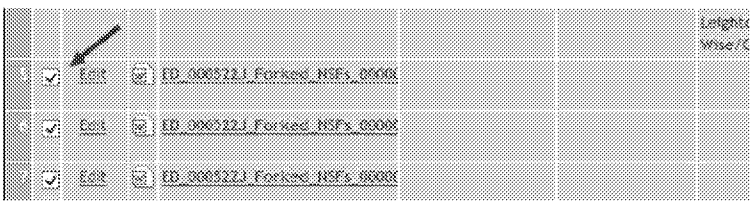
GETTING DOCUMENTS OUT OF RELATIVITY

If you are a first line reviewer, there is likely no reason for you to print or produce documents from Relativity. If you are helping with case management, you may need to get documents out of the database for a number of reasons.

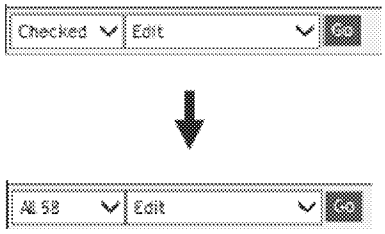
1. *Running a Production*: You may be at the end of your review and ready to deliver your final product to a requester. This will require the help of the e-discovery team in OEI. When you are ready to run a production, send an email to ediscovery@epa.gov. You should describe which documents need to be produced, if you would like them to be produced as images or in native format, and how you would like the documents to be stamped. The E-discovery team may follow up to clarify those and other details. If you know that you are going to request a large production, it can be helpful to reach out in advance.

2. *Printing Images*: If you are not running a final production, but rather need copies of one or more documents for some internal review, you can print images of your documents with or without redactions. Follow the steps below.

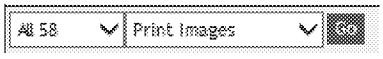
    a. Check the boxes of the documents that you would like to produce.



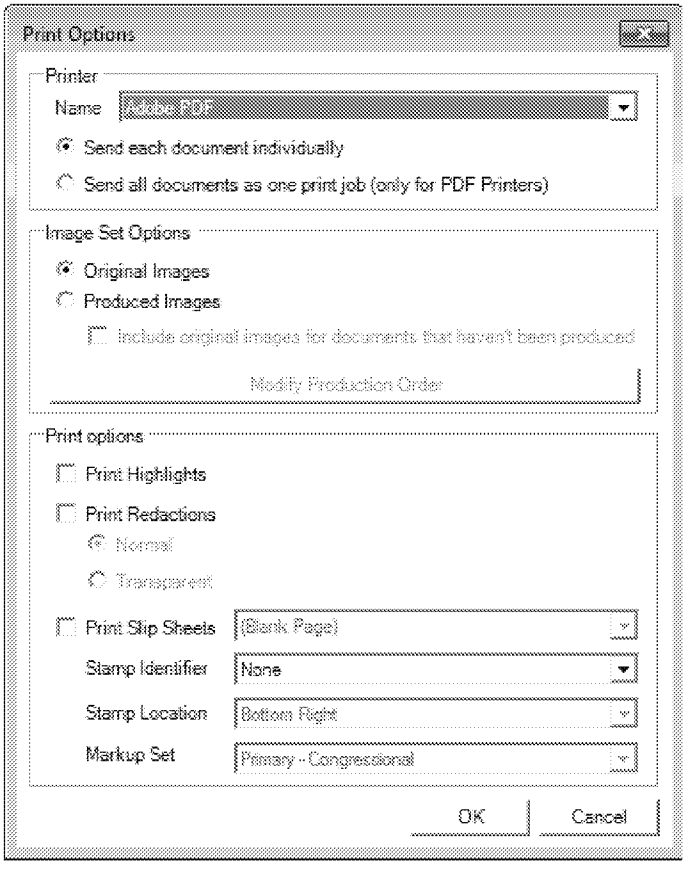
b. Alternatively, if you would like to print all of the documents in a particular saved search or folder, you can select "All" documents from the drop down in the lower left of your screen.



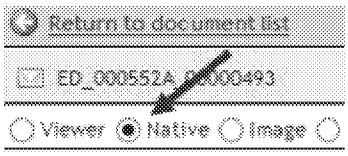
c. Using the second drop down menu, select "Print Images" and then press "Go".



d. You will be prompted with a number of choices. If you are trying to create a PDF, select a PDF printer. You have the options to send multiple documents as a group, print highlights or redactions, and select markup sets. Once you have set up your print job, press "OK" and Relativity will print your images. If you are printing to PDF, you wil be prompted to save the PDF.



3. *Opening in Native*: If you need to view or circulate a native file, open it using the native viewer and proceed from there.



Redacting in Adobe Acrobat Pro DC

Use these instructions to redact content in Adobe Acrobat Pro DC

(1) Choose **Tools** > **Redact**. The Redact toolset is displayed in the secondary toolbar.

(2) In the secondary toolbar, choose **Mark for Redaction** > **Text & Images**.

(3) (Optional) To set the appearance of redaction marks, click **Properties** in the secondary toolbar. (See Change the look of redaction markers.)

Note: The FOIA requires that the Agency provide an estimate of the volume of redacted information to the requester. This includes redaction marks within documents. Therefore, you must always use redaction marks or borders that are visible. In other words, never place a white redaction mark on a white background.

(4) Mark items you want to remove by doing any of the following:

- Double-click to select a word or image.
- Drag to select a line, block of text, object, or area.
- Press Ctrl as you drag to select areas of a page in a scanned document.

Note: To preview how your redaction marks appear, hold the pointer over the marked area.

(5) To apply multiple code entries to a single redaction, right-click a redaction mark and select an option. For more information, see Apply multiple code entries to a redaction. Tip: Use the **Find Text** tool to find and remove words or phrases in one or more PDFs that contain searchable text. (see below)

(6) (Optional) To repeat a redaction mark, right-click it and choose **Repeat Mark Across Pages**. This feature is convenient if a particular header, footer, or watermark appears in the same location on many pages.

(7) When you have finished marking the items you want to redact, click **Apply** in the secondary toolbar to remove the items, then click **OK**. The items aren't permanently removed from the document until you save it.

(8) If you want to search for and remove hidden information in the document by using the **Remove Hidden Information** feature, click **Yes** in the dialog box. Otherwise, click **No**.

(9) Choose **File** > **Save**, and specify a filename and location. The suffix **"_Redacted"** is appended to the filename. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both.

Tip: Use the **Find Text** tool to find and remove words or phrases in one or more PDFs that contain searchable text. (see below)

Search and Remove Text

Note: The **Find Text** tool doesn't search secured (encrypted) PDFs.

(1) Choose **Tools** > **Redact**.
The Redact toolset is displayed in the secondary toolbar.

(2) In the secondary toolbar, choose **Mark For Redaction** > **Find Text**.

(3) In the **Search** dialog box, specify if you want to search the current PDF or all PDFs in another location.

(4) Do one of the following:

- To search for only one word or phrase, choose **Single Word Or Phrase** and type the word or phrase in the text field.
- To search for multiple words, select **Multiple Words Or Phrase**, and then click **Select Words**. Type each word in the **New Word Or Phrase** text field and click **Add**. You can also import a text file with the list of words or phrases to search for.
- To search for a pattern (for example, phone numbers, credit card numbers, email addresses, social security numbers, or dates), click **Patterns**. Choose one of the available patterns. You can change the language version of the patterns. (See Select a different language version for patterns.)

(5) Click **Search & Remove Text**.

(6) In the search results, click the plus sign (+) next to the document name to see all occurrences of the word or phrase. Then, select the occurrences you want to mark for redaction:

- To select all occurrences in the list, click **Check All**.
- To select individual occurrences, click the check box for each one you want to redact. Click the text next to a check box to view the occurrence on the page.
- To mark none of the occurrences, close the **Search** dialog box or click **New Search** to start over.
- To mark whole words or partial words (characters) for redaction, select the option under **Redaction Mark Options**. For partial words, select **Mark Partial Word (s) For Redaction** the **Settings** dialog box appears. In the **Settings** dialog box, specify the number and location of the characters for redaction. Character redaction is useful if you're searching for a pattern, like credit card numbers, and want to leave part of the number visible for identification purposes.

(7) If you selected occurrences that you want to mark for redaction, click **Mark Checked Results For Redaction**. The items you selected in the list are shown marked for redaction.

Note: If you haven't saved the file, you can select redaction marks in the document and press **Delete** to remove the redaction mark. The redaction marks become permanent after you save the file.

(8) To remove the marked items, click **Apply** in the secondary toolbar, and then click **OK**. The items aren't permanently removed from the document until you save it.

(9) If you want to search for and remove hidden information in the document by using the **Remove Hidden Information** feature, click **Yes**. Otherwise, click **No**.

(10) Choose **File** > **Save**, and specify a filename and location. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both.

Find and remove hidden content

Tip: Use the **Remove Hidden Information** feature to find and remove content from a document that you don't want, such as hidden text, metadata, comments, and attachments. When you remove items, additional items are automatically removed from the document. Items that are removed include digital signatures, document information added by third-party plug-ins and applications, and special features that enable Adobe Reader users to review, sign, and fill PDF documents.

Note: To examine every PDF for hidden content before you close it or send it in email, specify that option in the **Documents** preferences using the **Preferences** dialog box.

(1) Choose **Tools** > **Redact**.
The Redact toolset is displayed in the secondary toolbar.

(2) In the secondary toolbar, click **Remove Hidden Information**.
If items are found, they are listed in the **Remove Hidden Information** panel with a selected check box beside each item.

(3) Make sure that the check boxes are selected only for the items that you want to remove from the document. (See Remove Hidden Information options.)

(4) Click **Remove** to delete selected items from the file, and click **OK**.

(5) Choose **File** > **Save**, and specify a filename and location. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both.
The selected content is permanently removed when you save the file. If you close the file without saving it, repeat this process, making sure to save the file.

Tip: Use this function to take file attachments you intend to withhold based on a FOIA exemption out of Adobe documents.

<u>Note: When marking documents for redactions in Adobe, always save 2 versions of the document</u>:

- One version with the redaction marks unapplied
  - This version will be the "review" version. The redaction marks will be visible along with the content you intend to apply the redaction mark to.
  - This version will also be uploaded to FOIAonline but not released to the requester.
- One version with the redaction marks applied
  - This will be your production version that will be released to the requester.

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Checklist: What to Include in a Final Response Letter

The checklist below details items to be included in a final response letter and provides sample language that may be useful. Draft your closeout letter to fit the particular needs of a request, but be sure it includes the key components below. Following signature of the letter, the letter should be scanned into FOIAonline even if it is not being delivered electronically.

Print on Agency Letterhead
[Date Stamp]

[Name
Organization
Street
City, State Zip Code]

Re: Freedom of Information Act Request No. EPA-*[XX-XXXX-XXXXXX]*, Final Response

Dear ***Mr./Ms. [Last name]:***

1. *SUMMARY OF REQUEST*
   - *Your letter should begin with the request number and summary of the request*
   - *Sample language:*

   This letter concerns the above-referenced FOIA request, received by the U.S. Environmental Protection Agency (EPA or Agency) on ***[Month, Day, Year]***, in which you requested, ***[INSERT a description of the FOIA request. If the request has been clarified, include the most recent clarification and note when it was clarified. Note key correspondence or communication with the requester, provide a timeline of EPA's response.]***.

2. DISPOSITION
   - *State which one of the following dispositions applies:*
     - *Granted. The records, in their entirety, may be released to the requester.*
     - *Partial Grant/Partial Denial. Portions of the record will be withheld from the requester if covered by either one or multiple FOIA exemptions. The portions of the record that are not redacted are released to the requester.*
     - *Denial. The record, in its entirety, will be withheld from the requester if covered by either one or multiple FOIA exemptions.*
     - *No Record. If, after a reasonable search likely to uncover all responsive documents, no records are located that are responsive to the request, the requester will be informed in writing.*

3. DESCRIPTION OF RECORDS

   - *Next, if the request is being granted in full, describe the records being provided*
   - *Sample language:*

The Agency has concluded its search for records responsive to your request and is providing the requested records in full. ***[INSERT a description of the records that are being provided]***.

   - *If records are being withheld in full or in part, describe the records. If there is a large volume of records that are being withheld, include an index of those records.*
   - *Sample language:*

The Agency has concluded its search for records responsive to your request and is ***[providing a portion of the requested records, [INSERT a description of the records that are being provided] / withholding all responsive records].*** The EPA is withholding # records in full and # records in part.

   - *If records are being withheld in whole or in part, you must note which FOIA exemptions are the basis for the withholding(s).*
   - *Sample language:*

Records are being withheld pursuant to: 5 U.S.C. § 552(b)***(#), [shorthand description of applicable exemption, such as: 552(b)(5), the Deliberative Process Privilege / 552(b)(5), the Attorney Client Privilege/552(b)(5), the Attorney Work Product Privilege / 552(b)(6) Personal Privacy].*** The records are exempt from disclosure because they ***[briefly describe reason for withholding such as: are predecisional and deliberative and would harm agency decision making if released (DPP)/ are confidential communications between an agency attorney and client concerning legal advice (ACP)/ are documents prepared by, or at the direction of, an attorney in contemplation of litigation(AWP)/ contain personal information which would be an unwarranted invasion of personal privacy if released (PP)].*** The attached index of withholdings provides further information concerning the withheld records ***[or if voluminous – "The attached appendix contains a categorical description of withholdings and a volume estimate."]***.

4. COST INFORMATION

   - *Inform the requester of the fees that are being assessed for the request and how to pay them.*
   - *Sample language:*

The cost to process your request was $***[#]***. Please see the attached invoice for billing and payment instructions.

5. FINAL APPEAL RIGHTS AND CONTACT INFORMATION

   - *Inform the requester that they may appeal the request, and provide them contact information for the appeal, the FOIA Public liaison, and OGIS. Also include the relevant staff person's contact information. The requester may want to simply seek clarification about something they don't understand rather than go through the appeals process.*
   - *Sample language (NOTE: THE FOLLOWING APPEAL LANGUAGE HAS BEEN RECENTLY UPDATED CONSISTENT WITH THE FOIA IMPROVEMENT ACT OF 2016):*

APPEAL LANGUAGE FOR ALL FINAL FOIA RESPONSES, EXCEPT AS NOTED BELOW:

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8610 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

If you have any questions concerning this response, please contact ***[Staff contact]*** of my staff at ***[###-###-####]***.

APPEAL LANGUAGE IF THERE IS AN INITIAL WITHHOLDING BASED ON EXEMPTION 4:

This letter concludes our response to your request. As noted above, the information withheld under Exemption 4 will be reviewed by the appropriate legal office, which will issue a final confidentiality determination. Therefore, you do not need to appeal the withholding of information under Exemption 4. Once the legal office issues a final confidentiality determination, EPA will notify you whether the information qualifies for confidential treatment or may be released. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholdings, you may appeal this response

by email at hq.foia@epa.gov or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service or overnight delivery you must address your correspondence to 1301 Constitution Avenue, N. W., Room 6416J, Washington, DC 20004. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. Appeals received after 5:00 pm EST will be considered received the next business day. The Agency will not consider appeals received after the 90-calendar-day limit. The appeal letter should clearly identify the determination being appealed, including the assigned FOIA tracking number shown above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail to the Office of Government Information Services, National Archives and Records Administration, 8610 Adelphi Road, College Park, MD, 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

If you have any questions concerning this response, please contact ***[Staff contact]*** of my staff at ***[###-###-####]***.

6. SIGNATURE

   - *Be sure your letter is signed at the Division Director level or above.*

Interim Response Letter Template

The below template is one way to correspond with a requester concerning an interim production. You may send an email, letter, or message through FOIA Online, and there are many different ways to communicate about an interim response. Just be clear that the production is interim and ensure that you are including the following components in your correspondence:

- Request information (number, date received, summary)
- Description of the interim production (number of records, general description)
- Anticipated closeout date/upcoming productions
- Notice that appeal information will be provided at close out
- Contact information

[Print on Agency Letterhead]

[Date Stamp]

[Name
Organization
Street
City, State Zip Code]

Re: Freedom of Information Act Request No. EPA-***[XX-XXXX-XXXXXX]***

Dear ***Mr./Ms. [Last Name]***:

This letter concerns the above-referenced FOIA request, received by the U.S. Environmental Protection Agency (EPA or Agency) on ***[Month, Day, Year]***, in which you requested, ***[INSERT a description of the FOIA request. If the request has been clarified, include the most recent clarification and note when it was clarified.]*** . The Agency is now releasing records in response to your request. Please note that this is an interim response, and the EPA continues to work on your request.

The records EPA is releasing include ***[INSERT a brief description of the records that are being produced]***.

The Agency expects to complete its response to your request by ***[Month, Day, Year]***. ***[OPTION: INSERT a description of a rolling production schedule or when the next interim production is expected if there will be additional interim productions.]***

Again, your request is not being closed at this time. When your request is closed, you will receive information concerning your appeal rights for any part of EPA's response. If you have

any questions about this interim production or your request generally, please contact ***[First Name Last Name]*** at [***xxxxxxx***]@epa.gov or by phone at [***XXX-XXX-XXXX***]. Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or call (202) 566-1667. Last, you may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8610 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[NAME]
[TITLE]

2017 EPA National Freedom of Information Act Training Conference

Presented by:

The Office of Environmental Information & The Office of General Counsel

September 12, 2017 – September 14, 2017

THE FOIA IMPROVEMENT ACT OF 2016

Matt Schwarz- OGC-GLO
schwarz.matthew@epa.gov
September 12, 2017
EPA National FOIA Training Conference

OVERVIEW

Changes that result in greater disclosures

- The "Rule of 3"
- Codification of the Foreseeable Harm Standard
- 25-year Sunset on the Deliberative Process Privilege

Changes affecting processing of FOIA requests

- New Elements for Response Letters
- Extending Time Limits
- Charging Fees

Other changes

2

GREATER DISCLOSURES - THE "RULE OF THREE"

The "Rule of Three" states that any document requested three times must be publicly-available in electronic format.

- This is different from proactive disclosures (discussed next).

Recommended Action:

✓Programs should make sure that all FOIA responses are properly uploaded to FOIAonline. Most records uploaded to FOIAonline are available to the public.

3

GREATER DISCLOSURES - PROACTIVE DISCLOSURES

The FOIA Improvement Act of 2016 amends Section 3102 of the Federal Records Act, 44 U.S.C. § 3102, to include a requirement that agencies establish "procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format."

4

GREATER DISCLOSURES - FORESEEABLE HARM STANDARD CODIFIED

Foreseeable Harm Standard:

Agencies "shall withhold information" under the FOIA "**only** if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."

Amendments codify the foreseeable harm standard set forth in Attorney General Eric Holder's "Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Oct. 8, 2009)."

5

GREATER DISCLOSURES - DUTY TO SEGREGATE NONEXEMPT INFORMATION

Agencies must "consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible" and "take reasonable steps necessary to segregate and release nonexempt information."

- Although the FOIA already included language requiring agencies to segregate nonexempt information, the FOIA Improvement Act of 2016 adds additional language that appears in the 2009 Attorney General Memorandum regarding agencies' obligation to segregate nonexempt information.

6

GREATER DISCLOSURES - NEW SUNSET PROVISION

25-year sunset on the Deliberative Process Privilege (DPP)

- DPP can no longer be applied to records created 25 years or more prior to the date of the FOIA request.
- The Sunset Provision does not affect withholdings under the Attorney-Client or Attorney Work Product privileges.

7

GREATER DISCLOSURES - RECOMMENDED ACTIONS

✓Continue to apply the foreseeable harm standard, as we have previously done, consistent with the Holder memorandum.

✓Do not withhold a document in full if it can be released in part.

✓Do not withhold a document or portions of a document under the deliberative process privilege if it was created 25 years or more prior to the date of the FOIA request.

8

PROCESSING CHANGES - NEW ELEMENTS FOR RESPONSE LETTERS

Final Response Letters for adverse determinations:

- Right to seek assistance from FOIA Public Liaison;
- 90 days to appeal; and
- Right to seek dispute resolution services from FOIA Public Liaison or Office of Government Information Services (OGIS), part of the National Archives and Records Administration (NARA).

9

PROCESSING CHANGES - EXTENSIONS OF TIME

If you get the additional 10 working days but then determine that you cannot respond within that extended period, you must notify the requester that it has the right to seek dispute resolution services from OGIS.

- This notification must be issued in a "timely manner." While "timely manner" is not defined in the Act, OGC recommends that offices send the letter during the 10 working day extended period.

10

PROCESSING CHANGES - RECOMMENDED ACTIONS

- ✓Use the new appeal language available on the intranet (next slide).
- ✓Continue to provide appeal language for all Final Response Letters, including full grants.
- ✓If you anticipate that it will take you more than 30 calendar days to respond to a FOIA request (i.e., 20 days plus 10 days for unusual circumstances), make sure to notify requesters:
  - (1) that you need time beyond the 10-day extension period; and
  - (2) that they have a right to seek dispute resolution services from the OGIS.

11

FOR COPYING AND PASTING INTO LETTERS:

NEW APPEAL LANGUAGE FOR ALL FINAL FOIA RESPONSES, EXCEPT EXEMPTION 4:

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

APPEAL LANGUAGE IF THERE IS AN INITIAL WITHHOLDING BASED ON EXEMPTION 4:

This letter concludes our response to your request. As noted above, the information withheld under Exemption 4 will be reviewed by the appropriate legal office, which will issue a final confidentiality determination. Therefore, you do not need to appeal the withholding of information under Exemption 4. Once the legal office issues a final confidentiality determination, EPA will notify you whether the information qualifies for confidential treatment or may be released. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholdings, you may appeal this response by email at hq.foia@epa.gov or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service or overnight delivery you must address your correspondence to 1301 Constitution Avenue, N. W., Room 6416J, Washington, DC 20004. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. Appeals received after 5:00 pm EST will be considered received the next business day. The Agency will not consider appeals received after the 90-calendar-day limit. The appeal letter should clearly identify the determination being appealed, including the assigned FOIA tracking number shown above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail to the Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

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PROCESSING CHANGES - NEW LIMITATION ON SEARCH FEES

Agencies can no longer charge search fees if the response is beyond the 20-day deadline (or 30-day in the case of "unusual circumstances"), even with an agreement from the requester.

As a reminder, "unusual circumstances" apply when there is a need:

- to search for and collect records from field offices, or other establishments;
- to search for, collect, and examine a voluminous amount of records; or
- for consultations with another agency or with more than two components within the same agency.

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PROCESSING CHANGES - NEW LIMITATION ON SEARCH FEES *EXCEPTION*

Agencies may still charge search fees (or duplication fees for "news media" or "educational" requesters) if:

- "unusual circumstances" apply, **and**
- "more than 5,000 pages are necessary to respond to the request," **if**:
  - (1) timely written notice has been made to the requester, **and**
  - (2) "the agency has discussed with the requester how the requester could effectively limit the scope of the request." The agency must make at least three good-faith attempts to discuss limiting the scope of the request with the requester and the communication must be by written mail, electronic mail, or telephone.
    - Note: "5,000 pages" refers to the number of pages in the total universe of documents required for review (i.e., "collected" documents), *not* the number of pages that will be ultimately released to the requester.

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PROCESSING CHANGES - NEW LIMITATION ON SEARCH FEES - RECOMMENDED ACTIONS

- ✓If you expect the final FOIA response to occur beyond the 10-day extension and more than 5,000 pages are necessary to respond, notify the requester *before* the 10 days expires and discuss how it can limit the scope of the request.
- ✓If you know that unusual circumstances will apply when you receive the request, invoke the additional 10 days in your acknowledgement letter and include language inviting the requester to discuss how to limit the scope of the request.
  - This will satisfy the "timely notice" requirement and will qualify as your first attempt to discuss with the requester how to limit the scope of the request.

15

PROCESSING CHANGES - NEW LIMITATION ON SEARCH FEES - RECOMMENDED ACTIONS (CONT.)

- ✓If a fee assurance letter is sent later, include another opportunity for the requester to discuss how to limit the scope.
  - This will qualify as your second attempt to discuss with the requester how to limit the scope of the request if the first attempt went unanswered. If the requester has not responded to either attempt, you will only need to make one additional attempt to contact the requester before satisfying the requirement that the agency make three good-faith attempts.
  - If in response to any attempt to discuss how to limit the scope of the request, the requester refuses to limit the scope, it is not necessary to make additional attempts.

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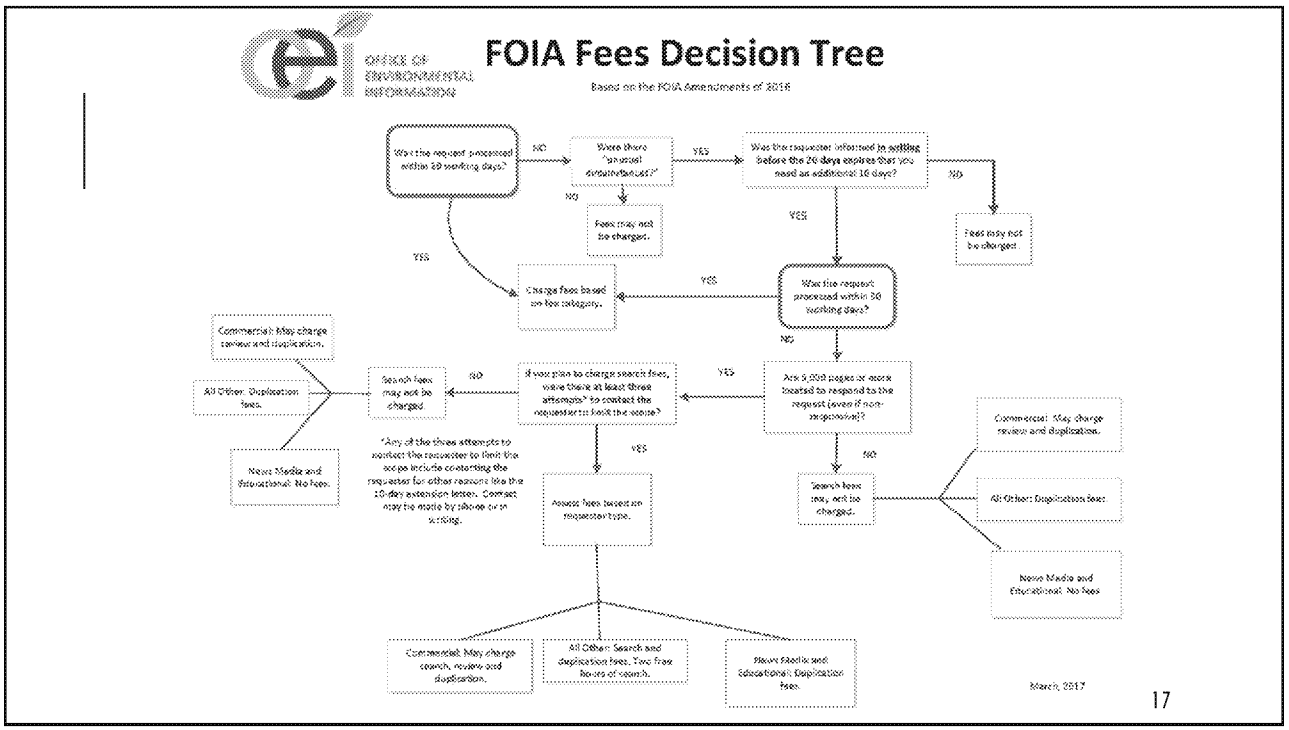

OTHER CHANGES

Chief FOIA Officers are now required to:

- "offer training to agency staff regarding their [FOIA] responsibilities,"
- "serve as the primary liaison with the Office of Government Information Services and the Office of Information Policy" which are part of NARA and DOJ, respectively.
- "review, not less frequently than annually, all aspects" of their agency's FOIA administration.

New Chief FOIA Officer Council will serve as a forum for collaboration across agencies and with the requester community to explore innovative ways to improve FOIA administration.

- It shall "meet regularly and such meetings shall be open to the public" and at least annually the Council must have an open meeting that permits interested members of the public to appear and present statements.

Annual FOIA Report must include two new elements:

- The number of times "the agency denied a request for records under subsection (c)" of the FOIA, and
- The "number of records that were made available for public inspection in an electronic format under subsection (a)(2)."

The **Director of OMB**, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that:

- Allows the public to submit a request to any agency from a single website, and
- May include additional tools that OMB finds will improve FOIA.

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RESOURCES

The FOIA Improvement Act of 2016
- https://www.congress.gov/114/bills/s337/BILLS-114s337enr.xml

DOJ Summary of the FOIA Improvement Act of 2016
- https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016

EPA FOIA Fees Decision Tree
- http://intranet.epa.gov/foia/docs/Fee-decision-tree.pdf

Model FOIA Appeal Language
- http://intranet.epa.gov/foia/docs/FOIA-Appeal-language-March2017.docx

Matt Schwarz, OGC-GLO, Information Law practice Group:
schwarz.matthew@epa.gov or 202-564-5654

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EPA FOIA REGULATIONS UPDATE

Lynn Kelly, OGC-GLO
kelly.lynn@epa.gov
September 12, 2017
EPA National FOIA Training Conference

NEED FOR REVISION OF EPA'S FOIA REGULATIONS

Most recent update to the regulations occurred in 2002

2007 Open Government Act Amendments

2011 EPA FOIA Workgroup Report Recommendation

2016 FOIA Improvement Act Requirement

Impact of technology changes to FOIA processing

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OVERVIEW OF POTENTIAL CHANGES

Organization

Revisions related to the 2007 and 2016 Amendments to FOIA

Improvements and Clarifications to EPA's FOIA Process

- Submission of Proper Requests
- Responding to Requests
- Administrative Appeals

FOIA Fees and Fee Waivers

Other Changes

22

POTENTIAL ORGANIZATION

- Follow structure of DOJ FOIA Regulations
- Use 10 subsections instead of 9
- Remove Exemption Categories subsection
- Add a Proactive Disclosures subsection

CURRENT	PROPOSED
§ 2.100 General provisions.	
§ 2.101 Where requests for records are to be filed.	§ 2.101 General provisions.
§ 2.102 Procedures for making requests.	§ 2.102 Proactive disclosures of Agency records.
§ 2.103 Responsibility for responding to requests.	§ 2.103 Requirements for making requests.
§ 2.104 Responses to requests and appeals.	§ 2.104 Responsibility for responding to requests.
§ 2.105 Exemption categories.	§ 2.105 Timing of responses to requests.
§ 2.106 Preservation of records.	§ 2.106 Responses to requests.
§ 2.107 Fees.	§ 2.107 Administrative appeals.
§ 2.108 Other rights and services.	§ 2.108 Preservation of records.
	§ 2.109 Fees.
	§ 2.110 Other rights and services.

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POTENTIAL UPDATES RELATING TO FOIA AMENDMENTS

Update definition of news media (2007)

Minimize "misdirected requests" delays (2007)

- Fewer offices designated in the regulations to receive FOIA requests and streamlined channels of submission to EPA

Updated tolling provisions (2007)

Establishment of the FOIA Public Liaison (2007)

Search fees limitation (2016)

Final response requirements (2016)

Time for appeal (90 days) (2016)

24

POTENTIAL PROCESS IMPROVEMENTS – REASONABLE DESCRIPTION

Potential definition incorporates standard established by legislative history and case law:

- *"a description that enables EPA personnel familiar with the subject matter to identify and locate the records sought using a process that is not unreasonably burdensome to or disruptive of EPA operations."*

Would establish that two common types of requests that would generally fail to meet this standard:

- "all records relating to" or "all records that in any way refer to" a topic, with no additional description; and
- "all documents" or "all emails" belonging to an individual with no description of a subject matter.

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OTHER POTENTIAL PROCESS IMPROVEMENTS

Incorporate three other types of requests commonly determined to be improper:

- Requests seeking creation of new records,
- Requests for records that don't exist (even if a document may be expected to come into existence at a later time), or
- Requests that ask questions rather than request documents.

Revise Privacy Act request submission instructions

Clarify impact of interim responses on appeal rights

Contact information for referrals

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OTHER POTENTIAL PROCESS IMPROVEMENTS

Removal of notice requirement for search cut-off date

FOIA language to describe requirements for aggregation of requests

Simplify the authority to approve release and withholding decisions

Update the language to reflect centralization of fee waiver and expedited processing decisions in HQ

Specify that the need to comment on rulemaking does not qualify a request for expedited treatment

Streamline intake process and decision-making authority for appeals

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POTENTIAL FEE AND FEE WAIVER CHANGES

Higher minimum billable threshold:
- From $14 to $250

Certification statement requirement for fee waivers
- No changes to six-factor standard

Clarify impact to timing of fee waiver requests for purposes of tolling
- Automatic toll unless requester submits contingent assurance of payment at the same time

Explicitly permit billing search costs if line by line review is needed to determine responsiveness

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POTENTIAL FEE AND FEE WAIVER CHANGES (CONT.)

Changes to direct costs:

CURRENT	Clerical	Professional	Managerial
Search & Review	$4.00 / 15 min	$7.00 / 15 min	$10.25 / 15 min
Duplication	$0.15 / page		

PROPOSED	GS-12 and under	GS-13 and over
Search & Review	$15.00 / 15 min	$20.00 / 15 min
Duplication	$0.10 / page	

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OTHER POTENTIAL CHANGES

Memorialize the National FOIA Procedures practice of posting released records online through FOIAonline

Remove list of exemptions as duplicative of the statute

30

NEXT STEPS & ESTIMATED TIMELINE

The draft regulations are in the final stages of management review.

Public Notice and Comment Period is 30 days.

EPA will need to respond to comments before a final rule can be issued.

For Questions on Status Contact: Larry Gottesman, Agency FOIA Officer at gottesman.larry@epa.gov

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CONTACT INFORMATION

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WHAT TO DO WHEN YOU RECEIVE A FOIA REQUEST: THE FIVE C'S

BEST PRACTICES TO SET YOU UP FOR FOIA SUCCESS!

NATIONAL FOIA TRAINING CONFERENCE, SEPTEMBER 12, 2017

PRESENTERS:
NICOLE REMENTER, OFFICE OF GENERAL COUNSEL, FOIA EXPERT ASSISTANCE TEAM
JENNIFER HAMMITT, OFFICE OF GENERAL COUNSEL, GENERAL LAW OFFICE

1

FIVE C'S

- Comprehend
- Collaborate
- Calculate
- Communicate
- Carry Out

2

COMPREHEND

Understand the Request!

3

COMPREHEND

1. Who is the requester?
2. What is the fee category?
3. Is the requester seeking preferred status?
4. What is the request type?
5. Have these records been previously requested?
6. Is the request assigned to the correct Action Office?
7. How many days remain on the clock?
8. Is the request proper?

4

COMPREHEND

Who is the requester?

- FOIA permits "any person" to submit a request for agency records.
- A "person" for purposes of FOIA does not include:
  - Another federal agency;
  - Congressional committee or subcommittee; or
  - Fugitive from justice seeking records about their fugitive status.
- A "person" for purposes of FOIA does include:
  - Local, state, and foreign governments;
  - Individual members of Congress not acting on behalf of the chamber, committee, or subcommittee;
  - Non-U.S. citizens or residents;
  - Corporations or other legal entities; or
  - Etc.

5

COMPREHEND

What is the fee category?

- Commercial
- Preferred
  - Representative of the News Media
  - Educational Institution
  - Non-Commercial Scientific Institution
- All Other requesters

6

COMPREHEND

Is the requester seeking preferred status?

- Expedited Processing
  - Goes to the front of the line, not "drop everything."
- Fee Waiver
  - If the request is improper, hold off on the fee waiver!

7

COMPREHEND

- Expedited Processing
  - Factors for Analysis
  - Deadline to Respond: 10 **calendar** days!

8

COMPREHEND

- Fee Waiver
  - Billable v. Non-billable and significance
  - Factors for Analysis

9

COMPREHEND

What is the request type?

- Simple vs. Complex Request
- Significance

10

COMPREHEND

Have these records been previously requested?

- Conduct a search of FOIAonline
- Publicly Available Records
- Rule of Three
- Aggregation of requests

11

COMPREHEND

Is the request assigned to the correct action office?

- Importance of assignment to appropriate Action Office in beginning

12

COMPREHEND

How many days remain on the clock?

- National FOIA Office will be perfecting requests prior to assignment to the Action Office.
- Clock management:
  - Clarification
  - Fees

13

COMPREHEND

Is the request proper?

- What is a proper FOIA request?
- Four considerations of a reasonably described request
- Hypotheticals

14

COMPREHEND

- What is a proper FOIA request?
  - Pursuant to §552(a)(3)(A), a proper FOIA request:
    - "Reasonably describes" the records sought; AND
    - Is made in accordance with EPA regulations.
- Agencies are only obligated to process proper FOIA requests.

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COMPREHEND

- What is a reasonably described request?
  - One that enables an agency employee (or contractor or grantee!) familiar with the subject matter to locate the record with a "reasonable amount of effort."
  - Obligation to be reasonable:
    - Act with articulable purpose(s)
      - *Tip #1:* Interpret request with an aim for some flexibility—be careful not to read the request so strictly that the requester is denied information you know exists in agency records!
      - *Tip #2:* Take notes on your initial brainstorming of how and where you might search for responsive records. This can help inform you how reasonably described the request is.
      - *DON'T GUESS!* While you may think you know what the requester wants, you may be wrong (and may be challenged on the search). Let the requester tell you!

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COMPREHEND

- Four Considerations of a Reasonably Described Request:
  1. Type(s) of records;
  2. Date range(s);
  3. Program Office(s)/Position(s)/Custodian(s); or
  4. Subject matter(s)/Search Term(s).
- These are four concepts to keep in mind when determining whether a request is proper or needs further clarification.

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COMPREHEND

Hypotheticals – Reasonably Described Requests

- *Hypothetical #1*: I request all yellow candy in all of EPA.
- *Hypothetical #2*: I request all Nestle brand hard candy in Troop B, including, but not limited to Everlasting Gobstoppers, Nerds, and Sweetarts.
- *Hypothetical #3*: I request the following candy:
  - Violet candy;
  - Chewy candy;
  - Sour flavored candy.
- I also want all Hot Tamales.

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COLLABORATE

Work together in EPA!

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COLLABORATE

FOIA cannot be successful in a vacuum!

- Action Office v. Contributing Office
- Importance of team work
- Ideas to facilitate cooperation with Contributing Office

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COLLABORATE

Action Office v. Contributing Office

- Agency FOIA Procedures outline specific responsibilities depending on your office's role in the request:
  - Action Office: Leader of the request.
  - Contributing Office: Possesses responsive records and works under the direction of Action Office in processing request.
- **Collaboration is part of our procedures!** *"For large, complex FOIA requests, it is suggested that the Action Office convene meetings with all interested Agency parties in order to clarify responsibilities, methods to be used for collection, and similar issues. Those meetings should include programmatic experts, Records Liaison Officers, FOIA Officers and FOIA Coordinators, information technology specialists, and legal counsel, as appropriate."*

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COLLABORATE

- Within your Office:
  - Think of new ways to make processes more efficient and easier.
  - Exchange ideas as request progresses to completion.
- With Other Offices
  - Different perspectives may shed light on potential issues you may have missed.
  - Other offices have unique experiences that may be relevant and helpful.
- **Takeaway**: Some clichés are useful—Two (or more) heads are better than one!

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COLLABORATE

- Working with Contributing Office(s)
  - Use Subject-Matter Experts (SMEs) to your advantage!
  - Set up coordination meeting with contributing office(s) that likely (not may) have responsive records.
    - Participants for meeting: SMEs, FOIA Coordinator(s), primary custodians.
    - Agenda:
      - Interpretation of request – discuss any clarification needed, potential scope of responsive records
      - Identify key custodians
      - Discuss search terms
      - Identify record systems
      - Talk about upcoming non-FOIA projects for each office and discuss where FOIA timeline/deadlines fit in
      - Responsibilities for each office – Manage expectations!
      - Hash out the issues to discuss with the requester

May need to be multiple meetings

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CALCULATE

Let's talk fees!

24

CALCULATE

- Requester's Fee Limit
- Fee Waivers
- Delinquent requesters
- Advance Payment

25

CALCULATE

- In accordance with the FOIA statute and EPA regulations, FOIA requesters must give assurance of payment of at least $25 with submission of their requests.
- Assurance of payment is not required if the requester requests and receives a fee waiver.

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CALCULATE

- Fee Waivers
  - Procedures
    - Requirements of a request for fee waiver
      - Submitted with FOIA request
      - Address the fee waiver factors
    - National FOIA Office makes determination on fee waivers requested for billable FOIA requests
      - Billable v. Non-billable and Significance
  - **Reminder! Even if the fee waiver is granted, per Agency FOIA Policy and Procedures, you still must to track your search and review time in FOIAonline!**

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CALCULATE

Delinquent requesters

40 C.F.R. § 2.107(h)

- Defined: A requester who fails to pay all fees charged to process FOIA request(s) within 60 calendar days of the fees assessment.
- Significance: Subsequent FOIA requests will not be processed until payment of the overdue fees is satisfied.
- Be sure to routinely check the Delinquent Requesters list!
  - Delinquent Requesters list is available at: https://usepa.sharepoint.com/sites/oei_Work/FOIA%20Invoices/SitePages/Home.aspx?e=1:5a2084ac65214b35a2869b03d654bc88.
  - If your requester appear on this list, contact the requester in writing to give notice that their delinquency status stops the clock for your FOIA request and provide information on how to remedy the delinquency.

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CALCULATE

Advance Payment

40 C.F.R. § 2.107(j)

- If a fee estimate exceeds $250, the Agency may require an advance payment by the requester up to the amount of the entire anticipated fee before commencing process on the request UNLESS the requester has a history of prompt payment and provides satisfactory assurance of full payment.
- If a requester has previously been 30 or more days late in making payment on a properly charged FOIA request, the Agency may, before commencing or continuing process on the request, require:
  - Payment of full amount due, plus any applicable interest; and
  - Advance payment of the full amount of any anticipated fee.

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COMMUNICATE

Pick up the phone!

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COMMUNICATE

- Pros of Requester Engagement
- Requester Engagement Boosts FOIA Program Success
- Responses to Common Arguments Against Requester Engagement
- Put Theory Into Practice

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COMMUNICATE

Pros of Requester Engagement

- Requester engagement is critically important to a good FOIA process.
- Requesters want to hear from you!
- Requester engagement helps to educate the requester community about our records, record systems, FOIA workloads, etc. They cannot read our minds!
- A good relationship with a requester may reap benefits beyond the FOIA request at hand!
- Requesters are talking about you – take control of your narrative!

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COMMUNICATE

Requester Engagement Boosts FOIA Program Success

- Consistent with purpose of FOIA
- Improves litigation posture
- Benefits FOIA processing efficiency

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COMMUNICATE

Put Theory Into Practice

- *Hypothetical #1*: I request all yellow candy in all of EPA.
- *Hypothetical #2*: I request all Nestle brand hard candy in Troop B, including, but not limited to Everlasting Gobstoppers, Nerds, and Sweetarts.
- *Hypothetical #3*: I request the following candy:
  - Violet candy;
  - Chewy candy;
  - Sour flavored candy.
- I also want all Hot Tamales.

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CARRY OUT

35

CARRY OUT

- Importance of a Good Administrative Record
- Unusual Circumstances

36

CARRY OUT

Importance of a Good Administrative Record

- A good administrative record tells the story of the request – from cradle to grave.
- Use Comments and Correspondence features in FOIAonline to maintain your administrative record.
- Include:
  - All communications (phone calls, email, and letters) with requester
  - Summary of internal discussions about request, especially decisions regarding interpretation of request, search strategy, withholdings, productions
  - Procedural actions and reasoning (e.g., clock stoppage, office reassignment)
  - Search instructions
  - Applied and unapplied versions of redacted and withheld records
  - Any information you think would be helpful to GLO on appeal/litigation

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CARRY OUT

Unusual Circumstances

5 U.S.C. § 552(a)(6)(B)

- The FOIA allows you 10 additional working days to process a request if one or more of the following elements is true:
  - The need to search for and collect records from "field facilities or establishments" separate from your location;
  - The need to search for, collect, and review a voluminous amount of records;
  - The need for consultation with another agency having a substantial interest in the determination of the request; or
  - The need to consult with two or more components of the agency having substantial subject-matter interest in the determination of the request.

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CARRY OUT

Unusual Circumstances

5 U.S.C. § 552(a)(6)(B)

- To properly assert unusual circumstances and have 10 additional working days to respond to the request, you must:
  - Notify the requester in writing that unusual circumstances apply to their request and the reason(s); and
  - Provide the anticipated date of response that is not more than an extension of 10 working days.

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CARRY OUT

- What if 30 working days still isn't enough time? You can extend the response time to be more than 30 working days upon notice to the requester *in writing*:
  - Unusual circumstances that apply to the request;
  - Agency response requires more than 10 additional working days to complete;
  - Provide an opportunity to limit the scope so that it may be processed within 30 working days or an opportunity to arrange an alternative time frame for processing the request or modified request;
  - Provide contact information for the FOIA Public Liaison to assist in the resolution of any disputes between the requester and agency; and
  - Provide notice of the requester's right to seek dispute resolution services from OGIS and OGIS' contact information.

40

CARRY OUT

Unusual Circumstances

- If the requester narrows the scope of the request so it can be processed within 30 working days, great!
- If, after clarification and consultation with the requester regarding the scope of the request, the request still cannot be processed within 30 working days, provide an estimated date of completion.
- As always, make sure to memorialize any agreements with the requester regarding extensions of time to respond or production schedules!

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RECAP

- The Five Cs will help you remember what to do when you receive a FOIA request!
  - Comprehend
  - Collaborate
  - Calculate
  - Communicate
  - Carry Out
- These concepts can be put into practice at any point of the FOIA process, not just the beginning!
- Likely, you will find yourself visiting and revisiting each 'C' along the way.

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QUESTIONS?

Thank you!

- Nicole Rementer, OGC, FOIA Expert Assistance Team
  - rementer.nicole@epa.gov
- Jennifer Hammitt, OGC, General Law Office
  - hammitt.jennifer@epa.gov

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Conducting a Defensible Search

2017 National FOIA Training Conference
Joan Kaminer, OGC/GLO
Denise Walker, OGC/FEAT

1

Content

- What is a defensible search?
- Crafting a defensible search
- Where and how to search
- Developing and Documenting the Search
- Best Practices
- Recent court decisions on adequacy of search

2

What is a Defensible Search?

3

What is a defensible search?

- Agencies must conduct a search that is "reasonably calculated to uncover all relevant documents." (Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).
- "Reasonably calculated" is situation specific.
  - Based on a reasonable interpretation of the scope of the request.

4

What is a defensible search? Cont'd

- **Search must be *reasonable* not *perfect.***
  - "A search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request" ((Meeropol v. Meese, 790 F.2d 942, 956 (D.C. Cir. 1986)).

5

What is a defensible search? Cont'd

- While generating search terms, EPA identifies a number of pseudonyms for Daenerys Targaryen.
- After consulting with subject matter experts, search terms include:
  - Daenerys Targaryen
  - Unburnt
  - Breaker of Chains
  - Khaleesi of the Great Grass Sea

Was this search reasonable?

6

Crafting a Defensible Search

7

You know nothing Jon Snow…

- Think through the search with your team!
- What information do you need to know in order to conduct a search?
  - Subject Matter & Search Terms
  - Search Time Frame
  - Record Repositories
  - Record Custodians

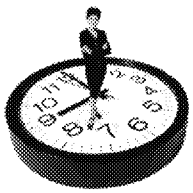
8

Subject Matter & Search Terms

- A clear request is the first place to start!
- Make sure that you and the subject matter experts clearly understand which records the requester is looking for.
- If you aren't sure… reach out to the requester to clarify!
- Search methodology may change depending on repository.
  - Not all repositories use Boolean operators:
    - AND, OR, and NOT

Identifying the Time Frame

- Search cut-off date:
  - Use date of request (§ 2.103(a))
  - If a different cut off date is used, notify requester pursuant to current EPA FOIA regulations (§ 2.103(a))
- When in doubt, discuss with the requester!
- Ensure ALL contributing offices use the same date.



10

Record Repositories

- Based on a reasonable interpretation of the scope of the request:
  - Identify all repositories likely to contain responsive records.
- Depending on the request, records may be located in Headquarters offices and/or Regional offices.
- The **action office** is responsible for coordinating with contributing offices and following up!
  - Action office must ensure all repositories, including in the contributing offices are identified and searched.

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Record Repositories

- **Records repositories at EPA, for example, may include:**
  - Outlook emails, calendar, Lync, and Skype
  - Lotus Notes mailboxes or calendars, and databases
  - Enterprise Content Management System (ECMS)
  - Content Management System (CMS)
  - Local or shared computer drives (C:, F:, G:, etc.)
  - SharePoint sites
  - OneDrive
  - Mobile devices (e.g., text messages and photographs)
  - Voicemail
  - External drives and discs
  - Hard-copy files

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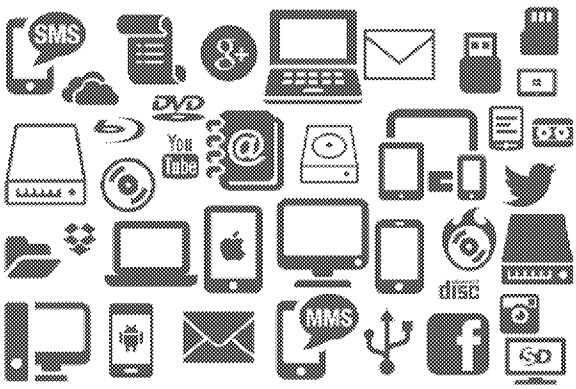
Record Custodians

- Identify individuals reasonably likely to possess responsive records in all identified offices.
- Discuss with experts in all identified offices to ensure a comprehensive list of custodians.
- Include separated employees, employees who have transferred to a different office, and contractors (including SEEs) where appropriate.

13

How do we find all of these records?!?



Where & How to Search

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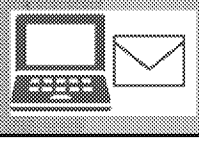
Office Outlook e-mails, Calendar, Lync, and Skype

- Locate your Search Point of Contact (SPOC).
  - MS Outlook Email Search Service SPOC List
  - SPOCs submit requests for MS Outlook searches on behalf of the program or regional office.
- Work with your SPOC and eDiscovery services to submit a search request via the eDiscovery SharePoint request site.



15

Search Criteria in Outlook

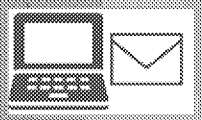
Term	Results contain
Iron	iron; IRON; IRon (not case sensitive)
Iron Throne	Both iron and throne (not case sensitive or in any particular order/proximity)
Iron AND Throne	Both iron and throne (not case sensitive or in any particular order/proximity)
Iron NOT Throne	Iron not throne
Iron OR Throne	Iron or throne
"iron throne"	Exact phrase, case sensitive

16

Lotus Notes e-mail, calendars, and databases

- When Lotus Notes is identified as a repository of responsive records, each custodian is responsible for conducting a manual search.

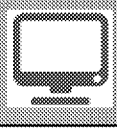
- Be sure to index your email before searching!



17

Enterprise Content Management System (ECMS)

- Emails saved through EZ Email Records are archived into ECMS as agency records.
- Records Liaison Officer (RLO) can assist in searching ECMS.
- Searching ECMS



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Searching OneDrive or SharePoint

- Using the query box in the top left corner of OneDrive or right corner of SharePoint site.
- Type in search term -> Enter
  - Full text search
- Filter by Date or Type
- Search Operators
  - Use Boolean search operators (AND, OR, and NOT)
  - Use Property search operators (>, =, …)
  - Use Proximity search operators (NEAR, ONEAR)
  - Other search operators (quotation marks, parentheses, wildcards)

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Mobile devices

- OEI's centralized search does not extend to data that are uniquely retained on mobile devices (text messages, photos, notes or other documents unique to the mobile device).
- If the custodian timely transfers those data into the Outlook system, the centralized search *will* capture these records.
- If records are not transferred to Outlook prior to the search, ensure responsive records are included in the search results.
- Instructions on how to forward text messages to EPA email accounts are located at:
  - http://intranet.epa.gov/mobiledevices/pdf/Instructions-Saving-Text-Messages.pdf.

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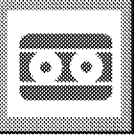

Personal e-mail & messaging

- Any employee who uses a personal messaging system, like email, to conduct government business has 20 days to forward that information into the Agency's Outlook system. Once forwarded into the system, the information can be captured via the centralized search.
- "EPA strongly discourages the use of personal email or other personal electronic messaging systems, including text messaging on a personal mobile device, for sending or receiving Agency records, but to the extent such use occurs, the individual creating or sending the record from a non-EPA electronic messaging system must copy their EPA email account at the time of transmission or forward that record to their EPA email account **within 20 days** of creation or sending."
  - EPA Records Policy, CIO 2155.2
  - *See also* 44 U.S.C. § 2911

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Other Repositories

- Content Management System (CMS)
- Local or shared computer drives (C:, F:, G:, etc.)
- External drives and discs
- Hard-copy files

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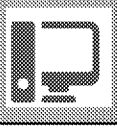

Separated Employee's Email and Data

- Access to a separated employee's email files, data files, voicemail files, call logs, and mobile devices:
  - Manager approves request for access and forwards the request to their IRM BC or IMO
  - IRM BC or IMO approves and forwards request to OEI FILE ACCESS REQUEST@epa.gov
- Office of Information Technology Operations (OITO) will provide the whole email box.
- Once manager receives the records, proceed through planned search and review process.

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Developing and Documenting the Search

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Developing and Documenting the Search Plan

- Use the FOIA Tool Kit as a guide!
  - Search memo (See sample search memo in the FOIA Toolkit)
- Document internal communications and communications with the requester in FOIAonline.
  - Memorialize verbal conversations.
  - Communicate with the custodians, SPOC, Discovery services, and office to ensure consistent application of the search plan.

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Working Collaboratively with Contributing Offices

- Need to be on the same page with contributing offices!
  - Apply consistent approaches to search (search terms, time frames etc.).
  - Ensure progress is being made.
  - Circulate any clarifications to the request to all appropriate offices.
- Have discussions early and often.
  - Document those discussions!

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Developing and Documenting Search Instructions

- Model Search Instructions
  - Reference to FOIA Toolkit
- Communicate and Confirm!
  - Be persistent to ensure people complete the searches.
  - Communicate internally and with the requester!

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Best Practices

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Best Practices

- Do NOT conduct a search for an improper request.
- Communicate with requester on scope of request before searching.
- Always document internal communications throughout the search process.
- Keep an eye on the clock.
- Planning your search is essential.
- Use a search memo to document your search.
- Maximize the Centralized Search
- When in Doubt, Ask.

What are your best practices?

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Recent court decisions on adequacy of search

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Recent Court Decisions

- Edelman v. SEC, No. 14-1140, 2017 WL 908473 (D.D.C. Mar. 6, 2017) (Moss, J.)
  - Court found that, though responsive record may have been found elsewhere, an agency is "not required to 'search every record system' in response to a FOIA request; it is only obligated to 'use[e] methods which can be reasonably expected to produce the information requested."
- Parker v. ICE, No. 15-1253, 2017 WL 829098 (D.D.C. Mar. 2, 2017) (Contreras, J.)
  - Summary judgment denied because the agency failed to provide sufficient detail about the search terms used. Conclusory declarations fail to show adequacy of search.
- Pulliam v. EPA, No. 15-1405, 2017 WL 659358 (D.D.C. Feb. 16, 2017) (Jackson, J.)
  - Agency failed to explain why the repositories searched "were the only locations searched" and state that "'no other record system was likely to produce responsive documents.'"
- Looks Filmproduktionen GmbH v. CIA, No. 14-1163, 2016 WL 4186652 (D.D.C. Aug. 5, 2016) (Howell, C.J.)
  - In addition to adequately demonstrating searches performed were reasonable, the court held that "documents 'about' a certain subject must have information regarding that subject, rather than just a mention of the word."

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Questions?

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And remember…

When the snows fall and the white winds blow, the lone wolf dies, but the pack survives.
-Ned Stark

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Quick Reference Guide:
How to Submit a Request for a Microsoft Outlook Email Search via SharePoint

The Environmental Protection Agency utilizes an enterprise-wide service to search and retrieve emails from Microsoft's (MS) Outlook email in support of Freedom of Information Acts (FOIA) requests, congressional inquiries, litigation and other business needs. Email searches conducted for these purposes support the Agency's commitment to transparency and openness and enable EPA to carry out its mission. The enterprise-wide service model for MS Outlook email searches is a component of the Agency's eDiscovery Service. The MS Outlook Email Search Service allows for greater efficiency and consistency in the processing of search and collection requests by utilizing the expertise of a single, focused team.

When to use the MS Outlook Email Search Service:

As an Agency employee, you may be responsible for responding to a FOIA request, congressional inquiry or litigation request. To respond, you must leverage the Search Service for MS Outlook email if there is uncertainty in the results that a search may generate. In instances when responsive MS Outlook emails are definitively known, you may not need to use the MS Outlook Email Search Service. However, for requests that require a search of MS Outlook email, staff may not conduct a search from their desktop and must instead use the enterprise MS Outlook Email Search Service.

Requesting an MS Outlook Email Search:

Requests for MS Outlook email searches are submitted through the Agency's eDiscovery SharePoint site by authorized users known as Search Points of Contact (SPOCs). Each Program and Region has staff designated as SPOCs who can access the SharePoint site and submit requests. SPOCs may include FOIA Officers and FOIA Coordinators, Information Management Officials (IMOs) and other staff designated to serve in this capacity. If you believe you need to be designated as a SPOC to submit search requests through the SharePoint site, you may request access through your IMO.

Accessing the eDiscovery SharePoint Site:

If you are designated as a SPOC for your organization, you will be given access to the SharePoint site and you will receive an email welcoming you the site. The email will contain a link to take you directly to the eDiscovery SharePoint site.

Figure 1. Email Invitation to SharePoint

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Completing a Request for an MS Outlook Email Search:

1. Log into the eDiscovery SharePoint site.
2. Fill out the required fields on the *New eDiscovery Service Request* form (See Table 1 for descriptions of fields).
3. Attach required Part B Excel file to the request. Every request **MUST** have a Part B attachment (See Part B Instructions below).
4. Submit the request. The system will send an email to the Contact and Alternate POC to confirm that the request was received. The email will appear in your Inbox from the sender, "eDiscovery." The system will continue to generate emails at key milestones as the request goes through the search process (See Table 2 for emails generated by the system).
5. Once the search is complete, the results will be placed on a secure storage site in the form of a PST file(s). You will be notified via email and provided a link to the location of your file(s). The search results will be available at this location for you to "pick up" for five business days.
6. Access the results of your search through the link provided and copy the PST file(s) to a local drive within five business days. You can then conduct your review.

Table 1: New eDiscovery Service Request Form Fields

Field Name (* = Required)	Description
Request Date*	The system automatically pre-populates the date the service request is initiated. This field is not editable.
Request Title or Identifier*	Enter a name for your search request. You can use the FOIAonline number, case number or another tracking number associated with your request. (Maximum of 250 characters).
Friendly Title	Enter a brief, shortened name for your service request to help reference or identify your request. (Maximum of 250 characters).
Collection Purpose*	Select the type of search request from the drop down menu. Options include: Congressional, Employment, FOIA or Litigation.
Relevant Information	Enter any special instructions or additional information to provide to the search technicians who will process your request, if applicable.
Keywords*	Enter unique words or phrases to be used to identify potentially relevant information for your search request. Use logical operators "AND," "OR" and "NOT," to define search terms.
Date Range	Using the date picker, select the beginning and end dates for your search request. This date will limit your search results to that period of time. For some searches it may not be possible to designate a beginning and/or an end date.
De-duplication	Select this checkbox if you wish to have duplicate emails removed from your search results. NOTE: If you select this checkbox you will receive one PST file that includes the search results of all custodians identified in your request. If you do not select de-

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Table 1: New eDiscovery Service Request Form Fields	
	duplication you will receive a separate file for each custodian (and you may have duplicate results).
Estimated # of Docs*	Enter a rough estimate of the number of documents you anticipate will be collected for the search request. This estimate will not constrain or limit your search. It is informational for the technician performing the search.
Required by Date*	Using the date picker, select the date by which you wish to receive the results of your search request.
Contact*	Enter a Point of Contact for the search request. The system will automatically pre-populate with the name of the person completing the request form, who is a designated SPOC. Using the address book, you may change this Contact name, if desired. The Contact will receive email messages about the status of the request, including the results of the search.
Contact Organization*	Enter the Contact's Program or Region.
Contact Phone*	Enter the Contact's phone number.
Contact Title*	Enter the Contact's job title.
Alternate POC	Using the address book, enter an alternate point of contact (POC) for the search request. NOTE: It is recommended that you provide an alternate POC, who will also receive emails about the status of the request, including the results of the search.

Table 2: Emails Generated by eDiscovery MS Outlook Search Service	
Request Status	Email Generated.
Started	When a request is successfully submitted in the system, the Contact and Alternate POC will receive an email informing them that the request has been received by the eDiscovery technical team.
In Progress	When a request has been assigned to an eDiscovery technician for processing, the Contact and Alternate POC will receive an email informing them that the request has been assigned for processing. This email will contain a unique system-generated eDiscovery tracking number (an ED#) for referral purposes.
Declined	If a request is declined for any reason, the Contact and Alternate POC will receive an email informing them that the request has been declined and the reason(s). The requestor will need to enter a new request to proceed.
Ready	After the eDiscovery technician has performed the requested search and created the PST file(s), the Contact and Alternate POC will receive an email informing them that the file(s) is ready for download and will be available for five (5) business days. The email will contain a link to the location where the data can be found.
Completed	After five (5) business days, the data will no longer be available for download, and the

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Table 2: Emails Generated by eDiscovery MS Outlook Search Service	
	request will be marked as completed and closed. The Contact and Alternate POC will receive an email informing them that the request has been completed and closed in the system.

Completing the Part B Documentation:

All MS Outlook email search requests are required to include a Part B Excel file attachment. The Part B attachment identifies the custodians who are to be included in your search request. Custodians are the EPA personnel who have or had MS Outlook email that is potentially responsive to the search request. Complete the two columns in the Part B Excel spreadsheet and provide the names and email addresses of the employees with MS Outlook email accounts that need to be searched as part of the request. It is important to remember to list all custodians with MS Outlook email accounts that need to be searched, including employees who may have separated from the Agency.

Downloading Part B Documentation:

1. Select the 'HERE' link at the top of the *New eDiscovery Service Request* form. A new browser window (or tab) will open with the Excel Online document template.
2. Select the 'File' menu option in the Excel Online document (**NOTE:** do not select the File menu of your browser).
3. Select the 'Save As' option from the File menu.
4. Select 'Download a Copy'. A file download dialogue box will display.
5. Select the 'Save As' button (**NOTE:** some operating systems only display a Save button, if that is the case, select the dropdown arrow next to the Save button to specify the download location).
6. Select the desired location on a local drive, network drive or OneDrive to save the template. Remember this location as you will need to locate the document to attach to the request.
7. Save the template.

Attaching Part B Documentation:

1. Select the 'EDIT' ribbon at the top of the *New eDiscovery Service Request* form.
2. Select the 'Attach File' option. You will be re-directed to the Attach document page.
3. Select the 'Browse' button to find Part B documentation from saved location (NOTE: filename must start with "Part B").
4. Select 'OK' button to attach document to request form.

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Manager's Guide to Requesting Access to A Departed or Current Employee's Email, Data and Electronic Activities logs

The Office of Technology Operations and Planning will provide access to email files (Legacy Notes and Office 365) as well as data files contained on OneDrive, or network drives, voice mails files, call logs, mobile devices and other relevant electronic activities. OTOP is not responsible for the data contents of any files, nor performs searches for FOIA, eDiscovery, or for other purposes, nor do they sign any affidavits. These request are for non-eDiscovery purposes. For search request please see the eDiscovery Website

The table below depicts the type of information available for electronic activities and the time limit for requesting access to the related data

Electronic Activities	**Content**	**Request Time Limit**
Legacy Notes	Emails, Calendars	Unlimited
Office 365	Email, Calendar, OneDrive	2/29/2013 - Forward
Data Files (network drives, (F: and/or G:) – EZ Tech Users	File and Folders	Unlimited
HQ Voice mail files	Voice mails	20 days
HQ VoIP Call logs	Outbound call/inbound calls	01/01/2014 - Forward
Mobile device data	Call Detail Reports (including text messages logs)	7 years
Login Events – EZ Tech Users	Login activities	30 days

Please Note

- Please note that access to data will not be available beyond the time limit stated above
- Mobile device call and text logs include to and from numbers, dates and time but not contents
- HQ VoIP Call logs can be generated showing the extension making or receiving calls, time/date of the call, and duration of the call. This can be generated by hour, day, month, or time period.
- SharePoint is not included since access is provided by the Site Collection Administrators (SCA)

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Access for a Departed Employee

Litigation and Investigation Cases

To support investigation cases, please contact the Office of Inspector General (OIG) for OIG procedures. Please note request from OIG, Law Enforcement, HR and the Department of Justice does not require approval by an IRM BC or IMO. Here is the link to the federal register notice which documents those entities allowed to request data https://www.gpo.gov/fdsys/pkg/FR-2002-02-22/html/02-3921.htm

To submit a request please follow the steps listed below:

1. The employee requesting access must submit their request to their management.
2. The manager must approve the request via an email to their designated Information Resource Management Branch Chief (IRM BM), Information Management Officer (IMO), or their designated approvers (Listed in the Global Address List as **IRM BCs and IMOs**). Here is a link to the SharePoint site with the official list here.
3. The IRM BCs, IMOs or their designated approvers must forward the written approval and include the completed table below to the EPACALLCENTER@EPA.GOV.

Table must be completed by the Approver and submitted to the EPACALLCENTER	
Role	Name
Approver	John Doe (IMO, IRM BCs or their designee whose name has been provided as authorized approvers)
Mail Box Name Employee's full name Employee's LAN ID Telephone number	Doe.Jane@epa.gov Jane Any Doe Jdoe 111-222-3333
Person Receiving Access (Include email address)	Steven Jones (Jones.StevenT@epa.gov)
Access Needed for the Following Applications:	○ Legacy Notes ○ Office 365 (Including OneDrive) ○ Data Files (network drives, (F: and/or G:)(EZ Tech) ○ HQ Voice mail files ○ HQ VoIP Call logs ○ Mobile device data ○ Login Events (EZ Tech)

4. A Remedy incident ticket will be automatically created and the request will be included in the ticket notes.
5. The local help desk verifies the approver and assigns tasks to the groups supporting AD, Legacy Notes, Office 365, SharePoint, and the local help desk (data files). (**If not verified, the request is returned to the requestor**).
6. If approved, a task will be assigned to the groups supporting AD, Legacy Notes, Office 365, SharePoint, data files etc.
7. As each task is completed, the person requesting the information will be notified and any instructions, if necessary, provided. Note – the person requesting the information may receive multiple emails if multiple technical teams were required to process the request.
8. When all tasks are completed and closed, the ticket will be resolved and closed.
9. Allow 5 business days from submission of the EPACALLCENTER email.

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Please Note

Departed employees' AD account is deleted after 90 days and access to email and network files are removed. For example if you request access 80 days after the employee's departure, you will only have 10 days to access the employee's data

Access to a Current Employee's Email and Data

Planned Absence

1. Planned absence (maternity leave, medical leave, long term leave): Employee will personally grant access to their mail box. Instruction can be found on the My Workplace training site at http://workplace.epa.gov/collaborationtraining.html

Litigation and Investigation Cases

To support investigation cases, please contact the Office of Inspector General (OIG) for OIG procedures. Please note request from OIG, Law Enforcement, HR and the Department of Justice does not require approval by an IRM BC or IMO. Here is the link to the federal register notice which documents those entities allowed to request data https://www.gpo.gov/fdsys/pkg/FR-2002-02-22/html/02-3921.htm

All other requests for access to a current Employees Files

The employee/manager requesting access sends their request to a manager.

1. If the manager approves the request, they forward the request, via email, to their IRM BC or IMO. Here is a link to the SharePoint site with the official list here.

If the IRM BC or IMO approves the request, they forward the request to OEI FILE ACCESS REQUEST@epa.gov . The email subject line must include the nature of your request (i.e. Access to Voice mail files). Note: Access to the OEI File Access Request mailbox includes federal and contractor email staff necessary to support the request.

Table must be completed by the Approver and submitted in the Email Email Subject must include the area of Request (i.e. Email access)	
Role	Name
Approver	John Doe (IMO, IRM BCs or their designee whose name has been provided as authorized approvers)
Mail Box Name Employee's full name Employee's LAN ID Telephone number	Doe.Jane@epa.gov Jane Any Doe Jdoe 111-222-3333
Person Receiving Access (Include email address)	Steven Jones (Jones.StevenT@epa.gov)
Access Needed for the Following Applications:	○ Legacy Notes ○ Office 365 (Including OneDrive) ○ Data Files (network drives, (F: and/or G:)(EZ Tech) ○ HQ Voice mail files ○ HQ VoIP Call logs ○ Mobile device data ○ Login Events (EZ Tech)

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2. As each task is completed, the person requesting the information will be notified and any instructions, if necessary, provided. Note – the person requesting the information may receive multiple emails if multiple technical teams were required to process the request

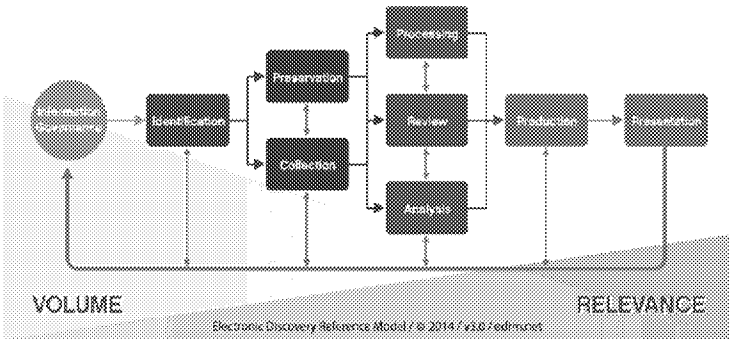
Collection & Processing:
Helping OEI Help YOU

Brian Thompson
Acting Director eDiscovery Division, OEI

1

A Conceptual View of eDiscovery & FOIA

Electronic Discovery Reference Model



2

What does the eDiscovery Division do?

- Centralized collection, search, processing, and set-up of the review database for certain data sources for all FOIAs, Congressional requests, and formal discovery.
- For routine FOIAs, the eDiscovery Division (EDD) will search and collect from Microsoft Outlook only (including email, calendar, and IMs) of both current and former EPA Employees. EDD will then process the results and load them into a Relativity Workspace for review.
- For routine FOIAs that require the search of Lotus Notes, please reach out to your Information Management Officer (IMO).

3

FOIA Collection

- Plan, Plan, Plan!
- **Develop a strategy**
  - Determine what it is the requester is looking for and working with the custodians, develop keywords that would assist in a search to locate most of the responsive documents.
  - Identification of your key custodians is crucial.
    - Multiple changes to your search request after it has been submitted adds time to the entire process.
- **Identify sources and locations of information**
  - Even if only submitting a search for Outlook email, remember you may also need to search for loose Electronically Stored Information (ESI), Sharepoint/OneDrive Files, Lotus Notes, and/or Paper Documents.

4

Requesting Collections

- Only a designated Search Point of Contact (SPOC) can submit a search request to eDiscovery Division.
- First step is to have your office's designated SPOC go to the SharePoint site and fill out the appropriate on-line form.
- SPOC will need list of custodians (names and emails), date range of search, and keywords / search strings to put in request.

5

Requesting Collections:
SharePoint Form

- **Requesting Title or Identifier***
  - For FOIA, this should include the FOIA #
- **Friendly Title**
  - This is how you would internally refer to the case.
- **Collection Purpose***
  - This is most likely just "FOIA". If you believe your request is a FOIA litigation or a FOIA Expert Assistance Team ("FEAT") FOIA, please reach out to OGC first.

6

Requesting Collections:
SharePoint Form (cont.)

- **Relevant Information**
  - Opportunity to provide additional information you think will be helpful for the collection, review, or communications:
    - Additional points of contact
      - Subject Matter Expert, Case Attorney …etc
    - Related Matters/Cases previously submitted (or that will be submitted)
    - Review specifications (special instructions or restricted access)
    - Tiers of Custodians
    - Interim or Final deadlines

- **Keywords***
  - These are your search terms!
  - AND vs. OR
  - The use of " "
  - Domain Restrictors

7

Requesting Collections:
SharePoint Form (cont.)

- **Date Range**

- **De-Duplication (always checked)**

- **Estimated Number of Documents**
  - Please let us know how many documents you reasonably think we should collect based on your custodians, date range, and search terms.

- **Required by Date**
  - Self set to 10-days. Please change if possible or appropriate.

- **Contact Information for SPOC/Office**

8

Requesting Collections:

The PART-B

9

Timing of Collections

- Collections take time.
- The more complicated the search terms and number of custodians the longer it may take.
  - But your review will be more efficient .
- Be prepared from the beginning with exact names/email addresses and search-terms.
  - Resubmitting or amending searches after PCA approval causes delays throughout.
- Determine if a tiered approach is permissible.
  - Interim productions to Relativity for review.

10

Review of Collected Documents

- EDD will load files to Relativity.
- EDD will notify the SPOC that the documents are loaded and ready for review.
  - It is the SPOC's responsibility to identify reviewers and inform others that the workspace is ready.
- Please remember to let EDD know who the reviewers are that need access to the workspace.

11

Questions

12

Helping OEI Help You Part II: Create Your Best FOIA Search Using the Power of Boolean Logic

Jennifer Hammitt, OGC-GLO

National FOIA Training Conference, September 12-14, 2017

1

Let's Make this Real: Gold King Mine

- August 5, 2015.
- A release of 3 million gallons of water containing material from the former mine.
- Involved Regions 6, 8, 9, HQ Offices and Programs
- EPA received over 60 FOIA and other requests.
- OEI collected 252,717 items related to the event.
  - That's the item count, not the page count.
- How do you find what requesters are asking for?

2

How to Identify Relevant Documents

- Getting Started - Know the Request and the Records!
  - Identify the key words and related words:
    - water
    - agua
    - lead
    - copper
    - "Gold King Mine"

Talking to your Subject Matter Experts can help you get the keywords right! There may be common terms, shorthand, or abbreviations that you otherwise may not know, or key phrases that can help you target exactly the right documents.

TIP: Watch out for overbroad terms! For example, "Water" in a search of Office of Water can bring every email with an "Office of Water" in the signature block.

3

Using the Power of Boolean Logic

The Special Sauce –Boolean Logic to Connect and Command

Use five basic connectors/commands to define relationships between search terms

- AND
- OR
- NOT
- " "
- ( )

Terms and connectors can help find responsive records and reduce non-responsive ones!

4

AND

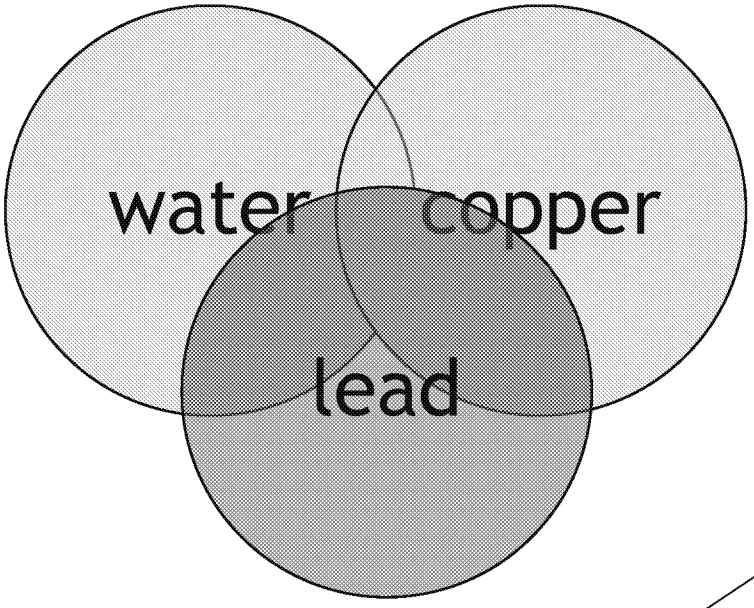
- AND is the first and simplest connector to apply.
- Every key word linked by AND must appear in the result.
- For example:

  Every key word must appear at least once in each document for it to appear in the result

  - water
  - water AND copper
  - water AND copper AND lead
- Only a document containing all three key words – water, copper, lead – will be in the result.

SYNTAX TIP: Always make sure connectors are CAPITALIZED

5



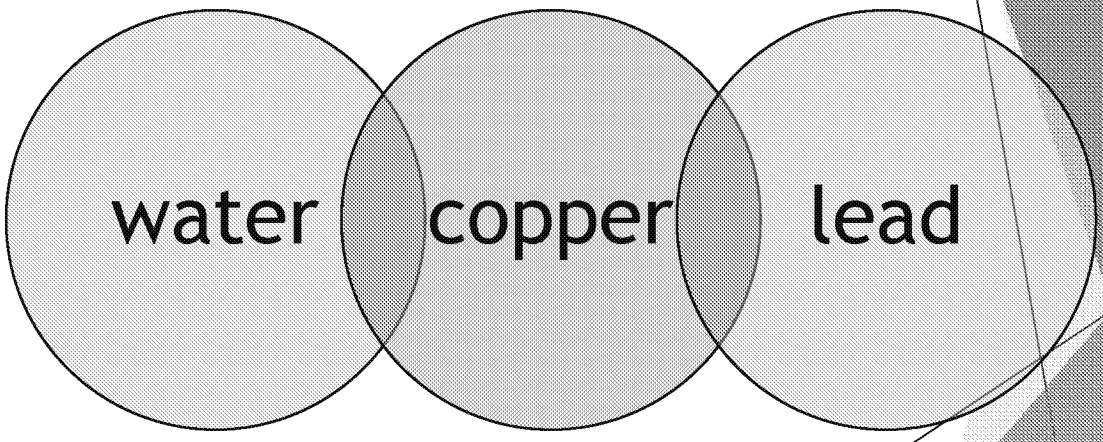
6

OR

- OR connector provides options in a search.
- Any key word linked by OR could appear in the result.
- For example:
  - Every key word might appear at least once for it to appear in the result
    - water OR agua OR lead OR copper
- Documents containing at least one of the key words will be in the result.
- "AND" connectors NARROW a search; "OR" connectors make it broader!

SYNTAX TIP: Blank Spaces will be read as "OR"!

7

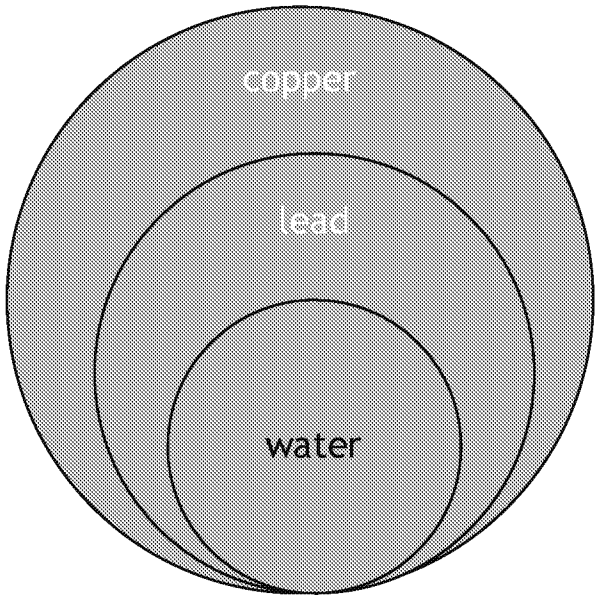


8

NOT

- NOT connector excludes.
- If words are often closely related, eliminate a key word by using NOT.
- The key word after NOT will not appear in the result.
- For example:
  - Copper AND Lead
  - Copper NOT Water
- Only documents with Copper and Lead but without the key word "water" will appear in the result – **SO BE CAREFUL!**
- This can be very helpful when you or your SME knows that there are overlapping subjects (e.g. "Gold King NOT Response" if you want to exclude documents about the response).

9



10

“ “ Quotation Marks

- “ “ the Quotation Marks command captures a phrase in its exact word order.
- Every key word in each phrase as written must appear in the result.
- For Example:
  - “Gold King Mine”
  - “Colorado River”
- Only documents containing the exact phrases will appear in the result.

SYNTAX TIP: You can also try NEAR( ) as a connector if your phrase or sentence is not exact but always close together: “Gold King” NEAR(10) Release.

11

( ) Parentheses

- This is the most powerful tool in the search toolkit.
- Parentheses commands that you do the action inside of them **FIRST**.
- If you have more than one set of parentheses, perform the actions inside of them, moving from left to right.
- For Example:
  - (water OR agua) AND (copper OR lead)
  - (water OR agua) NOT lead
- Follow the rules that apply to the key words **inside** the parenthesis.

SYNTAX TIP: Make sure your Parentheses are “Closed”!

12

SO: (water OR agua) AND ("Gold King Mine" OR "GKM") AND (copper NOT lead)

- The result set includes EITHER:
  - Water
  - Agua

  AND
  - Copper

  AND EITHER
  - Gold King Mine
  - GKM

  BUT NOT
  - Lead

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Conclusion: Pulling it all together

- Fully constructed Boolean search strings can look both confusing and complex, but don't worry, because they aren't!
- The first important thing to appreciate is that there are only five elements of syntax to understand: AND, OR, NOT, (), and "".
- Check for syntax, closed parenthesis, spaces, and capital letters.
- A little Boolean goes a long way! You now have the power to find the documents you seek – and no more.

14

Questions?

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15

Power User Strategies to Make Relativity Work For You

JONATHAN LUBETSKY, OFFICE OF AIR AND RADIATION
DENISE WALKER, OFFICE OF GENERAL COUNSEL, FEAT
PETER BERMES, OFFICE OF GENERAL COUNSEL, FEAT

Objective

Provide advanced strategies and techniques to promote efficiency, speed, and consistency of document reviews using Relativity.

Directed to: FOIA Project Leads, Relativity Admins, Reviewers

Roadmap

- Documents Tab
- Review Batches Tab
- Administration Tab
- Persistent Highlight Sets Tab
- Imaging
- Search Term Report Tab
- Inside the document coding pane

Review Strategies for Success

NATIONAL FOIA TRAINING CONFERENCE FALL 2017

DENISE WALKER AND PETER BERMES, OGC FEAT

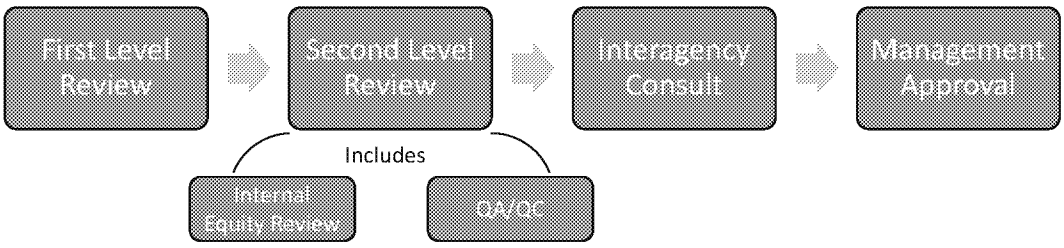
Agenda

1. Structuring your review process
2. Best practices for conducting a review
3. Questions

Structuring Your Review Process: Initial Questions

1. What do the FOIA Procedures say?
   http://intranet.epa.gov/foia/FOIA-Procedures.html
2. Based on the subject matter of the request, which offices at EPA need to be involved in the review process?
3. Are there likely to be other Agencies that created responsive records or will have a significant interest in the records we may produce?
4. What is the scope of this review? How many records are there?
5. What resources do you have available to respond to this request?

Structuring Your Review Process: Multi-Tier Review



Structuring Your Review Process: First Level Review

- **First Level Review: the initial reviewer must determine:**
  - Is the document responsive?
  - Are there FOIA exemptions that apply?
  - Does this document need additional review by others at EPA or other Agencies?
- **Building a first level review team**
  - This will require resources. Bring management into the decision-making process.
  - Reviewers will need training and time to commit to the project.
  - Think about all of the offices involved, it may be best to build a multi-office first level review team.
  - Most people can be trained in FOIA and help review documents. Leverage what resources are available.

Structuring Your Review Process: Second Level Review

- **Second Level Review:** What parties within EPA need to provide input on documents that are marked for release by the first level review team?
  - Other offices
  - Management
- **Purposes:**
  - Substantive input
  - Quality Control
  - Awareness
- **Common examples:**
  - A particular office may want to review all documents that were collected from custodians from that office that have been marked for production by the first level review team.
  - Office of Regional Counsel (ORC) and Office of General Counsel (OGC) may want to review records related to ongoing litigation.

Structuring Your Review Process: Second Level Review (cont.)

Offices you should reach out to if you have certain types of records:

OEX (Office of the Executive Secretariat) - If you have records sent to or from the Administrator or staff from the Administrator's Office, OEX will need to provide input before production.

OCIR (Office of Congressional and Intergovernmental Relations) - If you have communications between EPA staff and members of Congress or their staff, OCIR will need to provide input before production.

OPA (Office of Public Affairs) - if your request has significant media attention or you anticipate the release of records will generate media attention, reach out to OPA.

- For these and other offices, communication is key. Reach out initially to determine what types of records other offices may be interested in and the best way to structure a second level review.

7

Structuring Your Review Process: Interagency Consult/Referral

Interagency Consult	Interagency Referral
Another agency has a significant interest in a record, like an email exchange between EPA and another agency. EPA may ask for that agency's recommendation as to how to treat the record.	A record was created by another agency but is in EPA's possession. EPA may refer the record to the relevant agency for them to process.
Communicate with other relevant agencies about your request. They may not want to review records, but they should be aware of them.	The other agency will be responsible for responding directly to the requester. Notify the requester that the documents have been referred. Provide the point of contact for the other agency.

DOJ Guidance: https://www.justice.gov/oip/blog/foia-update-oip-guidance-referral-and-consultation-procedures

8

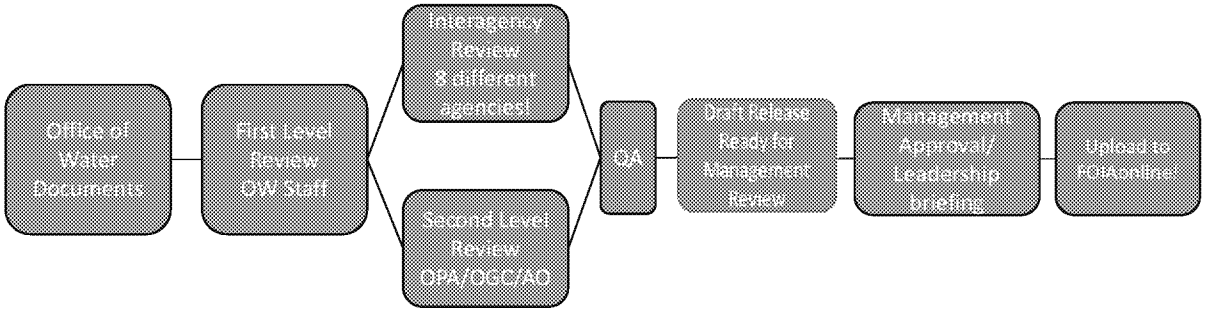
Structuring Your Review Process: White House/EOP Consult

- If you intend to produce records that have White House equities (records or correspondence involving the White House or any agency of the Executive Office of the President (EOP)), the FEAT will assist you with consulting the relevant office.
  - EOP agencies include: the White House Office (WHO), the Council on Environmental Quality (CEQ), the Office of Management and Budget (OMB), and the Office of Science and Technology Policy (OSTP).
  - Look for @__.eop.gov.
- Reach out to the Director of the FEAT or to Joan Moumbleaux of the FEAT for questions and assistance: moumbleaux.joan@epa.gov.

Structuring Your Review Process: Management Approval

- As a final step in the review process, you must have management approval (Division Director or higher) for release.
- If there are documents that management should be made aware of prior to public release, raise to division director level as part of management approval process.
- Strategies for management review and approval:
  - If the production is not unreasonably large, allow awareness reviewers to skim/review it in its entirety.
  - Highlight specific documents.
  - Create a summary or briefing.
  - Check to see if there are outstanding congressional requests related to your FOIA.

Structuring Your Review Process: Example 1- Multi-Agency FOIA Document Review



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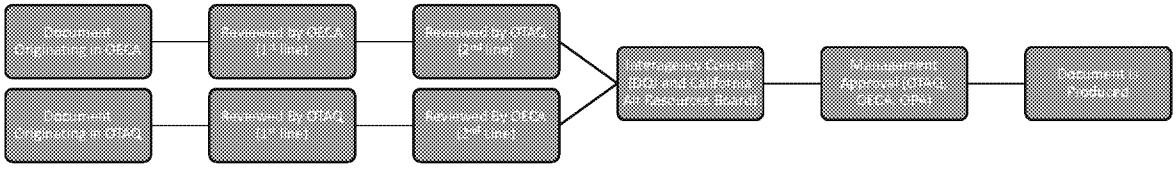
Structuring Your Review Process: Example 2- Multi-Office/Multi Agency FOIA Document Review



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Best Practices for Conducting a Review

1. Communication
2. Developing a Review Memo
3. Identifying Roles
4. Document Review Kick Off

Best Practices for Conducting a Review: Communication

Within EPA
- Make sure that all relevant offices are in the loop.
- Don't rely only on FOIA Online tasks; pick up the phone.
- Make sure management has a role.

•**With the Requesters**
- Frequent communication is the best policy.
- Keep them informed of your progress.
- If you run into problems or delays, let them know.
- Document your communications in FOIAonline.

With the Reviewers
- Provide them with feedback.
- Provide them with an opportunity to give feedback.
- Keep them updated on progress.

Best Practices for Conducting a Review: Develop a Coding Memo

- A guiding document can be a reference for reviewers to help them review documents consistently.
- The memo should at least address each of the major decisions a reviewer makes when reviewing records:
  - Responsiveness
  - FOIA exemptions
  - Referral or consult with other agencies or other EPA offices

Best Practices for Conducting a Review: Identifying Roles

- Identify a project lead.
- Know who to go to in management for key decisions about resources and discretionary application of privileges.
  - Your Division Director must sign off on any release of records - this level of management should be incorporated into the decision making process.
- Identify a subject matter expert or group of experts for questions about context or substance of records.
- Identify a FOIA law resource: ORC, OGC/GLO, and/or OGC/FEAT.
- Identify any necessary technical resources.

Best Practices for Conducting a Review: Document Review Kick Off

- This should be a significant block of time dedicated to training your review team and reviewing the first batches of documents.
  - Training: teach reviewers how to use technology, give them background information necessary to determine responsiveness, teach them relevant FOIA law.
  - Document Review: it is important to review documents in a group initially to generate questions and get answers in real time and to foster consistency.
- Make sure you are prepared for your kick off event.
  - Coordinate all technical needs in advance.
  - Pre-review records in a dry run.
- If possible, get the entire team together geographically or virtually.
- Make your review fun.

17

What if it's just me??

- Follow the FOIA Procedure for your office.
- Pay attention to deadlines.
- Communicate with the requester.
- Document in FOIAonline.
- Reach out for help if you need it:
  - Your FOIA coordinator
  - EPA Regional Counsel or OGC
  - DOJ FOIA Hotline
    (202) 514 - FOIA (3642)

18

QUESTIONS??

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FOIA Exemption 5

September 13, 2017

National FOIA Training Conference

Mike Boydston, R8 ORC
Jennifer Hammitt, OGC GLO

1

Remember:
FOIA mandates disclosure

Under the Freedom of Information Act (FOIA), the Government **must release** all records responsive to a FOIA request, unless the information is exempt from disclosure under one of the nine statutory exemptions.

2

Exemption 5 overview

- Protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"
- Incorporates civil discovery privileges into FOIA
  - Deliberative Process Privilege
  - Attorney-Client Privilege
  - Attorney Work Product Privilege

3

Exemption 5 Threshold Requirement

- "Inter-agency or intra-agency": if this isn't satisfied, you cannot assert Exemption 5.
- As interpreted, this is not strictly limited to records internal to executive branch agencies — depending on the facts, it **may** in limited circumstances also include agency communications with:
  - Outside experts and other consultants
  - States, tribes
  - Congress
  - Contractors
  - Federal Commissions
  - The White House

4

Exemption 5 Threshold Requirement: The Consultant Corollary

- *Klamath* case from Supreme Court.
- Agencies can protect advice from consultants and other outside experts functioning as an agency employee would be expected to do.
  - But the consultant must not be representing its own interest or some other outside interest in advising the agency.
  - Especially, the consultant cannot be seeking its own benefit at the expense of others (*Klamath*:"the distinction is even sharper" then).
- A consultant can be a volunteer.
- A formal consulting relationship is not necessary.
- Doesn't flow both ways — covers advice to EPA, not advice from EPA.

5

Other threshold requirement issues

- Common Interest Doctrine
  - Joint Prosecution Agreements
- Co-regulator?
- Settlements?
- "Peer Review" and "Stakeholder Review"

6

Exemption 5 – Deliberative Process Privilege (DPP)

Once the inter/intra threshold requirement has been met, material may be covered by DPP, if and only if, it is:

(1) **Predecisional:** The information must relate to deliberations before the adoption of an agency policy/decision.

and

(2) **Deliberative:** It "reflects the give-and-take of the consultative process."

Note: it's not enough that material is "internal."

7

DPP element 1: "Predecisional"

- DPP is not lost after the decision is made.
- But: created after the decision is made? Not predecisional
  - Final policy statements, opinions with force of law: these *are* the decisions, so are not predecisional
  - Documents that implement an established policy
  - Documents that explain or discuss actions already taken

8

DPP element 2: "Give and Take"

- What does it mean to "reflect give-and-take discussions"?
  - The decision does not have to be gigantic.
  - A decision does not even have to be reached.
  - But there has to be a decisionmaking process.
- Who drafted the information?
- What authority and level — did information flow from subordinate to superiors?
- Substantive vs. trivial decisionmaking
- Examples

9

DPP and Foreseeable Harm Analysis

- Now required by law (2016 FOIA amendments).
- Foreseeable harm analysis for DPP:
  - Harm quality of agency decisions?
  - Chilling effect on candid opinions / advice?
  - Public confusion from premature disclosure?
  - But: embarrassment ≠ harm

10

Deliberative Process Privilege: Applying the Privilege

Steps in considering DPP:

1. Inter/intra threshold
2. Exemption elements (predecisional & deliberative)
3. Foreseeable harm analysis
4. Redaction to release reasonably segregable information

11

Deliberative Process Rolling Sunset (part of 2016 amendments):

> …the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested

Therefore, as of today, you cannot claim DPP for documents dating from before September 1992.

12

Attorney-Client Privilege

- You still have to meet the Exemption 5 threshold.
- Concerns "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data v. Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).

13

Attorney-Client Privilege — issues and questions

- Confidential communications between agency attorneys can be covered, as can communications between attorneys and staff, that discuss legal issues or ask for legal advice.
  - Must be kept confidential/need to know
- A cc to an Agency attorney isn't itself enough (unless it's clear that purpose is to get/give attorney advice)!

14

Attorney Work Product

- The work product privilege protects material (1) prepared by, or at the direction of, an attorney (2) in reasonable anticipation of litigation.
- Extends to civil, criminal, and administrative litigation, as well as amicus briefs. *Envtl. Prot. Servs. v. EPA*, 364 F. Supp.2d 575, 586 (N.D.W.Va. 2005) (EPA administrative enforcement proceeding).

15

Attorney Work Product — issues and questions

- "In anticipation of litigation" / interplay with litigation holds
- What kind of material does it cover? Does it have to be substantive?

16

Redaction

Redacting responsive records: FOIA requires EPA to segregate non-exempt (releasable) information from exempt (withholdable) information, if the releasable information can be reasonably segregated.

Different redaction approaches for:

- Deliberative Process Privilege
- Attorney-Client Privilege
- Attorney Work Product

Concerns with subject-matter and general waiver.

17

Other possible Exemption 5 privileges?

- Settlement – No! (Evidentiary rule ≠ Exemption 5 privilege)
- Doctor/patient, clergy, other privileges?
- What about judicial orders / protective orders?
- Look to other exemptions when Exemption 5 can't apply – 7A (enforcement), 6 (privacy), 4 (business info).

18

A few practice tips

- Easily filter some non-privileged material in reviews by searching for communications with outside parties.
- Spotting drafts in Relativity
- Front-end recommendations for composition and labeling
- Effect of email header/footer labels

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Questions?

20

Resources / reference

- DOJ Guide: http://www.justice.gov/oip/doj-guide-freedom-information-act-0.
- DOJ FOIA resource page: http://www.justice.gov/oip/foia-resources.
- OGC Program Attorneys often know FOIA and can help on Exemption 5.
- ORC Information Law Attorneys (ask your ORC).
- OGC information law group: http://intranet.epa.gov/ogc/information.htm.

21

FOIA EXEMPTION 4 101:

Protecting Trade Secrets and CBI/PBI

2017 National FOIA Training Conference
Joan Kaminer, OGC/GLO
Casey Pickell, OGC/GLO

1

PURPOSE

- Unlock the mystery of confidential business information (CBI)
- Provide a foundation that will allow you to address common CBI issues that arise in Freedom of Information Act (FOIA) requests
- Training takeaways:
  - Identifying claimed or potential CBI;
  - CBI's new name;
  - Responding to a request for potential CBI and initial denials under Exemption 4; and
  - Your role in EPA's CBI process and the CBI determination process.

2

AGENDA

- What is FOIA Exemption 4?
- Identifying CBI
- What is My Role? The Initial Denial
- After the Initial Denial: A New Procedure
- Confidentiality Determinations
- Resources
- Case Study

3

What is FOIA Exemption 4?

4

What is Exemption 4?

- Purposes of Exemption 4:
  - To protect the interests of the government and businesses;
  - To encourage businesses to provide government with accurate and reliable confidential information; and
  - To provide assurances that the information will be safeguarded, therefore protecting businesses from competitive disadvantage.

5

What is Exemption 4?

FOIA Exemption 4 (5 U.S.C. § 552(b)(4)) covers two categories of information:

1. Trade Secrets
2. *Commercial* or *financial* information *obtained from a person* that is *privileged* or *confidential*

- For the purposes of this training, CBI includes both CBI and trade secrets.

6

What is Exemption 4?
Trade Secrets Defined

- "a secret, commercially valuable *plan, formula, process, or device* that is used in *making, preparing, compounding or processing* of a trade commodity, and that can be said to be the end product of either *innovation*, or *substantial effort*."
  - Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983) (emphasis added)

7

What is Exemption 4?
Where can trade secrets lurk?

- Trade Secret Data may be found in:
  - Contracts;
  - Manufacturing Descriptions;
  - Schematics & Printed Circuits;
  - Product Formulas;
  - Software; and
  - Quality control data & quality assurance procedures.

8

What is Exemption 4? Confidential Business Information

- Three part definition:
  1. Commercial or financial information;
  2. Obtained "from a person" AND
  3. Privileged or confidential.

9

What is Exemption 4? CBI is getting a new name!

- In the near future, across the Executive branch, CBI will be referred to as Proprietary Business Information (PBI).
- This change is a part of the implementation the Controlled Unclassified Information (CUI) program.
  - CUI standardizes safeguarding and dissemination of sensitive information across the Executive branch.
  - EPA will provide training in advance of implementation.
  - To avoid confusion, this training will use CBI.

10

Identifying CBI

11

Identifying CBI

- Take a deep breath. You can do this. It's not (usually) difficult.
- Two things to know:

  1. A company's claim may be obvious when looking at a document (explicit claim).

  2. Information can be ***potential*** CBI, even when not explicitly claimed.

12

Identifying CBI: Explicit Claim of CBI

- The documents may have markings, stamps or watermarks, stating:
  - "Trade Secret"
  - CBI/Confidential Business Information
  - PBI/Proprietary Business Information
  - CUI/Controlled Unclassified Information
- The company may have provided confidential and non-confidential submissions.
- Cover sheets, Cover Letters, or Emails.

13

Identifying CBI: No Explicit Claim of CBI

- Can information be potential CBI even if the company did not make an explicit claim? Yes!
- Even if no claim was made, apply the following standard:
  - "although [the business] has not asserted a claim, [it] might be expected to assert a claim if it knew EPA proposed to disclose the information…" 40 C.F.R. § 2.204(c)(2)(i)
- Watch out for:
  - Unit pricing information;
  - Information related to customer information;
  - Information that other companies have claimed as CBI; or
  - Financial or commercial information indirectly received.

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Identifying CBI: No Explicit Claim of CBI

- ASK! If you have identified potential CBI, you must ask if the affected business claims the information as CBI.
  - The affected business has three working day to respond (40 C.F.R. § 2.204 (c)(2)(ii))
- When has a business waived their right to claim information as CBI?
  - 1. When the business failed to assert a claim in response to an EPA request or demand for the information, or when filling out an EPA form, which required an explicit claim at the time of submission (See §2.203(a));
  - 2. When the business failed to assert a claim when informed that the failure "could result in disclosure of the information"; or
  - 3. When the business has "otherwise waived or withdrawn a claim covering the information."
    - 40 C.F.R. § 2.204(c)(2)(i)(A)-(C)

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What is My Role? The Initial Denial

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What is my role? The Initial Denial

- Review the records to identify affected businesses (40 C.F.R. § 2.204(c)(1))
- If the records contain potential CBI contact the business to ask if they are asserting a claim.
  - Keep an eye out for waivers!

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What is my role? The Initial Denial

- Redact, or withhold in full, potential CBI under Exemption 4
  - Segregability!
- Issue initial denial letter to FOIA requester
- Follow PBI Tracking Procedures

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What is my role?
The Initial Denial

- Initial Denial Language:

"The information withheld under Exemption 4 will be sent to the appropriate legal office to issue a final confidentiality determination. The appropriate legal office will contact you to confirm your continued interest in receiving a final confidentiality determination and provide you with a fee estimate, where appropriate. Therefore, you do not need to appeal the information withheld pursuant to Exemption 4. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholding, you may appeal this response…" [Followed by standard appeal language]

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After the Initial Denial

A New Procedure

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After the Initial Denial: How Does EPA Track CBI?

- Implementing new procedures for tracking CBI Cases in FOIAonline
- Tracking every initial denial of information (any response which withholds information under FOIA Exemption 4)

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After the Initial Denial: HQ Requests

- Notify the National FOIA Office to create a PBI tracking number in FOIAonline
- PBI case assigned to OGC
- OGC assigns PBI case to Information Law Practice Group (ILPG) attorney
- ILPG Attorney confirms requester's interest in determination
- ILPG Attorney works with program to complete the confidentiality determination

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After the Initial Denial: Regional Requests

- Include initial denial language in decision
- Notify the Region FOIA Coordinator to create a PBI tracking number in FOIAonline
- PBI case assigned to ORC
- ORC assigns PBI case to ORC attorney

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Is It CBI or Not?

Final Confidentiality Determinations

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Is It CBI or Not?
Your Role in the Determination Process

- Once the requester confirms interest in the determination (and assures payment of fees, if commercial) the attorney in the appropriate legal office will work with the program to process the request for CBI determination.
- Substantiation: Letter to affected business requesting a detailed, written statement specifying all grounds for withholding the particular information under any FOIA exemption.
  - Minimum of 15 business days to respond; and
  - No response, or substantiation provided after the 15 business days, constitutes a waiver of confidentiality (must follow up with a waiver letter);

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Is It CBI or Not?
Your Role in the Determination Process

- Upon receipt of a business' substantiation, the program office will provide OGC/ORC with the information listed in § 2.204(f) including the program's recommendation
- This information includes, but is not limited to:
  - FOIA request
  - Exemption 4 records at issue
  - Substantiation
  - Program recommendation and contact

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Is It CBI or Not?
Now the Analysis

1. Commercial or Financial Information:
   - Terms should be given their "ordinary meanings"
   - Qualifies if submitter has a "commercial interest" in information
   - Much broader set of information than what is a "trade secret"
2. "Obtained From a Person"
   - Any entity (other than a federal agency)
3. Is the information *privileged* or *confidential*?

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Is It CBI or Not?
Required vs. Voluntary

- Required Submission test:
  1. Whether EPA had the legal authority to obtain the information; *and*
  2. Whether EPA exercised its authority to require the submission. (40 C.F.R. § 2.201(i))

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Is It CBI or Not?
Voluntary Submission

- If a voluntary submission…
- *Critical Mass* Test:
  - Would the information customarily **NOT** be released to public by the person from whom it was obtained? If so, it is likely CBI.
    - (*Critical Mass Energy Project v. NRC*, 975 F. 2d 871 (D.C. Cir. 1992))

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Is It CBI or Not?
Required Submission

- If a required submission…
- *National Parks* Test:
  - Impairment Prong;
  - Likelihood of Substantial Competitive Harm Prong; or
  - Government Interest/Intrinsic Value Prong.
    - (*National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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Is It CBI or Not?
Final Confidentiality Determination

- OGC/ORC issues a final confidentiality determination
- Determination sent to businesses claiming confidentiality
  - Provides businesses ten business days to seek judicial review of EPA's determination after which time EPA will release information not entitled to confidential treatment to the requester
- OGC/ORC will close out the PBI Case in FOIAonline

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Resources

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Resources

- EPA CBI Regulations
  - https://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=40:1.0.1.1.2
- CBI Manuals for specific programs
- Controlled Unclassified Information (Future change)
  - https://www.archives.gov/cui
- OGC/ORC CBI Contacts

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QUESTIONS?

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CASE STUDY!

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Contact:

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FOIA Exemption 4: "Advanced Issues"

2017 NATIONAL FOIA TRAINING CONFERENCE

MELISSA SHAPIRO AND QUOC NGUYEN
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PURPOSE

This Exemption 4 training module will cover:

Advanced confidential business information (CBI) issues that may arise when processing a Freedom of Information Act (FOIA) request.

Other relevant CBI issues.

This training module will <u>NOT</u> cover:

CBI basics (but we will give you a lightening quick refresher).

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PRESENTATION OVERVIEW

I. **Exemption 4 Basics**

II. **Advanced CBI issues and FOIA – Expert Tips**

III. **Other CBI considerations that impact FOIA requests**

I. EXEMPTION 4 BASICS

SCOPE OF FOIA EXEMPTION 4 PROTECTION

- **Trade Secrets; and**
- **Commercial or Financial Information**
  - Obtained from a **Person** that is **Privileged** or **Confidential**.
  - Exemption 4 protects the interests of both the government and the submitters/owner of the information.

EPA FOIA PROCESS FOR CBI

(1) Identify information claimed as CBI;

(2) Initially deny the FOIA request;

(3) Request substantiation and obtain a program recommendation;

(4) Complete the CBI determination; and

(5) Provide outcome to affected business(es) and FOIA requester.

IS THE INFORMATION "CONFIDENTIAL"?

- Voluntary submissions: *Critical Mass* Test
  - Would the information customarily not be released to the public by the person from whom it was obtained?

    Critical Mass Energy Project v. NRC, 975 F. 2d 871 (D.C. Cir. 1992)

- Required submissions: *National Parks* Test
  - Impairment Prong
  - Competitive Harm Prong
  - Government Interest/Intrinsic Value Prong

    Nat'l Parks & Conservation Assoc. v. Morton, 498 F.2d 765 (D.C. Cir. 1974)

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LEGAL STANDARDS OF JUDICIAL REVIEW

- FOIA Requester
  - Challenges the Agency withholding under FOIA.
  - **De novo** standard of review.
    - Agency bears the burden of justifying non-disclosure.
    - Agency is afforded a presumption of good faith.

- Business Submitter
  - Challenges Agency's adverse CBI determination under Administrative Procedure Act (APA).
  - **Arbitrary and capricious** standard of review.

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II. ADVANCED CBI ISSUES AND THE FOIA

II. ADVANCED CBI ISSUES AND THE FOIA

1. *To be or not to* be…CBI – advanced issues in identifying claimed and unclaimed CBI.
2. *Reducing your CBI burden* – how to reduce your CBI burdens before, during, and after the initial phase.
3. *CBI is hard* – challenges (and solutions) for completing a confidentiality determination.

TO BE OR NOT TO BE CBI

IDENTIFYING CLAIMED CBI

- Stamped or labeled on the record
  - "Trade secret," "proprietary," "company confidential," or "confidential."
- Separate submission
  - For example: Within the regulatory docket, CBI is submitted by mail rather than electronically.
- Stated in the coversheet, letter, email correspondence, or inspection report

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TO BE OR NOT TO BE CBI

IDENTIFYING UNCLAIMED CBI

- **Unmarked CBI: What if no claim was made?**
  - Even if no claim was made, apply the following standard:
    - "although [the business] has not asserted a claim, [it] might be expected to assert a claim if it knew EPA proposed to disclose the information…"

40 C.F.R. 2.204 (c)(2)(i)

12

TO BE OR NOT TO BE CBI

IDENTIFYING UNCLAIMED CBI

- **Red Flags** for potential unmarked CBI:
  - Unit pricing information;
  - Information related to customer information;
  - Information that other companies have claimed as CBI; or
  - Financial or commercial information indirectly received.

TO BE OR NOT TO BE CBI

IDENTIFYING UNCLAIMED CBI (continued)

- If no claim was initially asserted, the further inquiry *may* be required:
  - Did EPA provide notice to the submitter?
    - 40 C.F.R. 2.203
  - Did the business waive or withdraw a claim?
    - 40 C.F.R. 2.204(c)(2)(i)
- **EPA** must request that the business submitter identify its CBI claims by telephone or other prompt means.
- The **Business** must assert the CBI claim no later than CBO of the **third working day** after EPA's inquiry.

REDUCING YOUR CBI BURDEN

TWO PHASES FOR REDUCING CBI CLAIMS

- Before the Final Response ("Initial Denial")
- After the Final Response

REDUCING YOUR CBI BURDEN

BEFORE THE FINAL RESPONSE

- Step 1: Contact the **FOIA requester**
  - Are they still interested in the claimed CBI?
  - Narrow the scope/modify the request.
  - Obtain an assurance of payment (commercial requester only).
- Step 2: Contact the **business submitter**
  - Drop/waive any CBI claims?
  - Can the requester obtain the information independent of the FOIA?

REDUCING YOUR CBI BURDEN

AFTER THE FINAL RESPONSE

- OGC/ORC will request confirmation of continued interest in the CBI.
  - Commercial requester will receive a cost estimate and require a written assurance of payment
- Program transmits request for substantiation.
  - Always use the most recent version of the ICR
  - Business have 15 working-days to respond.
  - Extension requests?

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LEARNING TIP!

UPCOMING CHANGES TO THE CBI/PBI PROCESS

- **New!** EPA will track every initial denial (Exemption 4 withholding).
  - The National FOIA Office/Regional FOIA Coordinator will create a "PBI" tracking number on FOIAonline.
- **New!** OGC Information Law Practice Group (ILPG)/ORC is assigned the PBI case.
  - ILPG/ORC Attorney will confirm requester's continued interest.
  - ILPG/ORC Attorney provides fee estimate and obtains assurance of payment (commercial requesters only).

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CBI IS HARD

CHALLENGES (& SOLUTIONS) FOR COMPLETING A FINAL CONFIDENTILAITY DETERMINATION

- Does this determination warrant a "clearly not entitled" confidential treatment letter?
- How to respond to an inadequate substantiation?
- Does a previously issued confidentiality determination affect your determination?
- How to build a defensible administrative record?

CBI IS HARD

CHALLENGE: "CLEARLY NOT ENTITLED" TO CONFIDENTIAL TREATMENT

- Program office may issue a determination that the information is "clearly not entitled to confidential treatment" under 40 C.F.R. 2.204(d)(2).
  - 10 working-days notice prior to release;
  - Notify OGC/ORC of this determination; and
  - Affected business can challenge the decision in Federal District Court.

CBI IS HARD

CHALLENGE: "CLEARLY NOT ENTITLED" (continued)

What type of CBI claim generally falls into this category?

- Information that is **publicly** available
- Statutory exemptions, such as:
  - Clean Air Act "emissions data"
  - Clean Water Act "effluent data"
  - TSCA "health and safety data" that does not include processing or mixture data
- Class Determinations

CBI IS HARD

CHALLENGE: INADEQUATE SUBSTANTIATION

What if the response to the request for substantiation does not support the CBI claim?

- Examples of inadequate substantiations:
  - Submitter fails to answer all substantiation questions.
  - Answers are incomplete or lack coherency.
  - Agency has reason to doubt the veracity of the answer.
  - Explanations are conclusory (lack detail or specificity).

CBI IS HARD

SOLUTIONS: INADEQUATE SUBSTANTIATION

- Solution 1: Go back to the submitter.
  - Ask the submitter for clarification or additional information.
- Solution 2: Rely heavily on the program recommendation.
  - Refer to the program's commentary to bolster the substantiation.
  - Practice Tip: Communicate your needs with the program early!
- Solution 3: Deny the claim.
  - Conclusory and generalized allegations cannot support an agency's decision to withhold requested documents.

CBI IS HARD

SOLUTIONS: INADEQUATE SUBSTANTIATION (continued)

What makes for an effective program recommendation?

- Supplements the record
- Critically analyzes CBI claims and substantiation
- Explains reasoning and avoids conclusory statements
- Addresses every claim
- Is well organized

CBI IS HARD

CHALLENGE: PREVIOUS CONFIDENTIALITY DETERMINATIONS

Issue 1. Individual determination

What if the information claimed as CBI has already been afforded confidential treatment through a previous confidentiality determination?

40 C.F.R. 2.205(b)(1)

CBI IS HARD

SOLUTION: PREVIOUS INDIVIDUAL DETERMINATION

- Step 1: Program office may issue an Initial Denial.
  - Reference the case citation/previous determination.
- Step 2 : OGC/ORC may issue new Final Determination.
  - Earlier determination is "of questionable validity"
  - Notice to business and opportunity to comment
  - Information no longer entitled to confidential treatment because:
    - Change in applicable law;
    - Newly-discovered or changed facts; or
    - Earlier determination was "clearly erroneous"

CBI IS HARD

CHALLENGE: PREVIOUS CONFIDENTIALITY DETERMINATIONS

Issue 2. Class Determinations

Purpose: "To make known the Agency's position regarding the manner in which information within a class will be treated…"

40 C.F.R. 2.207

CBI IS HARD

CHALLENGE: DEFENSIBLE ADMINISTRATIVE RECORD

How do you ensure that your administrative record provides you with enough information to support a final determination?

CBI IS HARD

SOLUTION: DEFENSIBLE ADMINISTRATIVE RECORD

- We typically rely on the following:
  - Copy of substantiation from business
  - Program recommendation
  - Copy of other correspondence with affected business(es)

See 40 C.F.R. 2.204(f)

- Consider the following:
  - Do your own sleuthing.
  - Talk to other Regions or HQ offices for prior determinations.
  - Consult other subject matter experts in the Agency.

LEARNING TIP!

BEST PRACTICES FOR DRAFTING A FINAL DETERMINATION

When drafting the final determination, make sure that you do the following:

- Create a complete administrative record.
- Provide specific explanations to support assertions (determinations should not be conclusory).
- Establish a clear link between information, supporting documentation, and final decision.
- Consider excluding CBI from the final determination so that it can be shared with the FOIA requester.

III. OTHER CBI CONSIDERATIONS THAT IMPACT FOIA REQUESTS

III. OTHER CBI CONSIDERATIONS

1. Confidentiality Agreements
2. Protective Orders
3. Toxic Substances Control Act (TSCA)

CONFIDENTIALITY AGREEMENTS

- **When reviewing a confidentiality agreement:**
  - Protection should not exceed what is permitted by law.
  - Originator of the information should be notified when shared information is responsive to a FOIA request.
- **If responsive records include information under a confidentiality agreement:**
  - EPA should provide originator with notice and opportunity to substantiate to determine if further action is needed.

PROTECTIVE ORDERS AND THE FOIA

Can a protective order issued by a court be a sufficient basis for withholding records under the FOIA?

- Example Protective Order language: Am. Farm Bureau Fed'n v. EPA 836 F.3d 963 (8th Cir. 2016).
  - "Subject to the limitations described in paragraphs 25 and 26 below, the EPA shall not disclose Farm Information in response to any request submitted under the Freedom of Information Act pending a final resolution of this litigation, including any appeals."

TSCA AMENDMENTS

New Requirements for Submitters:

- Upfront substantiations
- Substantiation for all CBI claims, except for those on information exempt from substantiation under TSCA section 14(c)(2)
- Certification statement
- Structurally descriptive generic name for chemical identity

TSCA AMENDMENTS

New CBI Review Process:

- All CBI claims for chemical identity filed after June 22, 2016
- Representative subset of 25% of non-chemical identity CBI claims
- Follow procedures set forth in 40 CFR Part 2, Subpart B
  - Program recommendation; and
  - Final Determination from the Office of General Counsel.
- 90 day review period.
- A10 year sunset unless CBI claim is re-asserted and re-substantiated

Questions?

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Take-Home Tip: Drafting an Effective Program Recommendation

(1) Supplements the record

Unlike OGC/ORC, programmatic experts have the unique opportunity to provide a holistic perspective on the information claimed as confidential business information (CBI) and on the significance of the determination, both for the Agency and the submitter. (Recognize that an adverse determination, for example, may have far reaching implications for an entire industry.)

To fill in the "gaps" of a submission, a program may consider supplementing the record as follows:

- Describe of the information claimed as CBI;
- Explain the circumstances in which the information claimed as CBI was obtained by EPA, and the purpose for which the information was submitted to the Agency; and
- Define the importance of the information to the Agency, to the submitter, and/or to the market in which the submitter conducts business.

(2) Critically analyzes CBI claims and the substantiation

The program recommendation should neither recite the substantiation provided by the company nor accept the submitter's assertions at face-value. Instead, subject matter experts within the program should build upon the information provided by the company and scrutinize the details of the substantiation.

In addition to using the resources and expertise at their disposal, programs should conduct an independent evaluation of the CBI. The program recommendation should reflect a concerted effort by the program to uncover the following information:

- Evidence that information claimed as CBI is publicly available;
- Previous CBI determinations by EPA or a Federal Court; and
- Any protective order or confidentiality agreement that covers the information.

(3) Explains reasoning and avoids conclusory statements

The decision to approve or deny a claim should be methodical and the reasoning should be clearly evident from the recommendation. Any assertions made or conclusions drawn in the program recommendation should feature the following:

- Narrative explanation featuring complete sentences;
- Direct references to the substantiation, external correspondence with the submitter, or other relevant materials; and
- Citations to any supplemental information (e.g. web address for site where information is found to be publicly available, and the date on which the site was last visited).

Remember to always show your work!

(4) Addresses every claim

When a submitter asserts multiple claims, the program recommendation should address every claim, including those that are not substantiated, but have been waived or dropped. Even if programs decide to address multiple claims as a group (see below), every claim should be accounted for in the recommendation.

(5) Is Well Organized

The recommendation is a critical part of the administrative record and should not only be understandable to OGC/ORC at the time of the CBI review, but should also make sense should the Agency need to defend the determination in the future in the context of litigation, FOIA, etc. The Program may also consider organizing the recommendation in a way that helps OGC/ORC address claims in the final determination (e.g. grouping claims).

Take-Home Tip: Reviewing Previous Confidentiality Determinations

I. INDIVIDUAL DETERMINATIONS

STEP 1. Has there been a previous determination issued by an EPA legal office (OGC/ORC) or Federal Court holding that the business information in question is entitled to confidential treatment?

- If no, the EPA program office can still issue an initial denial in accordance with the procedures set forth in 40 C.F.R. § 2.204.
- If yes, the EPA program office can respond to the request with an initial denial and include a citation to the relevant case or EPA determination.

STEP 2. Has there been either (a) a chance in applicable law, or (b) newly-discovered or changed facts since the previous confidentiality determination was drafted?

- If no, the EPA program office can refer the request to OGC/ORC, and the appropriate legal office may proceed with a final determination.
- If yes, the EPA program office should coordinate with OGC/ORC to evaluate whether modifying the previous confidentiality determination is appropriate.
  - If the previous confidentiality determination is deemed to still apply, the EPA legal office may deny the FOIA request for the CBI based on this previous determination.
  - If the previous confidentiality determination is deemed to no longer apply, OGC or ORC (with the concurrence of OGC) should do the following:
    - Inform the business of the FOIA request and decision to modify the previous confidentiality determination;
    - Afford the business an opportunity to substantiate the CBI claim(s) and review these comments; and
    - Issue a revised confidentiality determination that finds that the information is not entitled to confidential treatment, or that the period of confidential treatment will end sooner than prescribed by the previous determination.

II. CLASS DETERMINATIONS

What is it? A class determination is a determination that all information in a class:

- Is, or is not, voluntarily submitted;
- Is, or is not, governed by a particular section or substantive criteria;
- Fails to satisfy one or more applicable substantive criteria; or
- Satisfies one or more applicable substantive criteria, indefinitely or for a certain period of time. *See* 40 C.F.R. § 2.207(b).

When is it used? This process is used sparingly, and only when:

- EPA possesses, or is obtaining, related items of business information;
- The business information has one or more characteristics in common to support identical treatment; and
- A class determination would serve a "useful purpose."

EPA will generally provide formal notice and comment when issuing a class determination.

How does it impact the CBI Determination Process? The Agency's decision of whether to release information to a FOIA requester may be based on whether the information falls within a class determination.

Protecting Privacy Interests

EPA National FOIA Conference
Washington D.C.
September 2017

Jennifer MacDonald
Region 10 Senior Information Law Attorney
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Protecting Privacy Interests

TOPICS:

FOIA Exemptions 6 and 7(C)

The Privacy Act

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FOIA Exemptions 6 & 7(C)

Two FOIA exemptions protect personal privacy – Exemptions 6 and 7(C).

Information protected by these exemptions includes information commonly referred to as Personally Identifiable Information or PII.

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FOIA Exemption 6 – 5 U.S.C. § 552(b)(6)

Protects information about individuals found in **"personnel and medical files and similar files"** when the disclosure of such information **"would constitute a clearly unwarranted invasion of personal privacy."**

5

Exemption 7(C) – 5 U.S.C. § 552(b)(7)(C)

Protects **"records or information compiled for law enforcement purposes,"** the disclosure of which **"could reasonably be expected to constitute an unwarranted invasion of personal privacy."**

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Comparison of Exemptions 6 & 7(C)

FOIA Exemption	Information Protected	Likelihood of Privacy Invasion	Type of Privacy Invasion
6	Personnel, medical, and "similar"	**would** constitute	**clearly** unwarranted
7(C)	Law enforcement purposes	**could reasonably** constitute	unwarranted

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Exemptions 6 & 7(C)

Use the same analysis for both Exemptions 6 and 7(C)

1. Is the threshold satisfied?
2. Is a privacy interest implicated?
3. Is there a FOIA public interest in disclosure?
4. Balancing analysis of those interests.

Will depend on the nature and content of the requested records.

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Exemption 6 Threshold

"Personnel and medical files and similar files"

Courts have defined "similar files" broadly - includes all information related to a particular individual.

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Exemption 7(C) Threshold

"Records or information compiled for law enforcement purposes"

Includes records that are:

- Created by an agency pursuant to a law enforcement activity;
- Collected or recompiled during the course of a law enforcement activity

Individuals have a strong privacy interest in not being named in investigations.

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Exemption 7(C) Threshold

Types of law enforcement covered includes:

- Civil
- Criminal
- Administrative (i.e., regulatory)

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Privacy Interest

Privacy encompasses an "individual's control of information concerning his or her person."

Information does not need to be intimate or embarrassing to qualify for protection.

See DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989).

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Privacy Interest

Commonly found personally identifiable information:

- Name
- Address
- Phone number
- Date of birth
- Personal email addresses
- Financial information such as tax returns, bank account information
- Leave records
- Criminal history
- Medical history, health impacts, blood lead levels
- Social security number
- Familial relationships, marital status
- Names of potential witnesses
- Anonymous complainants' names, phone numbers, other contact information
- Conference phone numbers and access/passcodes

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Information not protected under Exemptions 6 or 7(C)

OPM regulations require disclosure of certain information related to federal employees (except those in law enforcement, DOD, National Security and other sensitive occupations) 5 C.F.R. § 293.311

- Name
- Position titles and occupational series
- Annual salary rates
- Performance awards and bonuses
- Grades
- Duty stations
- Position description and job elements
- Performance standards

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Information not protected under Exemptions 6 or 7(C)

Corporations have no privacy interests.

Except small companies/sole proprietorships can take on the privacy interests of its members.

See FCC v. AT&T, Inc., 562 U.S. 397 (2011).

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Privacy Interest - Practical Obscurity

Generally, individuals have no privacy interest in information that has been previously disclosed unless the information has over time become "practically obscure."

See DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

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Privacy Interest

The passage of time does not diminish a privacy interest and may, in fact, enhance it.

Public figures may have a diminished privacy interest but they do not forfeit all of their privacy rights.

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FOIA Public Interest

A FOIA public interest arises when disclosure of information "sheds light on an agency's performance of its statutory duties."

The requester's identity or private need for the information is not given any weight in this determination.

See DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

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FOIA Public Interest

The public interest must be served by the disclosure of the requested information.

Question to ask:

What do I learn about the agency's operations by knowing an individual's personal information?

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Balance the Interests

If there is a privacy interest and a FOIA public interest in disclosure:

- Accord each interest a measure of value; and
- Balance them to determine which is greater.

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Balance the Interests

In the absence of a cognizable public interest, the privacy interest will prevail in the balance.

"Something, even a modest privacy interest, outweighs nothing every time."

See Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).

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The Glomar Response

When a request seeks records concerning an identifiable individual and the records are of a particularly sensitive nature so that disclosure of their very existence could cause an invasion of privacy, it may be necessary to neither confirm nor deny the existence of the records, or "Glomarize".

- Programs need OGC/ORC concurrence prior to asserting a Glomar response.

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Categorical Denials

An option in the case of a third-party request that seeks records concerning an identifiable individual and the agency or the subject of the request has already publically confirmed the existence of the records.

See DOJ v. Reporters Committee, 489 U.S. 749, 777 (1989).

Differs from a Glomar response:

- A Glomar response protects a third-party's privacy interest as to whether or not the government even maintains records on them.
- A Categorical response protects a third-party's privacy interest in the content of the records. Existence of the records is known.

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Conclusion

- If privacy is not threatened by disclosure, 6 and 7(C) do not apply.
- If there is a privacy interest but no countervailing FOIA public interest in disclosure, withhold the record.
- If there is a privacy interest and a FOIA public interest, balance.

Privacy Act Overview

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Privacy Act of 1974

- **Purpose:** To regulate the collection, maintenance, use, and dissemination of personal information held by the Executive branch.
  - Restrict disclosure of personal information.
  - Grant a right of access to records about the requester.
  - Grant a right to seek amendment to records that are inaccurate, irrelevant, untimely, or incomplete.
  - Establish a code of fair information practices governing personal information.

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Central Rule: "No Disclosure without Consent"

- "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains [subject to 12 exceptions]." 5 U.S.C. § 552a(b)

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"No Disclosure without Consent"

- **Cannot disclose a Privacy Act record unless:**
  - Written request from subject,
  - Prior written consent from subject authorizing 3rd party access, or
  - Any of the 12 exceptions established in statute (e.g., routine uses, agency need to know).
- **Privacy Act Record:** "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph."
- **OMB Guidelines:** Any item of information about an individual that includes an individual identifier. 40 Fed. Reg. 28,948, 28,952 (July 9, 1975).

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"System of Records"

- **Privacy Act System of Records:** "a group of any [Privacy Act] records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."
  - Henke v. Dep't of Commerce, 83 F. 3d 1453: "retrieved" vs "retrievable."
- **System of Records Notice (SORN)**
  - Required by the Privacy Act.
  - Publication in the Federal Register upon establishment or revision of a System of Records.
  - Contact Judy Earle (earle.judy@epa.gov) or Marlyn Aguilar (aguilar.marlyn@epa.gov) in the National Privacy Program (NPP) in the Office of Environmental Information (OEI) for templates (currently being updated).

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Privacy Act Statements

- Required when asking for personal information that will go into a system of records.
- Must include:
  1. Authority for Collection;
  2. Purpose;
  3. Routine Uses; and
  4. Whether the collection is voluntary or mandatory.
     - "Mandatory": penalties for not providing information.

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Access and Amendment Rights

- Access Right:
  - Privacy Act requests go to EPA's National Privacy Programs and are then routed to the appropriate office through a Liaison Privacy Official (LPO).
  - Similar to other federal agencies, EPA processes Privacy Act requests as "first-party requests" under the FOIA to maximize access.
  - Any Privacy Act request must include a statement from the requester (1) declaring his or her identity and (2) stipulating that he or she understands that a false statement of identity is a misdemeanor punishable by up to $5,000. 40 C.F.R. § 16.3(c).
- Amendment Right: Individuals may amend (correct) their records.

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Penalties- Civil

- Amendment lawsuits - Injunctive relief.
- Access lawsuits - Injunctive relief.
- Accuracy lawsuits- Monetary damages for willful/intentional violations
- "Other provisions" lawsuits- Monetary damages for willful/intentional violations.
- Attorney's Fees difference:
  - FOIA: Fees if the lawsuit served as a "catalyst" in achieving a voluntary change in the agency's conduct.
  - Privacy Act: Fees are allowable only if there is a judicially-sanctioned change in relationship between parties such as a judgment on the merits or a consent decree.
    - Higher standard than the FOIA

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Penalties- Criminal

- Misdemeanor and fine up to $5,000:
  - Any employee who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it. 5 U.S.C. § 552a(i)(1).
  - Any employee who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) (SORNs). 5 U.S.C. § 552a(i)(2).
  - Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses. 5 U.S.C. § 552a(i)(3).

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Intersection of FOIA and Privacy Act

	FOIA	Privacy Act
Records	(1) created/obtained by agency and (2) under agency control	Privacy Act records in a System of Records
Access	Any person	U.S. citizens and aliens admitted for permanent residency
Searches	All appropriate records, including Systems of Records	Limited to SORs
Time Limits	20 working days by statute	20 working days by EPA regulation
Appeals	Sent to HQ FOIA, routed to OGC	Sent to National Privacy Program, routed to OGC
Fees	Statutorily-defined fee schedule	No fees for first copy of record, duplication thereafter
Processing	Proper request	Proper request + certification from requester

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PII Breaches- Examples

- An unauthorized disclosure of a Privacy Act record from a System of Records.
- A laptop containing PII is lost or stolen.
- PII contained in document posted to an EPA website.
- A manager is about to retire and places some of her files on a shared drive, but some of those files contain the PARS ratings of her subordinates.
- A group of employees are standing in an open area with cubicles discussing the PII of an individual seeking a job at EPA.

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EPA PII Breach Policy

- EPA Breach Policy: http://intranet.epa.gov/oei/imitpolicy/qic/ciopolicy/CIO-2151-P-02.2.pdf
  - **You *must* report any suspected or confirmed breach by calling the EPA Call Center:** 1-866-411-4EPA (4372).
- Personally Identifiable Information (PII): Defined by OMB as "Information that can be used to distinguish or trace an individual's identity, such as their name, SSN, biometric records (e.g., fingerprints), etc. alone, or when combined with other personal or identifying information that is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc."
- Sensitive Personally Identifiable Information (SPII): defined in EPA's Information Security Privacy Procedures as "a subset of PII, which if lost, compromised, or disclosed without authorization, could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual. The EPA defines SPII as social security numbers or comparable identification numbers, financial information associated with individuals, and medical information associated with individuals. SPII requires additional levels of security controls."
  - Requires additional controls such as encryption.

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Privacy Act Resources

- The Privacy Act of 1974
  - https://www.gpo.gov/fdsys/pkg/USCODE-2013-title5/html/USCODE-2013-title5-partI-chap5-subchapII-sec552.htm
- DOJ Overview of the Privacy Act of 1974 (2015 Edition)
  - https://www.justice.gov/opcl/overview-privacy-act-1974-2015-edition
- EPA National Privacy Program: Policies, Procedures, and Guidance
  - http://intranet.epa.gov/privacy/docs_guidance.html
- EPA Privacy Act Regulations at 40 C.F.R. Part 16
  - https://www.gpo.gov/fdsys/pkg/FR-2006-01-04/pdf/06-45.pdf

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Privacy Contacts

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Production: Crossing the Finish Line in Style

NATIONAL FOIA TRAINING CONFERENCE, SEPTEMBER 2017

PETER BERMES, OGC FEAT, AND MARK STILP, OGC GLO

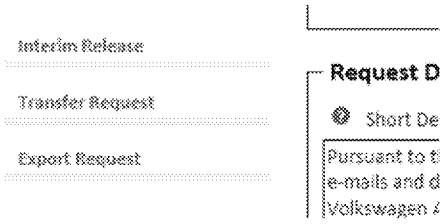
1

Agenda

1. Interim Responses
2. Final Responses
3. Making the Most of FOIAonline Communication Tools
4. Federal Records Act Requirements
5. Tips for Closing out Complex FOIAs
6. Q/A

2

Interim Responses: what are they?



Interim Responses: why are they useful?

- Rolling productions make extended response timelines easier to accept for requesters.
- Interim responses demonstrate progress and responsiveness, this builds a good record and continues a good relationship with the requester.
- Interim responses are an opportunity to quickly produce “low hanging fruit.”
- Interim responses are a good negotiating tool.

Interim Responses: what to include in correspondence with the requester

- Request information
- Description of interim production
- Description of schedule going forward
- Information about appeal timing at final response stage
- Contact information
  - Your office contact information AND Office of Government Information Services (OGIS) contact information

Interim Responses Tips

- Communication is key. Include the proper elements in your interim correspondence to ensure that the requester understands that they can expect more before the request is closed and that they are not in danger of losing appeal rights.
- Potential sources of confusion:
  - Redacted records: if you are releasing redacted records, make sure to communicate that the requester can appeal any withholdings at the time of closeout.
  - Inadequate search: make sure that the requester understands that the effort to respond to the request is ongoing, or else they may mistake the response to be final and therefore incomplete.

Final Responses: what are the options?

- **Full Grant:** all responsive records provided, no redactions or withholdings.
- **Partial Denial:** some records provided, some records are redacted or withheld.
- **Full Denial:** there are responsive records, but they are all withheld.
- **No Records:** after a reasonable search, no records are found.

Final Responses: what to include in a closeout letter

- Request information
- Determination: Full grant, partial denial, full denial
- Description of records:
  - What is being produced AND what is being withheld in whole or in part & volume of what is withheld in whole (volume of in part is provided with production of redacted records)
- Fee information
- Final appeal rights
- Contact information:
  - Your office contact information AND OGIS contact information.

Making the Most Out of FOIAonline Communication Tools

- Uploading responsive records
- Uploading, creating and sending correspondence via FOIAonline
- Creating comments in FOIAonline for internal communication

Uploading Responsive Records

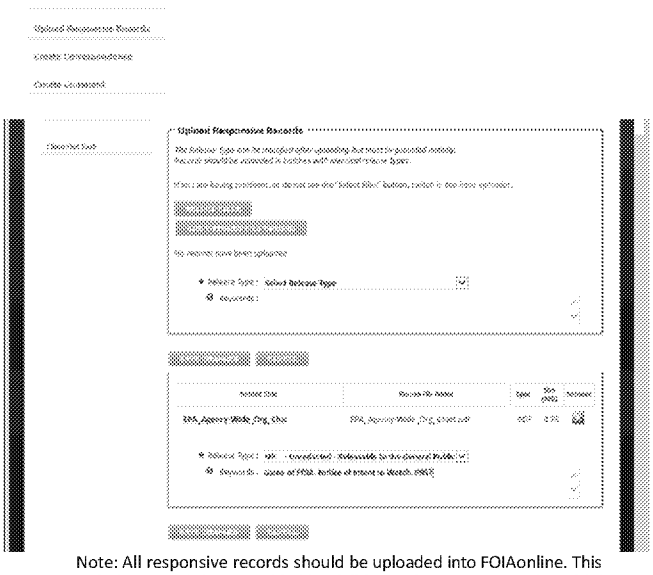
Upload all records into FOIAonline. Include records withheld in full and clean versions of records withheld in part. **Exception**:

- Documents containing CBI may not be uploaded into to FOIAonline because it is not a CBI-approved system. Consult your office's Records Liaison Officer (RLO) if such documents are responsive to a FOIA request that you are processing.

(1) Click the "Upload Responsive Records" button on the left menu bar.

(2) Click the green "Select Files" button.
Note: You need to select a release type code for each document. The release type designates whether the document includes redactions and whether it is releasable to the public.

Tip: Upload documents with the same release type in a batch upload and then apply the one release type code to the entire batch.



Note: All responsive records should be uploaded into FOIAonline. This includes records being withheld in full (**use release type Unreleasable**).

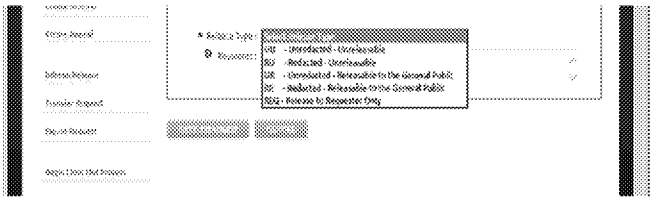
(3) Select a "Release Type" from the drop-down menu. Release types are:

- **UU-** Unredacted Unreleasable: Use this code on withheld-in-full documents. They will be kept internal and not released.
- **RU-** Redacted Unreleasable
- **UR-** Unredacted Releasable: For documents released in full.
- **RR-** Redacted Releasable: For documents released with redactions.
- **REQ-** Release to Requester Only: For documents released to the requester only and not released to the public (e.g., requests for the personal information of the requester).

(4) Best Practice: include keywords which will be used to locate the uploaded records by colleagues and members of the public.

(5) Click the green "Save Changes" button at the bottom.

Tip: For requests involving 2,000+ responsive record files, contact HQ FOIA for uploading assistance.



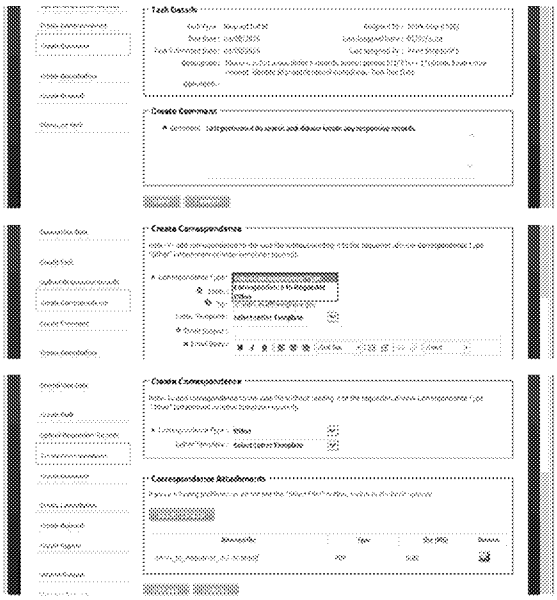
Uploading, Creating and Sending Correspondence

(1) Click the "Create Correspondence" button on the left menu bar.
(2) In the "Correspondence Type" drop-down menu and select "Correspondence to Requester" or "Other."

- Choose "Correspondence to Requester" to have the system send an email directly to the requester. The email can include any attachments you previously uploaded.
- Choose "Other" to upload correspondence as a record to the file, which will be kept internal to EPA.
- If you select "Other," skip to Step (7) below.

(3) If you want to use a pre-existing template, select one in the drop-down menu. Templates examples:

- Assurance of Payment
- Records Publicly Available on the Internet
- Extension Due to Unusual Circumstances
- Improper FOIA Request
- Request for Clarification



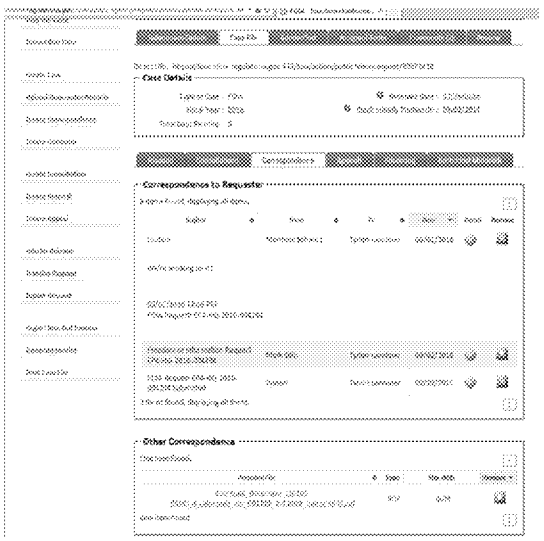
Important: If you use any FOIAonline templates, please ensure that all information in the template is consistent with all information in attached letters.

(4) Enter an email subject line that includes the FOIA request tracking number.
(5) Enter the body of the email.
- Notice FOIAonline's pre-set sender email address. Replies go to the pre-set sender, not you.

(6) Select any attachments.
(7) Click the green "Create" button.

To review existing correspondence:
(1) Click on the "Case File" subtab.
(2) Click on the "Correspondence" tab.

Correspondence tips:
- If you speak to the requester via phone, confirm the contents of that conversation by letter or email and upload the correspondence to FOIAonline.
- If you send search requests to OEI (e.g., for Outlook searches) or to other individuals, upload those search instructions to FOIAonline.
- Upload important internal correspondence to FOIAonline.



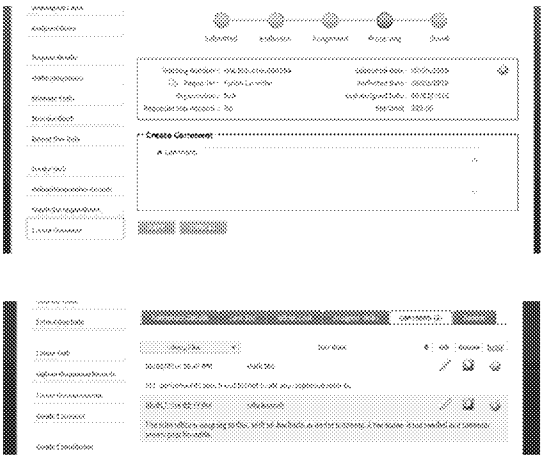
- To record internal processing notes that do not require a document to be uploaded, use the create a comment feature (described below).

Creating Comments for Internal Use:

(1) Click on "Create Comment" on the left menu bar.
(2) Enter a detailed comment in the "Comment" box.
(3) Click on the green "Save" button below.
- Comments will be date- and time-stamped and include the author of the comment.

Reading previously created comments:

(1) Click on the "Comments" subtab.
(2) To read a full comment, click on the blue button under "Detail." Alternatively, to expand all of the comments, click on the word "Detail."



Federal Records Act Requirements for Final Responses

EPA Records Schedule 1049: Information Access and Protection Records:

Item a: Access and disclosure request files.

Includes case files created in response to requests for information under Freedom of Information Act (FOIA)… and completed by granting the request in full; granting the request in part; denying the request for any reason, including the inability to fulfill request because records do not exist, or the request inadequately describes the records, or the search or reproduction fees are not paid; final adjudication on appeal to any of the above original settlements; and final agency action in response to court remand on appeal. **Includes the requests (either first-party or third-party); replies; copies of requested records; administrative appeals; and related supporting documents (such as sanitizing instructions).**

Excludes the record copies of requested records which are covered by their original disposition authority.

Disposable:

Close 6 years after final agency action or 3 years after final adjudication by the courts, whichever is later.

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Tips for Closing Out Complex FOIAs

1. When multiple requesters are seeking the same or similar records, use a single FOIAonline tracking number as a repository for the records and direct other requesters to that account.
2. When a particular topic is expected to generate many requests, make use of proactive disclosures.
3. When closing out many requests on the same topic, be mindful of expedited processing and the order in which requests were submitted.
4. Communication is important. If you are having technical problems that may delay a production or closing out a request, let your requesters know.

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Questions?

1. Interim Responses
2. Final Responses
3. Making the Most of FOIA Online Communication Tools
4. Federal Records Act Requirements
5. Tips for Closing out Complex FOIAs

Contact Information

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ADMINISTRATIVE APPEAL & LITIGATION PERSPECTIVES

2017 EPA NATIONAL FOIA TRAINING CONFERENCE

Lynn Kelly, Team Lead,
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1

PRESENTATION ROADMAP

- What is an Administrative Appeal?
- Overview of Appeals Process
- Top Tips to Reduce Appeals
- Overview of Litigation Process
- Avoidable Pitfalls
- Case Trends
- Q&A

2

WHAT IS AN ADMINISTRATIVE APPEAL?

- Per 40 C.F.R. § 2.104(g), Requesters can appeal any "adverse determination" by EPA:
  - A determination to withhold any requested record in whole or in part;
  - a determination that a requested record does not exist or cannot be located;
  - a determination that what has been requested is not a record subject to the FOIA;
  - a determination on any disputed fee matter, including a denial of a request for a fee waiver; or
  - a denial of a request for expedited treatment.
- Include "appeal language" in all final responses (with one rare exception).

3

TYPES OF APPEALS

- Failure to Respond
- Inadequate Search
- Improper Withholdings
- Fee Waiver Denial
- Expedited Processing Denial
- Improper Request Denials

4

OVERVIEW OF THE APPEALS PROCESS

- Requesters now have 90 days to appeal a response.
  - Time is measured by when EPA receives the appeal (any component).
  - OGC still has 20 working days to respond to the appeal.
  - Can be extended per the same "unusual circumstances" requirements of requests.
- Internal OGC Process for Appeals.
  - Your roles during an appeal.

5

APPEAL OUTCOMES

- Appeal is Denied in Full: OGC determines that all challenged actions were performed in full compliance with statutory and regulatory requirements.
- Appeal is Granted in Full or In Part: OGC determines that one or more challenged actions were not performed in full compliance with statutory and regulatory requirements.
  - With Remand pursuant to 40 C.F.R. § 2.104(k): OGC determination will provide instructions for completing corrective action by remanding the request to the program office assigned to the request.
    - Following the instructions on remand: The appeal instructions will either include:
      - (a) a timeframe for completing the corrective action(s) or
      - (b) a timeframe for the program office to communicate a schedule for completion to the requester.
    - Reopening in FOIA online.
    - Sending a new final response letter.
  - Without Remand.

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APPEALS BY THE NUMBERS

- Appeals are also tracked in the Annual FOIA Report.
- OGC's Information Law Practice Group currently has 9 attorneys and one Practice Group Lead.
- EPA receives an average of 230 FOIA appeals per fiscal year.
- EPA closes an average of 211 FOIA appeals per fiscal year.

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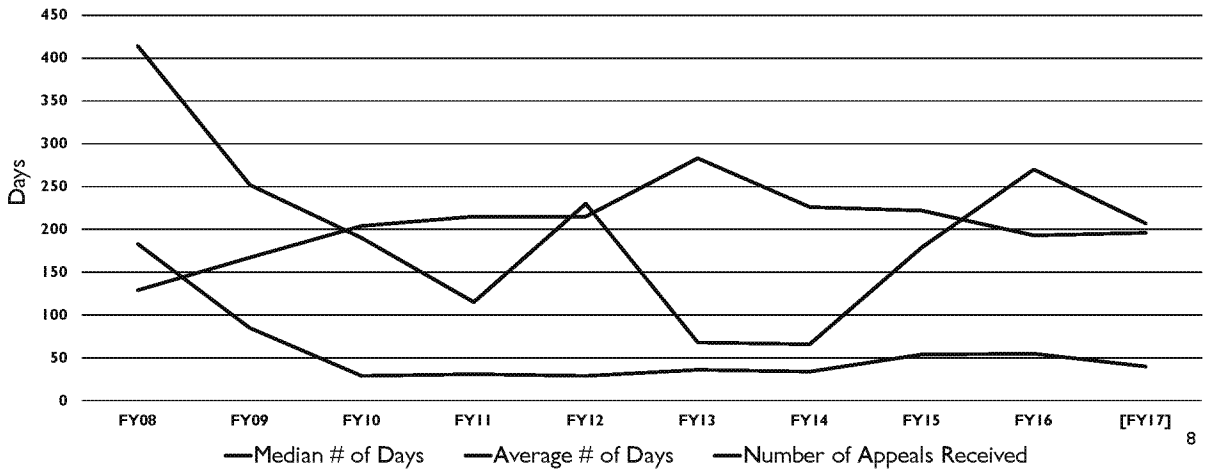
TIMING OF RESPONSES TO APPEALS



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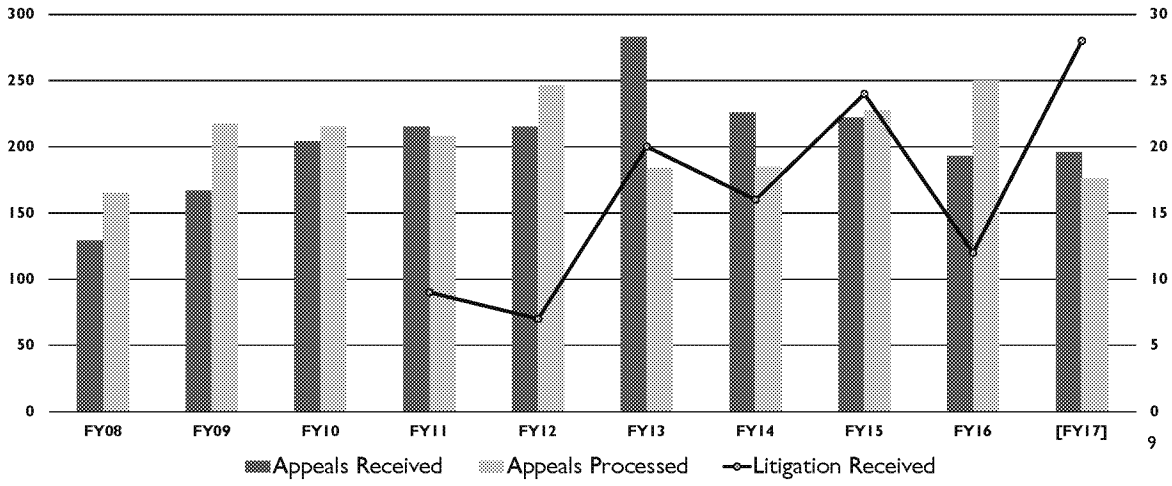
VOLUME OF APPEALS PROCESSED



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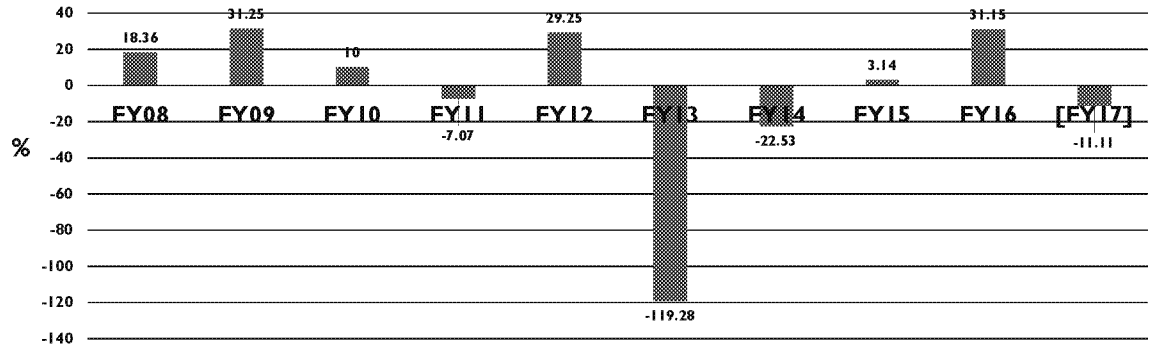
PERCENTAGE APPEAL BACKLOG REDUCTION



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TOP TIPS TO REDUCE APPEALS

- COMMUNICATE WITH THE REQUESTER (& INTERNALLY)
  - Large majority of appeals could be deferred, simplified, or avoided with better communication.
  - Importance of written communication in FOIAonline.
- RELEASE DOCUMENTS IN PART
  - There is a statutory requirement to apply redactions when possible.
  - If we get an appeal with no attempt to redact exempt information, we will remand it back to you.

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TOP TIPS TO REDUCE APPEALS (CONT.)

- PAY ATTENTION TO YOUR DESCRIPTION OF WITHHOLDINGS
  - Most requesters believe they are entitled to a *Vaughn* Index at the appeal stage.
  - EPA Regulations Require Certain Elements: 40 C.F.R. § 2.104(h).
  - A little goes a long way:
    - Try to provide a basic list of withholdings if using review software or detailed descriptions if you are using categories.
    - Focus on the detail that you **can** provide and don't shy away from index just because it may not be required at the initial response stage.

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OVERVIEW OF LITIGATION PROCESS

- FOIA allows requesters to challenge the Agency's response in federal court.
- To file suit, a requester must allege that an agency has improperly withheld records:
  - Actual denials – must file an Administrative Appeal.
  - Constructive denials – can go directly to court.

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OVERVIEW OF LITIGATION PROCESS (CONT.)

- EPA has 30 days to file an "Answer" to the "Complaint."
- Typical next steps in litigation:
  - Production Schedule (if applicable)
  - Vaughn Index
  - Declaration (Search and Withholdings)
  - Motion for Summary Judgment or Dismissal
  - Opinion & Order
  - Attorney Fees
- Roles of OGC, DOJ and Program/Regional Offices in Litigation.

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OVERVIEW OF LITIGATION PROCESS (CONT.)

Case 1:15-cv-01203-RC Document 40-4 Filed 02/13/16 Page 1 of 300

Vaughn Index – Hunton & Williams v. EPA, (1-15-cv-01203-RC)

REQUESTS 1 & 2 (006943)			
DOC-001 (9943-01-01)	Subject: Cargill	4/18/2014 1:59 PM	Author: Alexis Strauss, Deputy Regional Administrator
Recipients	Exemption(s)	Attachments	
Sylvia Quast, EPA R9 Regional Counsel; Jane Diamond, Water Division Director R9 EPA	Exemption (b)(5) – Deliberative Process Privilege	None	
Document Description	Justification		
E-mail transmitting information within Agency from the Deputy Regional Administrator Alexis Strauss to Regional Counsel Sylvia Quast and attorney Jane Diamond, Water Director, regarding SEPW staff, is a communication commenting on a legal opinion regarding the status of jurisdiction over and development of the Cargill Salt Ponds. The body of the e-mail was redacted in full.	Exemption (b)(5) – Deliberative Process Privilege The redacted email discussion reflects pre-decisional deliberations between EPA employees about the Agency's response to concerns regarding jurisdiction over and development of the Cargill Salt Ponds. The e-mail relates to EPA collaboration with the State Environmental Public Works department. At the time of this discussion, the Agency had not acted, and EPA was still deliberating on the best Agency-wide approach for coordinating its response. The author does not have decision-making authority with respect to providing the final response to said conditions. The withheld information is deliberative because EPA employees and managers were still internally discussing issues concerning responsive records and how to best coordinate the Agency's response, and were providing advice to the decision makers. The record reflects analysis, recommendations, and opinions that were considered as part of the Agency's decision making process prior to its actions regarding the Salt Ponds. The email does not constitute a final Agency action. Release would discourage open and frank discussions among its staff about the Agency's ongoing review of issues related to its response. Release would also have a chilling effect on agency decision-making processes, and on the Agency's ability to have internal discussions and consultations concerning its response. Furthermore, release would cause public confusion by disclosing rationales and reasons that were not in fact ultimately the grounds for EPA's ultimate response. The withheld information was not circulated outside the Agency. The Agency has released all reasonably segregable information. The remaining withheld information does not contain reasonably segregable factual information. To the extent any of the withheld information contains facts, is inextricably intertwined with the deliberative discussions concerning the Agency's ongoing development of its policies.		
DOC-002 (9943-02-03)	Subject: Cargill	5/14/2014 1:45 PM	Author: Alexis Strauss, R9 EPA
Recipients	Exemption(s)	Attachments	

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AVOIDABLE PITFALLS

- Processing Improper Requests
- Inadequate and Undocumented Searches
- Review Shortcuts
- Production (or lack thereof)

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AVOIDABLE PITFALLS: PROCESSING IMPROPER REQUESTS

- If you don't know precisely what the request is looking for, how will the Court?
- Failure to clarify aspects of otherwise proper request.
  - Difficulty and cost of clarifying in litigation.

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AVOIDABLE PITFALLS: INADEQUATE AND UNDOCUMENTED SEARCHES

- Taking too long to get started
  - Search Cut Off challenges
- Thinking Locally not Globally
  - Impacts of failing to identify potential EPA offices & custodians
- Failing to document the whys and why nots
  - "**All** locations likely to contain responsive records"
- Using inconsistent search strategies
  - Importance of communicating the scope

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AVOIDABLE PITFALLS: REVIEW SHORTCUTS

- Failing to Redact
  - Legal impact of releasing records after litigation
- Making "Not Responsive" Redactions
  - Decision in *American Immigration Lawyers Ass'n v. Executive Office for Immigration Review,* Case No. 15-5201 (D.C. Cir. July 29, 2016).
  - Importance of consent of the requester
- Making Redaction Errors
  - Inconsistency within duplicates
  - Over-redacting harmless material next to exempt material
  - *In Camera* review possibility

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AVOIDABLE PITFALLS: PRODUCTION (OR LACK THEREOF)

- Approximately 83% of the ~42 cases OGC is handling involve a failure to respond.
- Significance of production before lawsuit is filed.
- Lost opportunity for administrative review on appeal.
- Impact on schedule.
- Communication about timeline for production helps in litigation too.

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CASE TRENDS

- *OSTP* Case and Personal Messaging Accounts
- Discovery case-law
- *Vaughn* description standard

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Q&A DISCUSSION SESSION

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Lynn Kelly
Team Lead, FOIA Administrative Appeals
Information Law Practice Group
General Law Office
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Message

From: Walker, Denise [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B10D83A48A5E4AF7A9B1F01465330FF2-WALKER, DEN]
Sent: 8/10/2018 9:08:57 PM
To: OGC NFO FEAT [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=543b25c39eaa422b9f7bc3c6ff88d084-OGC FEAT]
Subject: Draft Flint Water Documents Project Training 06072016.pptx
Attachments: Draft Flint Water Documents Project Training 06072016.pptx

Flint Water Documents Project

CRISIS REVIEW: DENISE WALKER
EPA: OFFICE OF GENERAL COUNSEL, FOIA EXPERT ASSISTANCE TEAM

Overview

- Background on Flint Crisis and Document Management (30 min)
- FOIA Overview (1 Hour)
  - Background
  - Basic FOIA procedures
- BREAK FOR LUNCH (1Hour)
- FOIA overview (1 Hour)
  - Exemption 5
  - Exemption 6 and 7c
- Relativity Training (30 min)

Documents help tell the story

The EPA OGC FOIA Expert Assistance Team works with:

- The Office of Congressional and Intergovernmental Relations
- The Office of Public Affairs
- The Office of Environmental Information
- Subject matter experts in program offices and regions
- Other parts of OGC

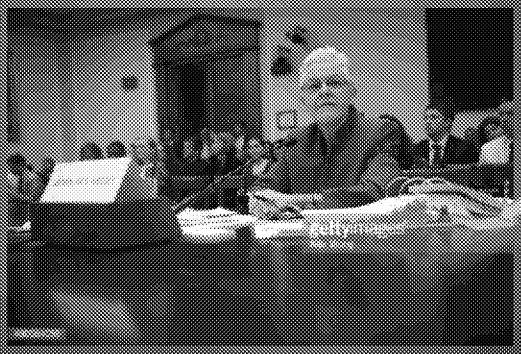
We gather and provide the documents that people need quickly!

When a crisis occurs, everyone needs to know what happened…

EPA must gather, organize, and provide the facts to:

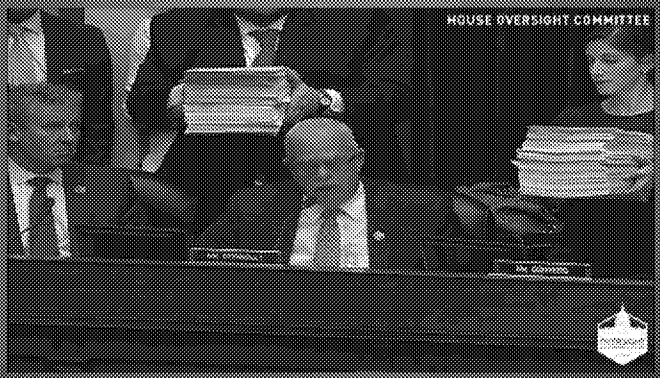
- Agency Leadership
- Congress
- The Media and the Public
- Litigants

Agency leadership must be prepared to respond appropriately to the crisis and answer questions.



Binders of documents

Congress receives information from EPA through Congressional Requests



Congressional Hearing on Flint Water Crisis: March 17, 2016 (2:29)

The Freedom of Information Act (FOIA) provides a way for the media and the public to ask for and receive information

Documents are sent to the media and public

Mr. Flesher is one of 40+ FOIA requesters

This is completely unintentional foreshadowing

A public health crisis unfolds. What we learned from the documents…

- **April 25, 2014**: City of Flint ceases purchasing treated water from Detroit Water and Sewerage Department and begins drawing water from the Flint River.
- **August 2014**: City of Flint receives Total Coliform Rule (TCL) maximum contaminant level (MCL) violation; boil water notices are issued.
- **December 2014**:
  - City of Flint exceeds total trihalomethane (TTHM) MCL under the Stage 2 Disinfection Byproducts Rule (DBPR) for the October – December 2014 period.
  - City of Flint completes six month round of lead and copper monitoring (July – December 2014). 100 samples taken indicate 90th percentile has 6 parts per billion (ppb) for lead.

Early 2015

- **January 2015**:
  - Flint begins second of two rounds of six-month lead and copper sampling.
  - EPA Region 5 (R5) is contacted by Lee-Ann Walters due to bad tap water.
- **February 18, 2015**: Lab results returned from Walters' home show high lead levels.
- **February 26, 2015**: EPA R5 (Jennifer Crooks) receives email from Walters regarding high levels of lead in her home. Crooks emails MDEQ (Steve Busch and Mike Prysby) expressing concern regarding the high lead levels.
- **February 26 -27, 2015**: EPA R5 (Miguel Del Toral) emails various individuals at EPA R5, EPA ORD (Mike Schock) and MDEQ (S. Busch, A. Rosenthal, M. Prysby) inquiring as type of corrosion control treatment (CCT) used by Flint, and noting that optimized corrosion control is required to be in place.
- **February 27, 2015**: MDEQ (S. Busch) informs EPA R5 that Flint has OCCT, and shares the July – December, 2014 lead sample results (4 ppb), which did not exceed the 15 ppb regulatory action level.

Join the review team to learn more about the FLINT timeline…

- The document reviewers are the first to help start making sense of the documents.
- Reviewers help identify documents that signal key decision points.
- We use a document review platform called "Relativity" to organize, review, sort, and redact the documents.
- Next we will learn about the Freedom of Information Act.
- Then, we will learn about Relativity.

Time for a short break

The Freedom of Information Act

- Introduction
- FOIA Procedures
- Exemption 5
- Exemption 6

- *Slide Credit: the following slides are adapted from training materials developed by the US Department of Justice, Office of Information Policy*

Introduction to the FOIA

July 5, 1966

President Lyndon Johnson signs into law the Freedom of Information Act

Law provides any person with a right of access to federal agency records unless those records are protected from disclosure under the law

Introduction to the FOIA

United States Supreme Court:

"The basic purpose of [the Freedom of Information Act] is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."

Introduction to the FOIA

FOIA is often described as a means for the public to know **"what their Government is up to"**

Applies to records of the Executive Branch of the federal government

Certain categories of records must be made available proactively by agencies while other records can be requested

Legislative Amendments to the FOIA

- **1974:** Narrowed law enforcement and national security amendments, broadened procedural provisions
- **1976:** Narrowed Exemption 3
- **1978/1984:** Technical Amendments
- **1986:** Broadened law enforcement protection, crafted new fee and fee waiver standards
- **1996:** Electronic records, proactive disclosures

Legislative Amendments to the FOIA

- **2002:** Precluded intelligence agencies from responding to requests made by foreign governments or international governmental organizations
- **2007:** Addressed procedural issues (tolling, document marking, recovery of attorney fees, tracking of requests, status updates), creates new Office of Government Information Services
- **2009:** Substantive changes to Exemption 3

Introduction to the FOIA

State governments and other countries have their own access laws for records

Sweden had the first such law, adopted in 1766

Current Policies

President Obama's Freedom of Information Act Memorandum (January 21, 2009)

Attorney General Holder's Freedom of Information Act Guidelines (March 19, 2009)

President Obama's FOIA Memorandum

"A democracy requires accountability and accountability requires transparency."

President Obama's FOIA Memorandum

FOIA should be administered with a clear presumption:

"In the face of doubt, openness prevails."

President Obama's FOIA Memorandum

Information should not be kept confidential merely because:

- officials might be embarrassed,
- errors and failures might be revealed, or
- because of speculative or abstract fears

Attorney General Holder's FOIA Guidelines

The Attorney General's FOIA Guidelines were written to underscore our nation's "**fundamental commitment to open government.**"

Attorney General Holder's FOIA Guidelines

When applying FOIA exemptions under Attorney General Holder's FOIA Guidelines, agencies must consider whether they reasonably foresee that disclosure would harm an interest protected by one of the exemptions.

Attorney General Holder's FOIA Guidelines

In the absence of such harm, agencies are encouraged to make a disclosure of information, in keeping with the President's call for greater transparency.

Agencies are strongly encouraged "to make discretionary disclosures of information."

The Freedom of Information Act

The FOIA pertains to federal agency records that exist and can be located in agency files.

Who May Make A FOIA Request?

- "Any person" – regardless of citizenship
- Includes individuals, corporations, associations, state and local governments, foreign government, etc.

Who May Make A FOIA Request?

The Exceptions

- Fugitives from justice, if the requested records relate to the requester's fugitive status
- Foreign governments requesting information from intelligence agencies

What Records are Subject to the FOIA?

<u>Agency records</u>

Two-part test:

- Created or obtained by agency

AND

- Under agency control when request received

What Records are Subject to the FOIA?

Agency records

Factors:

- Control
- Use
- Content
- Integration

The "Why" Behind the Request

FOIA requesters generally do not have to justify or explain their reasons for making requests.

Exceptions:

- When expedited processing is requested
- When a fee waiver is requested

A Proper FOIA Request?

- Request for agency records submitted in writing
- Request reasonably describes records requested
- Request complies with agencies regulations for making requests

Receipt and Acknowledgement

- Receipt of the request starts the time clock
- If the request will take longer than ten days to process, agency must assign an individual tracking number to the request
- Agencies must establish either "a telephone line or internet service" to provide status information to requesters

Receipt and Acknowledgement

- Status information should include the date of receipt and an estimated date of completion
  - **OIP Guidance:** *Assigning Tracking Numbers and Providing Status Information (7/8/14)*

Receipt and Acknowledgement

Routing Requirement

- Agencies have 10 days to "route/forward" **misdirected** requests to the proper office(s) within the agency.
- Addresses the situation where a FOIA request is inadvertently sent to a component that is not itself the proper office to process the particular request.

Receipt and Acknowledgement

Routing Requirement

- If the request is not received by the proper office(s) within 10 days, the 20-day statutory clock begins.
  - **OIP Guidance:** *New Requirement to Route Misdirected FOIA Requests (11/18/08)*

Time Limits for Responding to a Request

- 20 working days to respond
- In "unusual circumstances" agency may extend time limit by giving written notice to requester

Time Limits for Responding to a Request

- If time period is extended beyond 10 working days, agency must provide requester with opportunity to narrow scope of request and must make FOIA Public Liaison available

Time Limits for Responding to a Request

Unusual Circumstances

- Search in separate offices
- Examine voluminous records
- Consultation(s)

Time Limits for Responding to a Request

Tolling – "Stopping the Clock"

- The number of times the agency can toll (stop the clock) the response time is limited.
- Tolling can only occur if the request is properly made and the clock already started.

Time Limits for Responding to a Request

Limits on Tolling

- Agencies can toll one time when waiting for Requester to provide additional information.

Time Limits for Responding to a Request

Limits on Tolling

- Agencies can toll a request as many times as necessary in order to clarify any fee-related issues with a Requester.

  - **OIP Guidance:** *New Limitations on Tolling the FOIA's Response Time (11/18/08)*

Limits on Charging Search Fees

- Agencies are prohibited from charging certain fees if they do not meet the response time.
- The FOIA prohibits agencies from assessing search fees if the agency fails to meet the 20-day response time limit, unless unusual or exceptional circumstances apply to the processing of the request.

Limits on Charging Search Fees

Exceptions

- If either "unusual" or "exceptional" circumstances apply to the processing of the request, the exceptions to the rule apply and agencies can assess fees as they have normally done.
  - **OIP Guidance:** *New Limitations on Assessing Fees (11/18/08)*

Limits on Charging Search Fees

Unusual Circumstances

- Search in separate offices
- Examine voluminous records
- Consultation(s)

Limits on Charging Search Fees

Exceptional Circumstances

- Exceptional circumstances exist if the agency has a backlog of pending requests and is making reasonable progress in reducing that backlog

- Cannot include a "delay that results from a predictable workload of requests . . ."

Expedited Processing

Requesters may seek expedited or faster processing of their request by the agency

When seeking expedited processing, requesters must generally demonstrate "compelling need"

Expedited Processing

- Compelling need:
  - Imminent threat to the life or physical safety of an individual
  - Urgency to inform the public concerning actual/alleged Federal Government activity (with respect to a request from one engaged primarily in disseminating information)

Expedited Processing

In addition to compelling need, agencies may add other standards for granting expedited processing, which should be outlined in agency FOIA regulations.

Expedited Processing

Agencies have **10 calendar days** to decide whether to grant or deny requests for expedited processing.

Expedited Processing

Agencies must process requests that have been granted expedition as soon as practicable.

Expedited Processing

Standard of Review

Explain and detail rationale for agency decision on expedited processing to requester in writing

- **OIP Guidance:** *Ensuring Timely Determinations on Requests for Expedited Processing (12/29/14)*

Initial Processing

- Multi-track processing
- Frequent communication with requester
- FOIA Public Liaison
  - **OIP Guidance:** *The Importance of Good Communications with FOIA Requesters 2.0: Improving Both the Means and Content of Requester Communications (11/22/13)*

Assessing Fees

	Search	Review	Duplication
Commercial Use	✓	✓	✓
"Favored"			✓*
All Others	✓**		✓*

* First 100 pages of duplication free of charge per request.

** The first two hours of search free of charge per request.

Adequacy of Agency Search

- Agency must conduct a "reasonable" search.
- Not locating all requested records does not mean a search was not "reasonable."
- Agency must make efforts to search for records in all formats, including any electronic formats.

Reviewing the Documents

Exemptions and Segregation

- Agencies must identify exempt information and apply the appropriate exemption beside each redaction.

Reviewing the Documents

Exemptions and Segregation

- Attorney General Holder emphasizes agency obligation to segregate and apply foreseeable harm standard.
  - **OIP Guidance:** *Segregating and Marking Documents for Release in Accordance with the OPEN Government Act (10/23/08)*

Reviewing the Documents

Referral – Sending records to originating agency or component for direct response to the requester

Consultation – Obtaining the opinion of another program office before responding to the requester

Coordination – When records contains sensitive law enforcement or national security information

- **OIP Guidance:** *Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest In Them (12/5/2011)*

Responding to the Requester

Agency must provide records in any form requested "if readily reproducible"

Certain information should appear in final response letters, including:

- Total number of responsive records, and volume being released or withheld
- Exemptions asserted

Administrative Appeal

Final responses should also include administrative appeal rights, detailing how requesters may appeal adverse determinations to the agency

Agency administrative appeal authorities will review the initial action taken on the request and can direct that further actions be taken

Administrative Appeal

The determination on appeal must notify the requester of the right to seek judicial review.

Appeal determination letters should also advise requesters of the mediation services offered by the Office of Government Information Services, located at the National Archives and Records Administration.

Judicial Review

The FOIA provides requesters with the right to challenge an agency's decision in federal court.

Agencies have the burden of proof and must demonstrate to the court that no record has been improperly withheld.

Exemption 5

Exemption 5 protects

"inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Time for lunch!

Please meet back here at 1:00

Welcome back!

9 FOIA Exemptions

1. Classified Information
2. Personnel
3. Exempted by Other Statute
4. Confidential Business Information
5. **Civil Discovery Privileges**
6. **Personal Privacy Information**
7. Law Enforcement
8. Matters Related to Regulating or Supervising Financial Institutions
9. Wells

Exemption 5

Incorporates civil discovery privileges into the FOIA

Prevents requesters from using the FOIA to get documents that would be privileged in discovery.

Exemption 5

Two requirements:

1. Threshold

<u>and</u>

2. Applicable discovery privilege

Exemption 5

Two requirements:

1. Threshold

and

2. Applicable discovery privilege

Part I: Threshold

Basic Definition

"Inter-agency or intra-agency memorandums or letters."

The "Consultant Corollary"

The Exemption 5 threshold has been expanded to cover **certain** situations in which an agency receives documents from an outside party

Consultant Corollary – Who is a Consultant?

- Covers situations where outsiders are functioning as though they were agency employees.
- Those who have a formal, contractual, paid relationship with an agency as well as those consulted by the agency on an unpaid volunteer basis.

Consultant Corollary: Who is a Consultant?

- ***Dep't of the Interior v. Klamath Water Users Protective Ass'n***
- An outsider <u>cannot</u> be a consultant when the outsider is:
  - seeking a government benefit
  - at the expense of another party.

Miscellaneous Threshold Issues

Advice from a consultant must be coming <u>into</u> the agency, not <u>from</u> the agency.

Miscellaneous Threshold Issues

An agency can protect advice it receives <u>from</u> Congress,

An agency <u>cannot</u> protect advice it provides <u>to</u> Congress.

Miscellaneous Threshold Issues

Common Interest Doctrine:

- Common interest with the agency
- After the point at which the agency decides to enter into a common interest agreement.

Miscellaneous Threshold Issues

Common Interest Doctrine:

- Documents created while the outside party is seeking the agreement itself will <u>not</u> meet the threshold

Practical Threshold Considerations

Threshold issues to consider when processing potential Exemption 5 documents

Exemption 5

Two requirements:

1. Threshold

<u>and</u>

2. Applicable discovery privilege

Exemption 5

Two requirements:

1. Threshold

<u>and</u>

2. **<u>Applicable discovery privilege</u>**

Part II: Discovery Privileges

Exemption 5 incorporates all civil discovery privileges into the FOIA

Part II: Discovery Privileges

In practice only three come up with any degree of regularity:

- Deliberative process privilege;
- Attorney work-product privilege;
- Attorney-client privilege.

The Deliberative Process Privilege

Purposes of the privilege

- encourage open, frank discussion
- protect against premature disclosure of proposed policies
- guard against public confusion from release of reasons and rationales that were not ultimately the basis for agency decisions.

The Deliberative Process Privilege

Protects Process

- Integrity of agencies' decisionmaking processes.
- Documents protected where release would harm the decisionmaking process.

The Deliberative Process Privilege

Effect of Time

- Ability to use the privilege is not affected by the passage of time.
- Older documents are strong candidates for discretionary disclosure.

The Deliberative Process Privilege

Elements

Documents must be:

1. Predecisional

and

2. Deliberative.

The Deliberative Process Privilege

Elements

Documents must be:

1. **PREDECISIONAL**

and

2. Deliberative.

The Deliberative Process Privilege

"Predecisional" Defined

Antecedent to the adoption of an agency policy.

The Deliberative Process Privilege

Identifying Decisionmaking Processes

- Decisionmaking process that promoted the creation of the withheld documents.
- Final agency decision is not required.

The Deliberative Process Privilege

Eligible Information

- Documents created by the decisionmaker
- Documents that do not end up being considered by the final decisionmaker.

The Deliberative Process Privilege

Postdecisional Documents

Postdecisional documents are not protected by the privilege.

The Deliberative Process Privilege

Postdecisional Documents

- Public has the right to be informed of official agency positions.
- What is postdecisional to one decision may be predecisional to a subsequent decision.

Losing Predecisional Status

Incorporation

&

Adoption

Incorporation

The decisionmaker expressly cites a previously predecisional document as the rationale for an agency's decision.

Adoption

A previously predecisional document comes to be used by the agency as the embodiment of agency policy.

Retaining Predecisional Status: No Express Approval

Adoption of a bottom-line recommendation in a document without expressly indicating approval of the rationale(s) for the recommendation.

The Deliberative Process Privilege

Elements

Documents must be:

1. Predecisional

and

2. **DELIBERATIVE**

The Deliberative Process Privilege

"Deliberative" Defined

Communications that are offered in support of the agency's decisionmaking process.

Deliberative Information

- Recommendations
- Proffered opinions (e.g. "I believe that," "In my opinion," etc.).

Examples of Deliberative Documents

- Briefing materials
- Drafts

The Deliberative Process Privilege

Duty to Segregate Factual Information

The deliberative process privilege only applies to deliberative portions of documents.

Duty to Segregate Factual Information

Agencies must segregate out and release factual portions of the responsive document(s).

The Deliberative Process Privilege

Duty to Segregate Factual Information

Identity of the author is normally not deliberative

The Deliberative Process Privilege

Duty to Segregate Factual Information

"inextricably intertwined"

The Deliberative Process Privilege

Duty to Segregate Factual Information

Process of selection and inclusion of factual material constitutes deliberation

The Deliberative Process Privilege

Duty to Segregate Factual Information

"elastic facts"

Applying the Deliberative Process Privilege in practice

The Attorney Work-Product Privilege

Protects documents that were:

1. Created by or at the direction of an attorney.

   And

2. Created in reasonable anticipation of litigation.

The Attorney Work-Product Privilege

Prepared by or at the direction of an attorney.

The Attorney Work-Product Privilege

In Reasonable Anticipation of Litigation

Though a specific claim need not have been actually filed, the privilege will not apply until an articulable claim likely to lead to litigation has arisen.

The Attorney Work-Product Privilege

Applies to documents created in:

- Civil and criminal litigation,
- Administrative proceedings,
- An effort to settle claims***
- Recommendations to close a case or to decline prosecution

The Attorney Work-Product Privilege

Does not cover documents created subsequent to the closing of a claim.

The Attorney Work-Product Privilege

The privilege does <u>not</u> apply to documents created in an agency's normal course of business

The Attorney Work-Product Privilege

A document must meet the criteria for the privilege <u>at the time of its creation</u> in order to be covered by the privilege.

The Attorney Work-Product Privilege

Agencies are <u>not</u> required to segregated factual material from documents covered by the privilege

The Attorney-Client Privilege

Confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice

The Attorney-Client Privilege

For privilege to apply, communications must be:

1. Between an attorney and client

<u>And</u>

2. Confidential

The Attorney–Client Privilege

Who is the "Client"?

- Upper-level, "control group" personnel, and
- Lower-level officials whose participation may be necessary in order to provide the attorney with the information they need in order to provide advice.

The Attorney-Client Privilege

"Confidential" Defined

Communications can be considered confidential when the specific information conveyed is confidential, even though the underlying subject matter is known to third parties.

The Attorney-Client Privilege

Protects confidential information supplied from client to attorney, as well as the attorney's advice based upon client supplied information.

The Attorney-Client Privilege

The attorney-client privilege is <u>not limited</u> to situations involving litigation.

The Attorney-Client Privilege

As with work-product, the attorney-client privilege applies to both factual and deliberative materials.

The Attorney-Client Privilege

Secret Law

An attorney-client document cannot be protected if it serves as an authoritative statement of agency law

The Attorney Work-Product & Attorney-Client Privileges

Applying the Attorney Work-Product and Attorney-Client Privileges

Exemption 5 and the Holder Memorandum

Discretionary Release

Exemption 5 is a permissive, and not a mandatory exemption

Apply foreseeable harm standard

Conclusion: The Rule of 2

Always remember that Exemption 5 has two parts:

1) Threshold
2) Applicable Privilege

Conclusion: The Rule of 3

Also, each of the three main privileges has two parts:

Conclusions: The Rule of 2

Deliberative process

1. Predecisional
2. Deliberative

Conclusion: The Rule of 2

Attorney work-product

1. By or at the direction of an attorney
2. In reasonable anticipation of litigation

Conclusion: The Rule of 2

Attorney-client

1. Communication between attorney and client
2. Confidential

Exemptions 6 & 7(C)

- Personal Privacy Information

Exemptions 6 & 7(C)

The FOIA provides two exemptions to protect personal privacy.

Exemptions 6 and 7(C) are the two most frequently used exemptions.

Exemptions 6 & 7(C)

The same analysis is used for both exemptions 6 and 7(C):

- **Step 1** – Threshold satisfied?
- **Step 2** – Privacy interest implicated?
- **Step 3** – "FOIA public interest" in disclosure?
- **Step 4** – Balancing interests.

Exemption 6 – 5 U.S.C. § 552(b)(6)

Applies to "personnel and medical files and similar files" when disclosure of such information "**would constitute a clearly unwarranted** invasion of personal privacy."

Exemption 7(C) – 5 U.S.C. § 552(b)(7)(C)

Applies to "records or information compiled for law enforcement purposes," the disclosure of which "**could reasonably be expected to constitute an unwarranted** invasion of personal privacy."

Compare Exemptions 6 & 7(C)

Privacy Exemption	Type of Record	Likelihood of Invasion	Type of Invasion
6	Personnel, medical, "similar"	**would** constitute	**clearly** unwarranted
7(C)	Law enforcement purposes	**could reasonably** constitute	unwarranted

Exemption 6 Threshold

"Personnel and medical files and similar files"

Q: What is a "similar file"?

A: Courts have found this prong satisfied where the information pertains to a particular individual.

Exemption 6 Threshold

A file can generally exist in any format.

Audio recordings, for example, can be similar files.

See N.Y. Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990)

Exemption 7(C) Threshold

"Records or information compiled for law enforcement purposes"

This includes records:

- **Created** by an agency pursuant to a law enforcement activity
- **Collected or recompiled** during the course of a law enforcement activity.

Privacy Interest

Privacy encompasses an "individual's control of information concerning his or her person."

Information does not need to be intimate or embarrassing to qualify for protection.

DOJ's Reporters Comm. for Freedom
Press, 489 U.S. 749, 760 (1989)

Privacy Interest

Privacy interests have been found in personally identifying information such as:

- name
- address
- phone number
- date of birth
- medical history
- social security number

Privacy Interest – Glomar Response

When a request seeks records concerning an **identifiable individual** and the records are of a **particularly sensitive nature**, it may be necessary to neither confirm nor deny the existence of the records, or "Glomarize."

If you are interested in learning more about the Glomar Response, that topic will be covered in the advanced course. Categorical denials will also be discussed in the advanced course.

What doesn't get protection?

Federal employees:

- Name
- Position titles and occupational series
- Grades
- Annual salary rates (performance awards and bonuses)
- Position descriptions and job elements
- Performance standards

Law Enforcement Caveat

What doesn't get protection?

<u>**Corporations**</u> have no privacy interests.

Exception: Small companies/sole proprietorships can take on the privacy interests of its members.

What doesn't get protection?

A deceased individual has greatly diminished personal privacy interests in the context of the FOIA.

Survivor Privacy: A deceased individual's survivors may have a privacy interest in preventing disclosure of certain information pertaining to the deceased.

NARA v. Favish: Surviving family members' right to personal privacy with respect to death-scene photos.

NY Times v. NASA: Final words of Space Shuttle Challenger astronauts withheld to protect privacy of family members.

Privacy Interest

Practical Obscurity:

The general rule is individuals have no privacy interest in information that has been previously disclosed **unless** the information has over time become "practically obscure."

- See DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989)

Internet

Privacy Interest

The passage of time does not diminish a privacy interest and may, in fact, enhance it.

Privacy Interest

Public figures may have a diminished privacy interest but they do not forfeit all of their privacy rights.

Politicians for example

FOIA Public Interest

Q: What is a FOIA public interest?

A: Disclosure of information that "sheds light on an agency's performance of its statutory duties."

DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)

Public, not Private Interest

A requester's identity or private need for the information is not given any weight in this determination.

FOIA Public Interest - Burden

The burden is on the **requester** to show how disclosure would shed light on the operations of an agency.

FOIA Public Interest - Nexus

The **public interest** must be served by the disclosure of the requested information.

What do I learn about the agency's operations by knowing an individual's personal information?

Official Misconduct

Often, requesters will state that disclosure will reveal agency wrongdoing.

Official Misconduct Standard: Requesters "must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred."

Official Misconduct

There is a **significant public interest** in substantiated allegations of official misconduct of a **serious & intentional nature** by **high-level officials**.

The lower the level of the employee, the less substantial the public interest.

FOIA Public Interest

In the absence of a **cognizable public interest**, the privacy interest will prevail in the balance.

"Something, even a modest privacy interest, outweighs nothing every time."

Nat'l Ass'n of Retired Fed. Employees v. Horn
F.2d 873, 879 (D.C. Cir. 1989)

Balance the Interests

If there is a privacy interest and a FOIA public interest in disclosure:

- Accord each interest a measure of value
- Balance them to determine which is greater

Factors To Consider In Balancing

Information concerning the intimate details of a person's life generally deserve protection.
The passage of time usually serves to increase the privacy interest.
Agency may consider any adverse consequences disclosure may have on the identified individual.
Proven allegations of official misconduct, constitute a significant public interest.
Identities of individuals in law enforcement records are virtually never "very probative of an agency's behavior or performance." SafeCard Services v. SEC.
Commonly used approach:

Redact personally identifying information and release remainder. This both protects privacy and reveals government activity
Examples:
Disciplinary records of cadets at service academy
Lists of drugs routinely ordered by congressional pharmacy
Database of medical tort claims filed
Patient studies
Drug reports of air traffic controllers
Balance can also lead to disclosure.

Examples:
Addresses of recipients of hurricane relief money
Higher-level agency officials found to have committed misconduct

Conclusion

- If privacy is not threatened by disclosure, 6 and 7(C) do not apply.
- If there is a privacy interest but no countervailing FOIA public interest in disclosure, withhold the record.
- If there is a privacy interest and a FOIA public interest, balance.

Next Up… Relativity!

- RELATIVITY Training Video
- (27:32)

Message

From: Walker, Denise [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B10D83A48A5E4AF7A9B1F01465330FF2-WALKER, DEN]
Sent: 5/4/2018 7:11:09 PM
To: OGC NFO FEAT [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=543b25c39eaa422b9f7bc3c6ff88d084-OGC FEAT]
Subject: Emailing: FOIA Not Reasonably Described Pruitt v EPA order 2013 .pdf
Attachments: FOIA Not Reasonably Described Pruitt v EPA order 2013 .pdf

Just in case you don't have it- A good one to know!

Note this language:

Second, in their FOIA request, plaintiffs seek "any and all documents" that "discuss or in any way relates to" the three categories in part (a) of the request. Based upon this broad, vague language, the Court finds that plaintiffs have not reasonably described the records sought. A professional employee of the EPA would have to try to determine whether the communications contained in the documents "discuss" or in any way "relates" to the three topics in part (a) of plaintiffs' FOIA request. "Indeed, since the requests asked for 'all' records that 'relate to' each subject area, they were inevitably subject to criticism as overbroad since life, like law, is a seamless web, and all documents 'relate' to all others in some remote fashion." Freedom Watch, 925 F. Supp. 2d at 61 (internal quotations and citation omitted).

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. CIV-13-726-M
	)	
ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Defendant.	)	

ORDER

Before the Court is defendant's Motion to Dismiss, filed September 17, 2013. On November 6, 2013, plaintiffs filed their response, and on November 25, 2013, defendant filed its reply.

I. Introduction

This is an action by the Attorneys General of twelve states[1] under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended. On February 6, 2013, plaintiffs submitted a two part FOIA request to defendant Environmental Protection Agency ("EPA").[2] In their request, plaintiffs sought the following:

---

[1]The States involved are Oklahoma, Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah, and Wyoming.

[2]Plaintiffs and South Dakota previously submitted to the EPA a FOIA request on August 10, 2012. In their first FOIA request, plaintiffs sought records concerning "the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act . . . , the Clean Water Act . . . ., or the Resource Conservation and Recovery Act. . ." related to the requesting States' State Implementation Plans under the Clean Air Act or administration of any provision of these federal environmental programs. In the first FOIA request, plaintiffs asked the EPA to search for records regarding this subject from 80 identified interested organizations. On August 21, 2012, the EPA denied plaintiffs' fee waiver request, and on September 14, 2012, the EPA found the first FOIA request was too broad and failed to describe adequately the records sought.

any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2009, to the date of this letter that discuss or in any way relates to:

(a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy ("**Other Organizations**"), concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("**CAA**"), 42 U.S.C. § 7604(a)(2);

ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("**SIP**") required to be submitted to the U.S. Environmental Protection Agency ("**EPA**") pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "**Subject**").

"**Interested Organizations**" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club

- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club
- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates
- Wyoming Outdoor Council
- Greater Yellowstone Coalition

(b) Copies of any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) sent or received by the following EPA offices:

i. the Office of the Administrator;
ii. the Office of Environmental Information;
iii. the Office of General Counsel;
iv. the Office of Inspector General;
v. the Office of International and Tribal Affairs;
vi. the Office of Research and Development;
vii. Region 1;
viii. Region 2;
ix. Region 3;
x. Region 4;
xi. Region 5;
xii. Region 6;
xiii. Region 7;
xiv. Region 8;
xv. Region 9; or
xvi. Region 10.

(including receipt by carbon copy or blind carbon copy), regarding the Subject including, but not limited to, documents sent by or received from individuals

> representing or employed by the Interested Organizations or Other Organizations.

February 6, 2013 FOIA request, attached as Exhibit 1 to plaintiffs' Complaint for Injunctive and Declaratory Relief, at 1-3.[3] Within their FOIA request, plaintiffs also sought a fee waiver from the EPA pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

On February 22, 2013, the EPA responded to plaintiffs' FOIA request by denying their fee waiver request for failure to meet the regulation's requirements for such a waiver. On March 15, 2013, plaintiffs appealed that decision. On May 31, 2013, the EPA responded to plaintiffs' appeal by determining that plaintiffs had not submitted a proper FOIA request, dismissing the appeal on that basis and finding the fee waiver issue moot.

On July 16, 2013, plaintiffs filed the instant action. Through this action, plaintiffs request the Court to order the EPA to immediately process their FOIA request, to conduct a thorough search for all responsive records, and to promptly disclose the requested records in their entirety and make copies available to plaintiffs and to enjoin the EPA from charging plaintiffs fees for the processing of their requests. The EPA now moves, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss this action.

---

[3]Plaintiffs state that they seek this information out of their concern with the EPA's practice of settling with non-governmental entities on environmental regulatory enforcement issues that directly affect the States. Plaintiffs assert that because they are not parties to these cases and/or settlements, they have no ability to meaningfully participate in crafting these legally binding agreements, most of which ultimately require the States to enforce significant regulatory matters in a certain way. Plaintiffs contend that this directly results in minimizing the substantive role of the States in many energy, land use, and environmental regulatory programs in a manner that is contrary to the cooperative federalism structure set forth in federal law and the United States Constitution.

II. Discussion

The EPA contends that this action should be dismissed because plaintiffs have not submitted a perfected FOIA request. Specifically, the EPA asserts that plaintiffs' document request does not comply with FOIA because it does not reasonably describe the records sought.

"An agency's obligations commence upon receipt of a valid request; failure to file a perfected request constitutes a failure to exhaust administrative remedies." *Dale v. Internal Revenue Serv.*, 238 F. Supp. 2d 99, 103 (D.D.C. 2002). "This exhaustion requirement is a . . . 'jurisprudential doctrine' rather than a jurisdictional prerequisite; therefore, if a plaintiff's administrative remedies have not been exhausted, the matter is properly the subject of a motion brought under Rule 12(b)(6) for failure to state a claim upon which relief can be granted." *Freedom Watch, Inc. v. Dep't of State*, 925 F. Supp. 2d 55, 60 (D.D.C. 2013) (internal quotations and citations omitted).

FOIA provides, in pertinent part:

> each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3)(A). Records are reasonably described if the description "enable[s] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978) (internal quotations and citation omitted). "Although courts have been wary to prohibit this requirement from becoming a loophole through which federal agencies can deny the public access to legitimate information, it has been held that broad, sweeping requests lacking specificity are not permissible." *Id.*

Having carefully reviewed the parties' submissions, and particularly having reviewed plaintiffs' FOIA request which was attached to plaintiffs' Complaint for Injunctive and Declaratory Relief, the Court finds that plaintiffs' FOIA request does not reasonably describe the records requested such that a professional employee of the EPA who is familiar with the subject area of the request is able to locate the records with a reasonable amount of effort. First, while plaintiffs define "Interested Organizations" as any one of a list of 17 organizations, plaintiffs also seek documents relating to any consideration, proposal or discussion with "any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy" ("Other Organizations") and documents regarding the Subject sent by or received from individuals representing or employed by Other Organizations. The inclusion of "Other Organizations" makes the FOIA request clearly overbroad and does not reasonably describe the records sought; it effectively reincorporates the list of 80 organizations submitted in plaintiffs' first FOIA request to the EPA, as well as potentially numerous other unnamed and amorphous other organizations. The Court finds that a professional employee making a reasonable effort would have no idea how to locate the records plaintiffs seek as plaintiffs' definition of "Other Organizations" would require the EPA to search for and determine the organizational mission of any non-governmental organization that may have communicated with the EPA regarding topics under the CAA.

Second, in their FOIA request, plaintiffs seek "any and all documents" that "discuss or in any way relates to" the three categories in part (a) of the request. Based upon this broad, vague language, the Court finds that plaintiffs have not reasonably described the records sought. A professional employee of the EPA would have to try to determine whether the communications

contained in the documents "discuss" or in any way "relates" to the three topics in part (a) of plaintiffs' FOIA request. "Indeed, since the requests asked for 'all' records that 'relate to' each subject area, they were inevitably subject to criticism as overbroad since life, like law, is a seamless web, and all documents 'relate' to all others in some remote fashion." *Freedom Watch*, 925 F. Supp. 2d at 61 (internal quotations and citation omitted).

Third, in their FOIA request, plaintiffs seek documents that discuss or in any way relate to any consideration, proposal, or discussions with any Interested Organization or Other Organizations concerning the scope and application of the EPA Administrator's non-discretionary duty to take "certain actions" under the CAA. The term "certain actions" is not defined or limited in any manner, and a professional EPA employee would be left to guess which of the hundreds of actions that the Administrator has a non-discretionary duty to perform plaintiffs are actually interested in and, thus, which documents are being sought through the FOIA request are not reasonably described.

Because plaintiffs' FOIA request does not reasonably describe the records requested, the Court finds that plaintiffs did not submit a valid FOIA request to the EPA. Further, because plaintiffs did not submit a valid FOIA request, the Court finds that plaintiffs failed to exhaust administrative remedies. Finally, because plaintiffs failed to exhaust administrative remedies, the Court finds that this action should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Although the Court has found that plaintiffs did not submit a valid FOIA request, the Court is making no determination regarding plaintiffs' ultimate entitlement to the documents they are seeking. The Court fully believes that if plaintiffs work with the EPA and the EPA works with plaintiffs, plaintiffs will be able to submit a FOIA request that reasonably describes the records

requested and that will not be burdensome on the EPA. The Court would further note that any lack of cooperation by either plaintiffs or the EPA will not be viewed favorably by this Court, or any other court, if any future FOIA request becomes the subject of litigation.

Finally, in their Complaint for Injunctive and Declaratory Relief, plaintiffs also challenge the EPA's denial of their fee waiver request. Because this Court has found that plaintiffs' FOIA request was not valid, the Court finds that the EPA's denial of plaintiffs' fee waiver request is now moot. Alternatively, because the EPA determined that plaintiffs' appeal of the denial of their fee waiver request was moot, the Court finds that plaintiffs have failed to exhaust their administrative remedies on this issue. The Court, therefore, finds that plaintiffs' claim regarding the denial of their fee waiver request should be dismissed.

III. Conclusion

Accordingly, for the reasons set forth above, the Court GRANTS the EPA's Motion to Dismiss [docket no. 18] and DISMISSES this action.

IT IS SO ORDERED this 18th day of December, 2013.

VICKI MILES-LaGRANGE
CHIEF UNITED STATES DISTRICT JUDGE

ED_002194_00000049-00008

Message

From: Rementer, Nicole [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8584CAFFEF2B4418B4E6430198C6355B-REMENTER, N]
Sent: 8/29/2018 2:07:15 PM
To: Clarke, Victoria [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Clarke, Victoria]
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

Nicole M. Rementer
Attorney-Adviser | FOIA Expert Assistance Team (FEAT)
U.S. Environmental Protection Agency | Office of General Counsel
7426NN WJCN | 202.564.3692

From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 10:05 AM
To: Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

Victoria Clarke
Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. | 7348 WJCN
EPA Office: 202-564-1149
EPA Cell: 202-336-9101

From: Rementer, Nicole
Sent: Wednesday, August 29, 2018 10:04 AM
To: Clarke, Victoria <clarke.victoria@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

Nicole M. Rementer
Attorney-Adviser | FOIA Expert Assistance Team (FEAT)
U.S. Environmental Protection Agency | Office of General Counsel
7426NN WJCN | 202.564.3692

From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 10:03 AM

To: Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

Victoria Clarke
Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. | 7348 WJCN
EPA Office: 202-564-1149
EPA Cell: 202-336-9101

From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 10:01 AM
To: Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

Victoria Clarke
Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. | 7348 WJCN
EPA Office: 202-564-1149
EPA Cell: 202-336-9101

From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 9:59 AM
To: Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

Victoria Clarke
Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. | 7348 WJCN
EPA Office: 202-564-1149
EPA Cell: 202-336-9101

From: Rementer, Nicole
Sent: Wednesday, August 29, 2018 9:58 AM
To: Clarke, Victoria <clarke.victoria@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Deliberative Process / Ex. 5

Nicole M. Rementer
Attorney-Adviser | FOIA Expert Assistance Team (FEAT)
U.S. Environmental Protection Agency | Office of General Counsel
7426NN WJCN | 202.564.3692

From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 9:57 AM
To: Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Ex. 5 - Deliberative Process | Attorney-Client

Victoria Clarke
Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. | 7348 WJCN
EPA Office: 202-564-1149
EPA Cell: 202-336-9101

From: Rementer, Nicole
Sent: Wednesday, August 29, 2018 9:54 AM
To: Clarke, Victoria <clarke.victoria@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

I'll flag this for Tim and cc you. Ex. 5 - Deliberative Process | Attorney-Client

Ex. 5 - Deliberative Process | Attorney-Client

Nicole M. Rementer
Attorney-Adviser | FOIA Expert Assistance Team (FEAT)
U.S. Environmental Protection Agency | Office of General Counsel
7426NN WJCN | 202.564.3692

From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 9:53 AM
To: Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Most likely, yes.

Victoria Clarke
Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. | 7348 WJCN
EPA Office: 202-564-1149
EPA Cell: 202-336-9101

From: Rementer, Nicole
Sent: Wednesday, August 29, 2018 9:52 AM
To: Clarke, Victoria <clarke.victoria@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

And this should go on the Hot Topics Agenda…

Nicole M. Rementer
Attorney-Adviser | FOIA Expert Assistance Team (FEAT)
U.S. Environmental Protection Agency | Office of General Counsel
7426NN WJCN | 202.564.3692

From: Clarke, Victoria
Sent: Wednesday, August 29, 2018 9:47 AM
To: Sandfoss, Kristina <Sandfoss.Kristina@epa.gov>; Rementer, Nicole <rementer.nicole@epa.gov>
Subject: RE: FOIA Assignment for EPA-HQ-2018-010843

Oh boy, how fun.

Victoria Clarke
Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. |7348 WJCN
EPA Office: 202-564-1149
EPA Cell: 202-336-9101

From: Sandfoss, Kristina
Sent: Wednesday, August 29, 2018 9:43 AM
To: Clarke, Victoria <clarke.victoria@epa.gov>; Rementer, Nicole <rementer.nicole@epa.gov>
Subject: FW: FOIA Assignment for EPA-HQ-2018-010843

Deliberative Process / Attorney-Client / Ex. 5

From: admin@foiaonline.gov [mailto:admin@foiaonline.gov]
Sent: Tuesday, August 28, 2018 7:03 PM
To: Sandfoss, Kristina <Sandfoss.Kristina@epa.gov>
Subject: FOIA Assignment for EPA-HQ-2018-010843

Your office has been assigned to the FOIA request - EPA-HQ-2018-010843. Additional details for this item are as follows:

- Tracking Number: EPA-HQ-2018-010843
- Requester: Austin R Evers
- Request Track: Simple
- Submitted Date: 08/22/2018
- Due Date: 09/26/2018

- Short Description: N/A
- Description: See attached. EPA-18-0447

Ex. 5 - Deliberative Process | Attorney-Client

Message

From: Walker, Denise [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B10D83A48A5E4AF7A9B1F01465330FF2-WALKER, DEN]
Sent: 3/28/2018 9:22:37 PM
To: OGC FEAT [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=543b25c39eaa422b9f7bc3c6ff88d084-OGC FEAT]
Subject: FW: Pruitt Order- FOIA not reasonably described
Attachments: FOIA Not Reasonably Described Pruitt v EPA order 2013 .pdf; FOIA unreasonable review Vietnam Vets v. DHS 03312014.pdf

A good one to keep on hand…

Denise A. Walker
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. | 7308A WJCN
Office: 202-564-6520
EPA Cell: 202-816-9872

Have a FOIA question? Try here first!

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. CIV-13-726-M
	)	
ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Defendant.	)	

ORDER

Before the Court is defendant's Motion to Dismiss, filed September 17, 2013. On November 6, 2013, plaintiffs filed their response, and on November 25, 2013, defendant filed its reply.

I. Introduction

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[1]The States involved are Oklahoma, Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah, and Wyoming.

[2]Plaintiffs and South Dakota previously submitted to the EPA a FOIA request on August 10, 2012. In their first FOIA request, plaintiffs sought records concerning "the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act . . . , the Clean Water Act . . . ., or the Resource Conservation and Recovery Act. . ." related to the requesting States' State Implementation Plans under the Clean Air Act or administration of any provision of these federal environmental programs. In the first FOIA request, plaintiffs asked the EPA to search for records regarding this subject from 80 identified interested organizations. On August 21, 2012, the EPA denied plaintiffs' fee waiver request, and on September 14, 2012, the EPA found the first FOIA request was too broad and failed to describe adequately the records sought.

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- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
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- Our Children's Earth Foundation
- Plains Justice
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- Environmental Defense Fund
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- Natural Resources Defense Council
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- Greater Yellowstone Coalition

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iii. the Office of General Counsel;
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vii. Region 1;
viii. Region 2;
ix. Region 3;
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February 6, 2013 FOIA request, attached as Exhibit 1 to plaintiffs' Complaint for Injunctive and Declaratory Relief, at 1-3.[3] Within their FOIA request, plaintiffs also sought a fee waiver from the EPA pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

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The EPA contends that this action should be dismissed because plaintiffs have not submitted a perfected FOIA request. Specifically, the EPA asserts that plaintiffs' document request does not comply with FOIA because it does not reasonably describe the records sought.

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> each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3)(A). Records are reasonably described if the description "enable[s] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978) (internal quotations and citation omitted). "Although courts have been wary to prohibit this requirement from becoming a loophole through which federal agencies can deny the public access to legitimate information, it has been held that broad, sweeping requests lacking specificity are not permissible." *Id.*

Having carefully reviewed the parties' submissions, and particularly having reviewed plaintiffs' FOIA request which was attached to plaintiffs' Complaint for Injunctive and Declaratory Relief, the Court finds that plaintiffs' FOIA request does not reasonably describe the records requested such that a professional employee of the EPA who is familiar with the subject area of the request is able to locate the records with a reasonable amount of effort. First, while plaintiffs define "Interested Organizations" as any one of a list of 17 organizations, plaintiffs also seek documents relating to any consideration, proposal or discussion with "any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy" ("Other Organizations") and documents regarding the Subject sent by or received from individuals representing or employed by Other Organizations. The inclusion of "Other Organizations" makes the FOIA request clearly overbroad and does not reasonably describe the records sought; it effectively reincorporates the list of 80 organizations submitted in plaintiffs' first FOIA request to the EPA, as well as potentially numerous other unnamed and amorphous other organizations. The Court finds that a professional employee making a reasonable effort would have no idea how to locate the records plaintiffs seek as plaintiffs' definition of "Other Organizations" would require the EPA to search for and determine the organizational mission of any non-governmental organization that may have communicated with the EPA regarding topics under the CAA.

Second, in their FOIA request, plaintiffs seek "any and all documents" that "discuss or in any way relates to" the three categories in part (a) of the request. Based upon this broad, vague language, the Court finds that plaintiffs have not reasonably described the records sought. A professional employee of the EPA would have to try to determine whether the communications

contained in the documents "discuss" or in any way "relates" to the three topics in part (a) of plaintiffs' FOIA request. "Indeed, since the requests asked for 'all' records that 'relate to' each subject area, they were inevitably subject to criticism as overbroad since life, like law, is a seamless web, and all documents 'relate' to all others in some remote fashion." *Freedom Watch*, 925 F. Supp. 2d at 61 (internal quotations and citation omitted).

Third, in their FOIA request, plaintiffs seek documents that discuss or in any way relate to any consideration, proposal, or discussions with any Interested Organization or Other Organizations concerning the scope and application of the EPA Administrator's non-discretionary duty to take "certain actions" under the CAA. The term "certain actions" is not defined or limited in any manner, and a professional EPA employee would be left to guess which of the hundreds of actions that the Administrator has a non-discretionary duty to perform plaintiffs are actually interested in and, thus, which documents are being sought through the FOIA request are not reasonably described.

Because plaintiffs' FOIA request does not reasonably describe the records requested, the Court finds that plaintiffs did not submit a valid FOIA request to the EPA. Further, because plaintiffs did not submit a valid FOIA request, the Court finds that plaintiffs failed to exhaust administrative remedies. Finally, because plaintiffs failed to exhaust administrative remedies, the Court finds that this action should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Although the Court has found that plaintiffs did not submit a valid FOIA request, the Court is making no determination regarding plaintiffs' ultimate entitlement to the documents they are seeking. The Court fully believes that if plaintiffs work with the EPA and the EPA works with plaintiffs, plaintiffs will be able to submit a FOIA request that reasonably describes the records

requested and that will not be burdensome on the EPA. The Court would further note that any lack of cooperation by either plaintiffs or the EPA will not be viewed favorably by this Court, or any other court, if any future FOIA request becomes the subject of litigation.

Finally, in their Complaint for Injunctive and Declaratory Relief, plaintiffs also challenge the EPA's denial of their fee waiver request. Because this Court has found that plaintiffs' FOIA request was not valid, the Court finds that the EPA's denial of plaintiffs' fee waiver request is now moot. Alternatively, because the EPA determined that plaintiffs' appeal of the denial of their fee waiver request was moot, the Court finds that plaintiffs have failed to exhaust their administrative remedies on this issue. The Court, therefore, finds that plaintiffs' claim regarding the denial of their fee waiver request should be dismissed.

III. Conclusion

Accordingly, for the reasons set forth above, the Court GRANTS the EPA's Motion to Dismiss [docket no. 18] and DISMISSES this action.

IT IS SO ORDERED this 18th day of December, 2013.

VICKI MILES-LaGRANGE
CHIEF UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VIETNAM VETERANS OF AMERICA CONNECTICUT GREATER HARTFORD CHAPTER 120, VIETNAM VETERANS OF AMERICA, VIETNAM VETERANS OF AMERICA SOUTHERN CONNECTICUT CHAPTER 251, VIETNAM VETERANS OF AMERICA CONNECTICUT CHAPTER 270, AND VIETNAM VETERANS OF AMERICA CONNECTICUT STATE COUNCIL,	
Plaintiffs,	
v.	Civil No. 3:10CV1972(AWT)
DEPARTMENT OF HOMELAND SECURITY, VETERAN'S AFFAIRS, AND DEPARTMENT OF DEFENSE,	
Defendants.	

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This action is brought by the Vietnam Veterans of America ("VVA") Connecticut Greater Hartford Chapter 120, Vietnam Veterans of America, Vietnam Veterans of America Southern Connecticut Chapter 251, Vietnam Veterans of America Connecticut Chapter 270, and Vietnam Veterans of America Connecticut State Council against defendants United States Department of Defense (the "DoD") and its components Department of the Army, Department of the Navy and Department of the Air Force and its subcomponents the United States Marine Corps, the National Guard

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Bureau, the Army National Guard, and the Air National Guard; the United States Department of Homeland Security ("the DHS") and its component, the United States Coast Guard;[1] and the United States Department of Veterans Affairs ("VA") and its components, the Veterans Health Administration and the Veterans Benefits Administration, alleging violations of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

The Amended Complaint seeks declaratory and injunctive relief compelling the disclosure and release of agency records. Specifically, the plaintiffs request the release of records beginning in October 1, 2001 regarding the defendants' use of personality disorder discharges when separating service members from the armed forces. The defendants have moved for summary judgment. For the reasons set forth below, the motion is being granted in part and denied in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

In late October 2010, the plaintiffs sent FOIA requests to: the DoD and seven DoD components: the Army, the Navy, the Air Force, the Marine Corps, the National Guard Bureau, the Army National Guard, and the Air National Guard; the Coast Guard (a component of the DHS); and two components of the VA, the Veterans Health Administration and the Veterans Benefits

[1] After the motion for summary judgment was filed, the plaintiffs filed a stipulation of dismissal with prejudice with respect to their claims against the Department of Homeland Security and its component, the United States Coast Guard.

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Administration. The FOIA request letters requested "all records related to the use by branches of the United States Armed Forces of personality disorder discharges and adjustment disorder discharges to separate members of the Armed Forces from service since October 1, 2001."[2] (Am. Compl. Ex. A (Doc. No. 22) at 1; Am. Compl. Ex. C (Doc. No. 24) at 1). The letters also provided a non-exclusive list of the types of records the plaintiffs were interested in. In each of the requests, the plaintiffs agreed to pay search, duplication and review fees up to $100, but sought a fee waiver or reduction of any amount greater than $100.

By letters dated February 21, 2011, plaintiff VVA Chapter 270 sent nine additional FOIA requests to the DoD, its seven components, and the Coast Guard. The requests were identical in substance to the October 2010 requests submitted to the same components. Additionally, by letters dated March 7, 2011, plaintiffs VVA Chapter 251 and VVA Connecticut State Council sent another nine FOIA requests to DoD, its seven components, and the Coast Guard. These requests were identical in substance to the October 2010 and February 2011 requests.

On December 15, 2010 the plaintiffs filed suit alleging that the defendants violated FOIA by failing to provide documents responsive to the plaintiffs' requests and seeking to

[2] The request letter to the United States Coast Guard substituted "Coast Guard" for "Armed Forces." (Am. Compl. Ex. B (Doc. No. 23) at 1).

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compel the release of such documents. Subsequent to the filing of the complaint, the defendants conducted searches for responsive documents and produced to the plaintiffs the documents they found. The plaintiffs contend, however, that the searches and the defendants' declarations with respect to their searches are inadequate.

After this litigation was commenced, the plaintiffs expressed to the defendants that their initial FOIA requests included not just aggregate data and policy documents, as the DoD and the Coast Guard had construed the requests, but also the personnel records (hereinafter "separation packets") of all of the service members discharged on the basis of a personality disorder since October 1, 2001.[3] The defendants expressed skepticism as to the plaintiffs' position, so on April 4, 2011 the plaintiffs sent letters to the DoD and the Coast Guard in an attempt to eliminate any question as to the scope of their initial requests. After sending the April 4, 2011 request letters, the plaintiffs' counsel and the defendants' counsel discussed how they would proceed with the new requests. The parties discussed the fact that the documents that the defendants were scheduled to release in May 2011 might

[3] The plaintiffs also sought individual VA files for the same service members (hereinafter the "claims files"). The Veterans Benefits Administration concluded that the individual veterans' claims files would be responsive to the plaintiffs' request, but determined that the files were exempt from disclosure and therefore could not be released.

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sufficiently address the issues that the plaintiffs were interested in and thereby obviate the need for the individual separation packets. Therefore, the parties agreed that the plaintiffs would review the documents the defendants were scheduled to release in May 2011 and then determine how they wanted to proceed with respect to the separation packets.

The plaintiffs received the majority of the responsive documents on June 2, 2011. The plaintiffs also received "a handful of additional records [that] have been discovered and released as a result of supplemental searches." (Local Rule 56(a)(1) Stmt. ¶ 10). The documents the plaintiffs received total more than 1,300 pages, and the defendants directed the plaintiffs to additional documents that were already publicly available. The defendants withheld one document, an email between a staff judge and his Air Force clients, pursuant to FOIA Exemptions 5 and 6. The Air Force also redacted the names and contact information of individuals "below the SES-level or military equivalent" pursuant to Exemption 6. (Local Rule 56(a)(1) Stmt. ¶ 11).

After reviewing the documents, the plaintiffs' counsel informed the defendants' counsel that the plaintiffs still sought the individual separation packets. The defendants agreed to provide the plaintiffs with several sample separation packets in order to help the plaintiffs narrow their requests. Sample

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separation packets from the Army, Navy and Marines were provided to the plaintiffs on July 29, 2011. At the plaintiffs' request, another sample separation packet from the Navy was provided on September 14, 2011, and some additional documents from the sample service members' personnel files provided by the Marines and the Army were released to the plaintiffs on September 16, 2011 and October 21, 2011, respectively. The defendants redacted certain information from the packets, invoking FOIA Exemption 6.

Based on the sample separation packets they received, the plaintiffs told the defendants that they would "narrow their request to a small, randomized sample of approximately 1,624 individual files." (Local Rule 56(a)(2) Stmt. ¶ 21). The plaintiffs also stated their willingness to narrow their requests for the VA claims files.

II. LEGAL STANDARD

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(a). See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223 (2d Cir. 1994). On a motion for summary judgment in a FOIA action, "the defending agency has the burden

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of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994) (citing 5 U.S.C. § 552(a)(4)(B); EPA v. Mink, 410 U.S. 73, 79 (1973)). To satisfy that burden, the agency may rely on "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and [explaining in reasonable detail] why any withheld documents fall within an exemption." Id.

To establish the adequacy of a search, an agency affidavit or declaration must be "relatively detailed and non-conclusory" and "submitted in good faith." SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (quotation marks omitted); see also Wood v. FBI, 432 F.3d 78, 85 (2d Cir. 2005). This means, for instance, that an agency affidavit or declaration must describe in reasonable detail the scope of the search and the search terms or methods employed. See, e.g., Maynard v. CIA, 986 F.2d 547, 559 (1st Cir. 1993); N.Y. Times Co. v. U.S. Dep't of Def., 499 F. Supp. 2d 501, 518 (S.D.N.Y. 2007). Because "[a]ffidavits submitted by an agency are accorded a presumption of good faith[,] . . . discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are

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adequate on their face." Carney, 19 F.3d at 812 (quotation marks omitted).

III. DISCUSSION

A. Individual Service Member Files

The plaintiffs argue that the searches conducted by the DoD, its components, and the Veterans Health Administration are facially inadequate because the agencies did not construe the plaintiffs' requests to include individual service member files.

1. Department of Defense Separation Packets

The DoD argues that the plaintiffs' original requests did not encompass the individual separation packets and that it was reasonable for the DOD and its components to interpret the requests as seeking only aggregate data. The defendants argue, in the alternative, that if the requests did include the separation packets, the request is unduly burdensome.

"[A]n agency is obligated to construe a FOIA request liberally." Servicemembers Legal Defense Network v. Dep't of Defense and Dep't of Justice, 471 F. Supp. 2d 78, 86 (D.D.C. 2007). "When the request demands all agency records on a given subject then the agency is obliged to pursue any 'clear and certain' lead it cannot in good faith ignore." Halpern v. F.B.I., 181 F.3d 279, 288 (2d Cir. 1999) (quoting Kowalczyk v. Dep't of Justice, 73 F.3d 386, 389 (D.C. Cir. 1996)).

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Here, the plaintiffs' FOIA request letters contain an introductory paragraph which is followed by a non-exhaustive list of specific types of information they seek. In the last sentence in the introductory paragraph, the plaintiffs state, "This letter requests all records related to the use by branches of the United States Armed Forces of personality disorder discharges and adjustment disorder and/or readjustment disorder discharges to separate members of the Armed Forces from service since October 1, 2001." (Am. Compl. Ex. A at 1 (emphasis added); Am. Compl. Ex. C at 1 (emphasis added)). The letters define "records" as "all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies." (Am. Compl. Ex. A at 1 n.1; Am. Compl. Ex. C at 1 n.1). Although many of the specifically enumerated items refer to aggregate data and policies, the last sentence of the introductory paragraph makes it clear that the plaintiffs are seeking all records related to the use of personality disorder and adjustment disorder discharges to separate service members. See Serv. Women's Action Network v. Dep't of Defense ("SWAN I"),

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888 F. Supp. 2d 231, 242 (D. Conn. 2012) ("The fact that every other request -- in both the DoD and VA FOIA letters -- appears to ask for aggregate data does not mean that [one specific request] may not ask for individual data. It may explain why Defendants misread the request, but it is disingenuous for Defendants to now attempt to argue that this [request] never asked for 'all records.'"). The individual separation packets for members who were separated for such reasons fall squarely within the documents requested in the plaintiffs' FOIA letters.

However, "an agency need not respond to a request that is so broad as to impose an unreasonable burden upon the agency, such as one which requires the agency to locate, review, redact, and arrange for inspection a vast quantity of material." Serv. Women's Action Network v. Dep't of Defense ("SWAN II"), 888 F. Supp. 2d 282, 290 (D. Conn. 2012) (internal quotation marks omitted); see also Halpern, 181 F.3d at 288 ("[A]n agency need not conduct a search that plainly is unduly burdensome.").

The defendants estimate that there exist approximately 26,000 individual separation packets. The plaintiffs believe that the number is closer to 31,000. The defendants state that the separation packets contain personally identifying information and would therefore have to be heavily redacted before they could be released to the plaintiffs. Using the more conservative figure of 26,000 and assuming that the average

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separation packet contains 50 pages, the defendants estimate that it would take approximately 27 years and cost $571,912 in search fees and $194,985 in duplication fees to search for and produce the individual separation packets at a rate of 80 packets per month. (Herrington Decl. (Doc. No. 37-20) ¶¶ 23, 24).

The plaintiffs do not contest the time and cost estimates or dispute that searching for and producing all of the individual separation packets would be unduly burdensome. Rather, the plaintiffs state that they have indicated their willingness to narrow their request to a representative sample of the separation packets and that the narrowed request is not unduly burdensome. In the context of settlement negotiations, the plaintiffs initially offered to accept a sample of 8% of personality disorder separation packets. The plaintiffs then revised their offer to accept approximately 5.64% of personality disorder separation packets, which would constitute approximately 1,624 individual separation packets. In their opposition memorandum, although the plaintiffs do not state what percentage of adjustment disorder separation packets they would seek, they state that they are "willing to narrow their request." (Pls.' Mem. Opp. Mot. Summ. J. (Doc. No. 42) at 10).

The defendants argue, and the court agrees, that the court should not consider whether the plaintiffs' proposed narrowed

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search would be unduly burdensome. Under FOIA, requesters may modify their requests after submission. See 5 U.S.C. § 552(a)(6)(B)(ii) ("The agency shall . . . provide the person an opportunity to limit the scope of the request."). However, "no statute requires a court to allow FOIA modifications during the course of litigation." Serv. Women's Action Network v. Dep't of Defense ("SWAN III"), No. 3:11-CV-1534(SRU), 2013 WL 1149946, at *3 (D. Conn. Mar. 19, 2013). Thus, it is proper for the court to rule on "the only request actually before [it]." Id. at *4; see also Wilson v. U.S. Dep't of Transp., 730 F. Supp. 2d 140, 155 (D.D.C. 2010) ("[A]n agency need only conduct a search as to the original request, and not to subsequent additions or clarifications.").

The record here does not contain information sufficient for the court to assess the reasonableness of the narrowed search that the plaintiffs propose. While the plaintiffs have proposed to accept approximately 5.64% of personality disorder separation packets, they have not identified the scope of their request for adjustment disorder separation packets. Without knowing what the request is, the court cannot determine if it is a reasonable one. More importantly, the DoD and its components have not made an administrative determination as to whether they would grant the plaintiffs' narrowed request for separation packets and whether the plaintiffs' narrowed request is unduly burdensome.

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Ruling on the reasonableness of the scope of the narrowed request would allow an end-run around the requirement that FOIA requesters exhaust their administrative remedies. See Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 61 (D.C. Cir. 1990) ("Exhaustion of administrative remedies is generally required before filing suit in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision.").

Because the court can only consider the request actually before it -- here, the request for all of the individual service members' separation packets -- the court concludes that the plaintiffs' original request would have imposed an unreasonable burden on the defendants, and therefore they are not required to respond. See Am. Fed'n of Gov't Emps., Local 2782 v. U.S. Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) ("An agency need not honor a request that requires an unreasonably burdensome search.").

2. Veterans Administration Files

With respect to the VA files, the defendant argues that the plaintiffs' request for the individual files is unduly burdensome.[4] The defendants state that the plaintiffs' request would require the Veterans Benefits Administration (the "VBA")

[4] The court notes that as with the DoD, the Veterans Health Administration (the "VHA") did not construe the plaintiffs' request to include individual files.

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to search through approximately 797,050 files located at 67 different facilities. The search for the documents itself would take approximately 890,000 hours and cost $35,284,730. The labor required to redact and duplicate the identified documents would take approximately 600,320 hours and cost $16,568,832. The estimated duplication fees would total approximately $1,125,000. Searching for and duplicating the individual files at the VHA would involve a process similar to that at the VBA. The VHA estimates that the process would take approximately 4,000,000 hours.

As with the DoD separation packets, the plaintiffs do not contest the time and cost estimates or dispute that searching for and producing all of the claims files would be unduly burdensome. The plaintiffs instead say that they are willing to narrow the scope of their request so that it is not unduly burdensome. However, it is apparent from the plaintiffs' opposition memorandum that their offer to narrow the scope of their request to the VA was not made prior to the commencement of this litigation. The plaintiffs state that they "hereby narrow their request for all VBA claims files and VHA application files to a sample of these files that correlates with the sample of [personality disorder] and [adjustment disorder] separation packets requested from DoD and its military components." (Pls.' Mem. Opp. Mot. Summ. J. at 15). The

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plaintiffs then state that, alternatively, they would be willing to accept aggregate data from the VA.

For the reasons set forth above with respect to the separation packets, the court cannot consider the plaintiffs' proposed narrowed search, especially where the proposal is made for the first time in the plaintiffs' memorandum in opposition to the motion for summary judgment. The court can only consider the request that was actually made to the VA. Because the original request made by the plaintiffs was unduly burdensome,[5] the VA is not required to respond.

B. Search and Duplication Fees

In their opposition to the motion for summary judgment, the plaintiffs' state that the "[d]efendants have unlawfully charged search and duplication fees." (Pls.' Mem. Opp. Mot. Summ. J. at 19). While the plaintiffs' memorandum is unclear as to which defendants have charged search and duplication fees and for which records, it appears that the plaintiffs are referring to the individual service member files discussed in Section III.A, above. Because the court has determined that the plaintiffs'

[5] The parties' memoranda discuss whether the VA properly invoked FOIA Exemptions 3 and 6 with respect to the VA claims files. The VA determined that it could not release the claims files at all because they are exempted by FOIA. The plaintiffs argue that the entire files are not exempt, but that instead information within the files is exempt. Therefore, they seek heavily redacted copies of the claims files. However, because the court finds that the search, duplication and redaction of the VA claims files would be unduly burdensome and therefore that the defendant does not need to respond, the court need not address the application of Exemptions 3 and 6 to the claims files.

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requests for the individual service member files are unduly burdensome and the defendants were not required to respond, the issue of whether search and duplication fees may be assessed is moot.

C. Adequacy of Agency Searches

The defendants have moved for summary judgment on the adequacy of the searches that each agency undertook in responding to the plaintiffs' FOIA requests. The plaintiffs argue that the defendants have not met their burden of showing that the searches were adequate and object to the declarations submitted in support of the searches.[6]

FOIA mandates that in responding to "a request for records, an agency shall make reasonable efforts to search for the records . . . ." 5 U.S.C. § 552(a)(3)(C). To prevail on summary judgment when the adequacy of an agency's search is at issue, "the defending agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." Morley v. CIA, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (internal quotations omitted). "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." Weisberg v. U.S.

[6] The plaintiffs' objections are voluminous, and the court does not address each and every objection the plaintiffs raise with respect to every declaration and search.

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Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (emphasis in original). The adequacy of the agency's search is judged by a standard of reasonableness. See Grand Cent. P'Ship, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) ("[A]n agency's search need not be perfect, but rather need only be reasonable.").

"In adjudicating the adequacy of the agency's identification and retrieval efforts, the trial court may be warranted in relying upon agency affidavits." Morley, 508 F.3d at 1116. "The Second Circuit has adopted the D.C. Circuit position that such reliance is only appropriate, however, when agency affidavits are relatively detailed and nonconclusory, and submitted in good faith." El Badrawi v. Dep't of Homeland Sec., 583 F. Supp. 2d 285, 298 (D. Conn. 2008) (citing Grand Cent. P'Ship, 166 F.3d at 488-89) (internal quotation marks omitted). Thus, "[a] district court in a FOIA case may grant summary judgment in favor of an agency on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." Grand Cent. P'Ship, 166 F.3d at 478 (emphasis in original) (internal quotation marks omitted).

In reviewing affidavits for "reasonable specificity," district courts will look for an affidavit to "set[] forth the search terms and the type of search performed, and aver[] that

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all files likely to contain responsive materials (if such records exist) were searched . . . ." Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990). Additionally, an "affidavit[] should identify the searched files and describe at least generally the structure of the agency's file system which renders any further search unlikely to disclose additional relevant information." El Badrawi, 583 F. Supp. 2d at 298 (internal quotation marks omitted). An agency need not describe all of its file systems, but instead "an adequate description need only provide reasonable detail about the parameters and execution of an agency's search and aver that all files likely to contain responsive material were searched." SWAN I, 888 F. Supp. 2d 231, 245 (D. Conn. 2012).

"Affidavits submitted by an agency are accorded a presumption of good faith." Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994). Thus, if agency submissions are adequate on their face, "the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations." Id.

"An affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to satisfy Rule 56(e); there is no need for the agency to supply affidavits from each individual who participated in the actual search." Id. at 814. However, "the agency employee submitting an affidavit must

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have some personal involvement in supervising the FOIA search." El Badrawi, 583 F. Supp. 2d at 298.

"If agency affidavits fail to meet standards, a "district court will have a number of options for eliciting further detail from the government. It may require supplemental . . . affidavits or may permit appellant further discovery." Halpern, 181 F.3d at 295. "When the courts have permitted discovery in FOIA cases, it is generally limited to the scope of the agency's search." El Badrawi, 583 F. Supp. 2d at 301. Further, courts have consistently held that "a court should not, of course, cut off discovery before a proper record has been developed; for example, where the agency's response raises serious doubts as to the completeness of the agency's search, where the agency's response is patently incomplete, or where the agency's response is for some other reason unsatisfactory." Exxon Corp. v. FTC, 466 F. Supp. 1088, 1094 (D.D.C. 1978).

1. Department of Defense

In support of its motion for summary judgment, the DoD submitted the declarations of William Kammer ("Kammer"), Chief, Office of Freedom of Information Division; Michael Pachuta ("Pachuta"), Deputy Director for Policy, Officer & Enlisted Personnel Management, Office of the Deputy Assistant Secretary of Defense for Military Personnel Policy; Samuel Peterson ("Peterson"), Freedom of Information Act and Privacy Act

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Specialist for the Defense Manpower Data Center; Linda Thomas[7] ("Thomas"), Director, Tricare Management Activity Privacy and Civil Liberties Office; and Robert Welch ("Welch"), Executive Officer and Chief of Staff for the Armed Forces Health Surveillance Center.

After receiving the plaintiffs' request, the Freedom of Information Division at the DoD "tasked" the Defense Manpower Data Center ("DMDC"), the Office of the Undersecretary of Defense for Personnel and Readiness ("OUSD (P&R)"), the Office of the Secretary of Defense and the Office of the Chairman of the Joint Chiefs of Staff to conduct a search for responsive records. The Office of the Assistant Secretary of Defense for Health Affairs ("OASD (HA)") was later tasked to conduct a search as well. The offices were chosen based on the nature of the work performed by the agency.

The DMDC maintains "the largest and most comprehensive central archive of personnel, manpower, casualty, pay, entitlements, procurement, survey, testing, training and financial data in the DoD." (Kammer Decl. (Doc. No. 37-3) ¶ 5). DMDC informed the Freedom of Information Division that it only maintained documents responsive to Items 1 and 2 of the

[7] The person who originally processed the request passed away prior to drafting a declaration describing her search. While Thomas was not present at the time the search was completed, she "reviewed the administrative record, including the request, requests for search among various offices, and their responses, and [was] briefed by the staff who conducted the search." (Thomas Decl. (Doc. No. 45-12) ¶ 2).

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plaintiffs' request. After determining how separations for personality disorder were coded in DMDC's files, DMDC searched "its Active Duty Military Personnel Transaction File, Reserve Components Common Personnel Data System Transaction File, and Contingency Tracking System File" for separations based on personality disorder. (Samuel Peterson Decl. (Doc. No. 37-5) ¶ 12).

The declarations submitted by Kammer and Peterson are insufficient to show that DMDC conducted an adequate search. The declarations do not describe DMDC's filing system, but instead only list the files that DMDC searched. Kammer and Peterson do not state why those files were selected to be searched at the exclusion of others. Additionally, Peterson does not describe how the search of DMDC's files was conducted. While he explains the process whereby DMDC determined which search terms to use, he does not state which search terms ultimately were used. Thus, the court is unable to determine whether the search conducted by DMDC was adequate.

The OUSD (P&R) "develops policies, plans, and programs to ensure the readiness of the Total Force as well as the efficient and effective support of peacetime operations and contingency planning preparedness." (Kammer Decl. ¶ 7). Pachuta conducted a physical search of office administrative files for documents responsive to the plaintiffs' request. He also conducted a

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search for electronically stored files. Pachuta describes that the OUSD (P&R) has an "electronic file system on a shared drive that maintains folders on the various military personnel policy subjects administered by the office." (Pachuta Supp. Decl. (Doc. No. 45-11) ¶ 1). He searched the Separations Policy folder and the Hearing Preparation folder using the key words "personality disorder," "adjustment disorder" and "readjustment disorder." He also used the same key words to search the Office of the Secretary of Defense Staff Action Correspondence Control Portal, which contains electronic files of all staff actions since 2007 by offices within the Office of the Secretary of Defense.

The declarations provided by Kammer and Pachuta do not adequately describe OUSD (P&R)'s search to show that it was reasonably calculated to find all responsive documents. While Pachuta describes that OUSD (P&R) maintains an electronic file system, he does not explain why he searched only two folders on the shared drive for responsive documents. Additionally, he refers to the Secretary of Defense Staff Action Correspondence Control Portal as containing files of all staff actions, but he does not describe what he means by "staff actions" or what types of documents could be expected to be found in the Portal. Thus, the declarations do not show that OUSD (P&R)'s search was adequate.

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The OASD (HA) "oversees the DoD Military Health System, a global medical network within the DoD that provides healthcare to all U.S. military personnel worldwide." (Kammer Decl. ¶ 11). Thomas states Health Affairs ("HA") and Tricare Management Activity ("TMA") "are logical places to search." (Thomas Decl. ¶ 4). TMA and HA contain have databases, but they were not searched because neither database maintains military discharge status. Additionally, it was determined that DMDC could produce more comprehensive results, and therefore HA and TMA "were not the agencies of record for the requested records." (Thomas Decl. ¶ 5).

OASD (HA) also "tasked" the Office of Chief Medical Officer and the Office of Deputy Assistant Secretary for Force Health Protection and Readiness ("FHP&R") to search for records responsive to the plaintiffs' request. The Deputy Chief Medical Officer at the Office of Chief Medical Officer reported that based on his personal knowledge of the office, the office did not contain responsive records. However, the Deputy Chief Medical Officer suggested that searches be conducted at the Deputy Under Secretary of Defense, Military Personnel Policy and the OUSD (P&R)[8]. FHP&R searched three of its subordinate offices most likely to contain responsive records: the Armed Forces Medical Health Surveillance Center; the Defense Center of

[8] The search of this office is discussed above.

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Excellence for Psychological Health and Traumatic Brain Injury; and the Office of Psychological Health Strategic Operations.

The Armed Forces Medical Health Surveillance Center "is the central epidemiological health resource for the U.S. Military." (Welch Decl. (Doc. No. 45-13) ¶ 3). The center maintains the Defense Medical Surveillance System, which contains "up-to-date and historical data on recorded health diagnoses . . . and experiences of Service members throughout their military careers." (Welch Decl. ¶ 3). The center informed the plaintiffs that it was unable to respond to their request because the "data maintained in the [Defense Medical Surveillance System] do not include separation records nor contain details on the reasons Service members are separated from the military." (Welch Decl. ¶ 7).

The Defense Center of Excellence for Psychological Health and Traumatic Brain Injury reviewed its database for responsive information. It also reviewed the Armed Forces Health Longitudinal Applications system. However, "it was determined that these databases lacked the necessary data elements, chiefly, their database does not include discharge status." (Thomas Decl. ¶ 8). The center suggested that the FHP&R front office be searched. However, the front office "declined to search" based on their "knowledge of their mission functions and associated sets of records." (Thomas Decl. ¶ 8).

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Despite the fact that the Office of Psychological Health Strategic Operations was identified as one of the three FHP&R offices most likely to have responsive records, Thomas states that the office "would not have been tasked to search . . . based on the FHP&R front office referral to [the Office of Chief Medical Officer]." (Thomas Decl. ¶ 8).

The court finds that the declarations submitted in support of OASD (HA)'s searches are insufficient to show that OASD (HA) conducted a search that was reasonably calculated to uncover all relevant documents. Thomas's declaration shows that all but one of the offices which were directed to search for responsive records simply declined to do so, stating that they would not have responsive documents. However, her declaration does not describe what those offices do contain and why they would not have any responsive documents. In fact, Thomas's declaration reflects that none of the offices within OASD (HA) conducted an actual search.[9] Additionally, Thomas's declaration shows that two offices potentially containing responsive documents were never searched. The Deputy Chief Medical Officer suggested that the Deputy Under Secretary of Defense, Military Personnel Policy might have responsive records, but Thomas does not aver that

[9] While the Defense Center of Excellence for Psychological Health and Traumatic Brain Injury reviewed its database and the Armed Forces Health Longitudinal Applications system for responsive information, the center determined that those two sources did not contain the necessary data elements to retrieve responsive records.

that office was ever searched or explain why it was not. Likewise, Thomas does not explain why FHP&R's front office's referral to the Office of the Chief Medical Officer would obviate the need to search the Office of Psychological Health Strategic Operations when it was identified as one of the three FHP&R offices likely to have responsive records. Thus, OASD (HA) has not shown that it conducted an adequate search.

Based on the foregoing, the declarations submitted by the DoD do not meet their burden of showing beyond material doubt that the search conducted by the DoD was adequate. Therefore, the motion for summary judgment is being denied as to the adequacy of the search and the plaintiffs are permitted limited discovery concerning the adequacy of the search.

2. Army

In support of its motion for summary judgment, the Army submitted the declarations of eleven individuals: Mary Nance Jordan ("Jordan"), Program Analyst, Freedom of Information and Privacy Act Specialist for the U.S. Army; Kathleen Vaughn-Burford[10] ("Vaughn-Burford"), Management Analyst in the Department of the Army G-1; Gerald Conway ("Conway"), Deputy Chief, Enlisted Career Systems Division; David Sproat

[10] Vaughn-Burford was not the original Action Officer in charge of the Army G-1's search. The original Action Officer retired after the search was completed but before she was required to provide a declaration. Thus, Vaughn-Burford "rel[ied] on the case folder and notes to prepare the declaration." (Vaughn-Burford Decl. (Doc. No. 37-7) ¶ 3).

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("Sproat"), Assistant Deputy for Health Affairs in the Office of the Deputy Assistant Secretary of the Army for Manpower & Reserve Affairs; Ronald Hoggard ("Hoggard"), Information Release Specialist for the Department of the Army Human Resources Command; Lawrence Bosworth ("Bosworth"), Chief, Operations/Training Branch, HRC PERSIND/Technology Division; Scott Kuhar ("Kuhar"), Chief, Transition Branch, HRC; Jose Burgos ("Burgos"), Chief, Freedom of Information Program for the Chief Attorney and Legal Services Directorate, Office of the Administrative Assistant to the Secretary of the Army; Rudolph Koger ("Koger"), Chief of Staff for the Army Review Boards Agency; John Peterson ("Peterson"), Chief, Freedom of Information and Privacy Act Office, Headquarters, U.S. Army Medical Command; and Jacquelyn Randolph ("Randolph"), Chief, Attitude and Opinion Research Unit, U.S. Army Research Institute for the Behavioral and Social Sciences.

Jordan's declaration discusses the initial steps that were taken after the Army received the plaintiffs' request letters. Based on, inter alia, her consultation with Peterson, Internet review of various agencies' functions and where similar requests had been referred to in the past, Jordan determined that the request should be referred to (1) the Army G-1; (2) the Human Resources Command, which is a part of the Army Medical Command;

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(3) the Army Review Boards Agency; and (4) the Army Medical Command ("MEDCOM").[11]

After receiving the referral from Jordan's office, the action officer responsible for the plaintiffs' request at the Army G-1 determined, based on her experience, that the Demographics Office and the Enlisted Career Systems Division were the offices within the Army G-1 that were likely to have responsive records. The action officer made this determination because the Demographics Office "maintains human resources trend data, of which enlisted separations by reason for separation is a category" and because the Enlisted Career Systems Division "is responsible for enlisted Separations policy." (Vaughn-Burford Decl. ¶ 3). The searches resulted in several responsive documents, but Vaughn-Burford was unable to discern based on the case files which office had provided which documents. Thus, she directed the Demographics Office and the Enlisted Career Systems Division to conduct a new search.

The Demographics Office "collects and compiles a full-range of human resources statistical data for summary reports to evaluate and support senior level decisions relative to readiness of the Force and G-1/M&RA policies and programs." (Vaughn-Burford Decl. ¶ 7). Dr. Maxfield ("Maxfield") of the Demographics Office "accessed her demographics files and

[11] Each of these offices has submitted affidavits describing its search.

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provided the spreadsheet she maintained." (Vaughn-Burford Decl. ¶ 7). Based on Maxfield's knowledge of the data and reports her office maintains or creates, she determined that the spreadsheet was the only responsive document her office contained.

The Enlisted Career Systems Division conducted a search of the "loss files" maintained in the Army's Total Army Personnel Database. From this search, the division created a document showing all personality disorder discharges. The Deputy Chief of the Enlisted Career Systems Division, Conway, determined that there were no other responsive documents. Conway states that "[o]ther than information contained within the [Total Army Personnel Database] and AR 635-200, the two places [he has] kept information on [personality disorder separations] is a particular PST folder within Microsoft Outlook and a folder on [the] shared 'H' drive." (Conway Decl. (Doc. No. 45-4) ¶ 3). Based on his involvement with the Enlisted Career Systems Division's involvement with personality discharges since "the beginning," he avers that no other files exist on this topic. With respect to the PST folder and the H drive, Conway states that neither location contains an extremely large number of items, and therefore he was able to look at every item to determine whether it was responsive; he did not need to use search terms.

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Based on her conversation with Conway, Vaughn-Burford requested that the Assistant Secretary of the Army for Manpower and Reserve Affairs conduct a search of its hardcopy and electronic records. The request was referred to the office's subcomponent, the Deputy Assistant Secretary of the Army for Manpower and Reserve Affairs ("DASA(MP)"). DASA(MP) is responsible for oversight of medical and personnel policy and programs. The office maintains files in the "action officer" folder under the Assistant Secretary of the Army for Manpower and Reserve Affairs. Sproat, Assistant Deputy for Health Affairs at DASA(MP) conducted a search of the action officer folder using the search terms "personality" and "PD." He avers that "[b]ased on the way information is maintained in DASA(MP), these two terms would capture any [responsive document] . . . including those regarding adjustment disorder." (Sproat Decl. (Doc. No. 45-9) ¶ 4). Sproat also searched his own folder and the folder of another DASA(MP) employee. Based on his seniority in DASA(MP), Sproat states that he would have personal knowledge and access to any responsive document in DASA(MP).

The declarations submitted on behalf of the Army G-1 are insufficiently detailed to show that the Army G-1 conducted a search that was reasonably calculated to uncover all relevant documents. Vaughn-Burford's declaration does not adequately describe why her predecessor chose to refer the plaintiffs'

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request to the three offices discussed above, but to no others. Thus, the court is unable to determine whether the Army G-1's decision to search only three offices was reasonably calculated to uncover all relevant documents. As to the search conducted by the Demographics Office, Vaughn-Burford's declaration is insufficiently detailed. She does not address the office's filing system and does not specify how the search for documents was conducted. She states only that Maxfield "accessed her demographic files," which is not a sufficiently detailed description of the search. With respect to the Enlisted Career Systems Division, Conway's declaration adequately describes the office's filing system and how he conducted his search. However, Conway mentions that information is contained within the "AR 635-200," but does not state what the AR 635-200 contains or whether and how it was searched. Thus, the court cannot determine whether the search his office conducted was sufficient. As to DASA(MP), the court finds that Sproat's declaration is insufficiently detailed. Sproat discusses the location of DASA(MP)'s electronic files, but his reference to his own folder and the other DASA(MP) staff member's folder makes it is unclear whether the office also maintains paper files or whether these are electronic files maintained separately from the "action officer" folder. Additionally, Sproat's statement that "personality" or "PD" would capture

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documents relating to adjustment disorder is conclusory; he does not explain why that would be so. Therefore, the court finds that the declarations submitted in support of the Army G-1's search are insufficient to show beyond material doubt that its search was adequate.

After the Human Resources Command ("HRC") received the plaintiffs' request, Hoggard, an information release specialist with the HRC, contacted Vaughn-Burford because the statistical data that the plaintiffs sought was within the Army G-1's purview and likely not located within the HRC. At that time, Vaughn-Burford informed him that HRC need not respond because the Army G-1 was working on responding to the request. Subsequently, however, Vaughn-Burford asked Hoggard to verify that HRC's Separation Branch did not have responsive documents. Hoggard then "tasked" the Transition Branch, which maintains HRC records on separations, to conduct a search. Hoggard also later referred the plaintiffs' request to the U.S. Army Physical Diability Agency and the PERSIND branch, both of which are within the HRC.

The Transition Branch maintains a database that contains data provided by the Army G-1 on individuals separated from the Army. The database contains the following fields: name, social security number, rank, grade, sex, race, ethnicity, primary military occupational specialty, separation program designator,

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separation category, fiscal year, basic active service date, loss date, command, station, and unit identification code. The database only contains data back to 2008. The Transition Branch Chief, Kuhar, searched the database by using "separation codes JFX and LFX relating to personality disorders, and JFV . . . and LFV relating to other physical or mental conditions." (Kuhar Decl. (Doc. No. 45-6) ¶ 4). In addition to searching the database, the Transition Branch conducted a search of their computers that "looked for the phrases 'personality disorder,' 'adjustment disorder' and 'readjustment disorder.'" (Hoggard Decl. (Doc. No. 37-9) ¶ 7). The Transition Branch does not maintain paper records.

The U.S. Army Physical Disability Agency responded to the referral from Hoggard stating that it did not have any responsive records. The agency advised Hoggard that it "only maintained records on individuals processed through the disability system, and not Soldiers separated administratively." (Hoggard Decl. ¶ 11).

The PERSIND branch created three spreadsheets that contain the number of members of the Army who have been separated on the basis of personality since 2001. The spreadsheets were created using the personality disorder separation codes "JFX" and "LFX." (Bosworth Decl. (Doc. No. 45-2) ¶ 2). PERSIND did not use codes "JFV" or "LFV" to search for separations based on adjustment

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disorder because those codes would "capture[] information unrelated to adjustment disorder discharges." (Bosworth Decl. ¶ 3).

The declarations submitted on behalf of the HRC are insufficiently detailed to show that the HRC conducted a search that was reasonably calculated to uncover all relevant documents. Hoggard and Kuhar's declarations do not adequately describe the Transition Branch's file system. Although they describe in sufficient detail the database that the Transition Branch maintains, they do not describe how the branch's other electronic files are maintained. They state only that the listed search terms were used to "determine if anyone had a record of any case on their computer" with those phrases. Such description is not adequately detailed. Hoggard's declaration with respect to the response he received from the U.S. Army Physical Disability Agency is devoid of detail. From his declaration, the court is unable to discern how, or even if, the agency conducted a search. As to the PERSIND branch, Hoggard and Bosworth do not state what database was searched using the separation codes that they list. They also do not describe what information the database contains or whether PERSIND maintains any other filing systems. Thus, the declarations are insufficiently detailed to show beyond material doubt that the search conducted by the HRC and its offices was adequate.

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The Army Review Boards Agency (ARBA) is the highest level for review of personnel actions taken by lower levels of the Army. It administers fifteen boards, including the Army Board for Correction of Military Records and the Army Discharge Review Board. After receiving the plaintiffs' request, Rick Schweigert ("Schweigert") conducted a search for records responsive to Item 12 of the plaintiffs' request. Schweigert "made visual and physical searches of current and archived paper, electronic files and databases" for responsive records that were not already available to the public. (Burgos Decl. (Doc. No. 37-10) ¶ 7). The search did not produce any responsive records.

The ARBA also maintains the ARBA Case Tracking System ("ACTS"). ACTS is used to account for, process, and manage cases for the fifteen boards administered by the ARBA. "The ACTS databases contain basic information related to each applicant, application and case to include name, SSAN, and mailing address, date of receipt, applicant request, case ID, case issues, case location, case responsibility, analyst of record, case status, board type, board date, final decision, and final decision date." (Koger Decl. (Doc. No. 45-5) ¶ 3). The ARBA conducted a search in ACTS for cases potentially involving requests for discharge upgrades or record corrections from former service members who received a discharge for personality disorder from September 2001 to October 2010. The search did

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not include a separate search for "adjustment disorder" or "readjustment disorder" because those terms are not used in ACTS. The search used the following terms to search for cases potentially involving personality disorder, adjustment disorder, or readjustment disorder: "Personality Conflict; Personality Disorder (Old character & behavior disorder); No Neuropsychiatric (NP) Evaluation; Chp 5, E, Convenience, Personality Disorder, Character; Chp 5, E, Convenience, Personality Disorder, Reason; Chp 5, E, Convenience, Personality Disorder, Process; Psychiatric/Psychological Problems; Vietnam War Syndrome; and Administrative Discharge - PTSD." (Koger Decl. ¶ 6).

The declarations submitted on behalf of the ARBA are insufficiently detailed to show that the ARBA conducted a search that was reasonably calculated to uncover all relevant documents. The Burgos declaration is conclusory and lacks detail regarding ARBA's filing systems and the search conducted by Schweigert. While Koger explains one search that was conducted by ARBA of the ACTS database, that one search is insufficient to show that ARBA otherwise conducted an adequate search. Therefore, the declarations do not show beyond material doubt that the search conducted by the ARBA was adequate.

John Peterson, Chief of the FOIA Office at MEDCOM coordinated with Alvin Fahie ("Fahie"), the Office Administrator

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of the Directorate Health Policy & Services to determine whether any MEDCOM entities might have responsive records. The Directorate Health Policy & Services is a part of the Behavioral Health Division, which is "intended to be a central point of contact for all behavioral/psychological health policy and implementation issues in support of the U.S. Army." (John Peterson Decl. (Doc. No. 37-8) ¶ 4). Fahie "tasked" Isaias Garcia ("Garcia"), the web developer for the Directorate Health Policy & Services, to search for responsive records. Garcia searched the Behavioral Health Division's storage network using a Windows Explorer search for the keywords "PTSD," "personality disorder," "adjustment disorder," "readjustment disorder," "PD," "AD" and "RD." (John Peterson Decl. ¶ 5; John Peterson Supp. Decl. (Doc. No. 45-7) ¶ 2). Garcia then reviewed each result to determine whether it was relevant to the plaintiffs' request. In addition to Garcia's search, Fahie "conducted a search of his computer, desk, personal files, and office files including hard copy and electronic files." (John Peterson Supp. Decl. ¶ 5).

The two declarations submitted by Peterson on behalf of the MEDCOM are sufficiently detailed to show that MEDCOM conducted a search that was reasonably calculated to uncover all relevant documents. Peterson adequately explains why he determined that the Behavioral Health Division should be searched for responsive documents. Although the search described in his first

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declaration was not adequate, the subsequent searches he directed Garcia and Fahie to conduct were reasonably calculated to uncover all relevant documents and are described in sufficient detail in his supplemental declaration. Peterson describes the electronic storage network that the division maintains and how Garcia conducted the search. Additionally, he avers that Fahie searched the division's records, which included files stored in his computer, desk, personal files and office files. Thus, Peterson's affidavits show that MEDCOM's search was adequate.

Based on the foregoing, the declarations submitted by the Army do not meet their burden of showing beyond material doubt that the search conducted by the Army was adequate. Although the court concludes that MEDCOM's search was adequate, the declarations describing the other searches are insufficient to show that the entire search conducted by the Army was reasonably calculated to uncover all relevant documents. Therefore, the motion for summary judgment is being denied as to the adequacy of the search and the plaintiffs are permitted limited discovery concerning the adequacy of the searches.

3. Navy

In support of its motion for summary judgment, the Navy submitted the declarations of Robin Patterson ("Patterson"), Head of the Department of the Navy, Chief of Naval Operations,

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Privacy and Freedom of Information Act Policy Office; David German ("German"), Freedom of Information Act and Privacy Act Officer, Bureau of Naval Personnel ("BUPERS") and Commander, Navy Personnel Command; and Salvatore Maida ("Maida"), Freedom of Information Act and Privacy Act Officer, Bureau of Medicine and Surgery.

Clarice Julka ("Julka") was the processor assigned to the plaintiffs' request. "Based on her experience and knowledge of Navy structure and commands, she determined that the commands likely and reasonably expected to maintain the records sought were the Navy Personnel Command (NPC), the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN M&RA), and the Navy Bureau of Medicine and Surgery (BUMED)." (Patterson Decl. (Doc. No. 37-12) ¶ 9). Patterson concurred in the determination and he avers that it was unlikely that any other commands would have responsive documents.

The Bureau of Naval Personnel ("BUPERS") and Commander, Navy Personnel Command ("CNPC") is the "record holding activity for the U.S. Navy Official Military Personnel File." (German Decl. (Doc. No. 37-11) ¶ 5). After receiving the plaintiffs' request, BUPERS/CNPC determined that the Navy Personnel Command Records/Data Maintenance Quality Division ("PERS-33") and Navy Personnel Command Conduct and Separations Division ("PERS-835") were the two offices most likely to contain responsive records.

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PERS-33 coordinated with the Defense Manpower Data Center ("DMDC") to search DMDC's Personnel Data Repository using a Statistical Analysis Software. The Data Repository was searched using personality disorder separation codes. PERS-33 was unable to search for adjustment disorder discharges because codes for those discharges "are comingled with other reasons for separation." (German Decl. ¶ 8(a)). Additionally, PERS-33 was unable to search the Data Repository for readjustment disorder discharges because they "are not familiar with that term as a reason for discharge." (German Decl. ¶ 8(a)).

BUPERS/CNPC also conducted a search of electronic data stored on the "Branch Head desk-top computer hard-drive" within PERS-835. (German Supp. Decl. (Doc. No. 45-14) ¶ 8(b)). The search was conducted "using subject knowledge and/or key words or acronyms 'Personality Disorder,' 'PD,' 'Post Traumatic Stress Disorder,' 'PTSD,' and 'Adjustment Disorder.'" (German Supp. Decl. ¶ 8(b)). In addition to the electronic search, BUPERS/CNPC found four responsive documents in the Navy Military Personnel Manual. BUPERS/CNPC suggested that the Board of Corrections of Naval Records and the Navy Discharge Review Board may contain responsive records as well.

German's declarations are insufficient to show that BUPERS/CNPC conducted an adequate search. While he states that responsive documents were found in the PERS-835 hard-drive and

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the Navy Military Personnel Manual, he does not describe the types of filing systems that BUPERS/CNPC maintains. His reference to the Navy Military Personnel Manual suggests that certain documents are maintained in hard-copy, but he does not reference any other locations where hard-copy files and documents are stored. Additionally, German does not state how PERS-835 located the responsive documents in the Navy Military Personnel Manual other than "[t]hrough subject-matter knowledge." (German Supp. Decl. ¶ 8(b)). Such a statement does not demonstrate with reasonable specificity how the search was conducted. Therefore, German's declarations do not show that BUPERS/CNPC conducted an adequate search.

Based on BUPERS/CNPC's suggestion, Patterson asked the Board of Corrections of Naval Records ("BCNR") and the Navy Discharge Review Board ("NDRB") to search for responsive information. The BCNR and the NDRB review and provide administrative remedies within the Department of Navy. Most applications for relief at the BCNR request the upgrade of the characterization of an administrative discharge. Patterson's declaration states that BCNR does not maintain a database of the types of discharges in the cases that come before it or the ratio of cases in which relief is granted or denied for different types of discharges. Patterson avers that the only place where BCNR would have information responsive to the

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plaintiffs' request is in the individual case files. While BCNR takes the position that the plaintiffs' request did not encompass the individual files, if it did, those files are publicly available online, and therefore BCNR was not required to retrieve and search through each individual case file.

Similar to BCNR, NRDC reviews service member discharges. NRDB maintains the Naval Discharge Review Board System ("NDRBS"), which is a local database designed to track applications submitted by former Navy and Marine Corps service members. The NDRBS collects basic applicant information such as "name, SSN, address, phone number, e-mail address, discharge characterization of service, and narrative reason for separation." (Patterson Supp. Decl. ¶ 5). The NDRBS can be searched by category, such as discharge characterization of service or narrative reason for separation; whether an upgrade was granted; number of days to process a case; and case storage location. After receiving the plaintiffs' request, NRDB conducted a search of the NDRBS using the terms "personality disorder," "PD" and "COG(PD)." (Patterson Supp. Decl. ¶ 5). NRDB was unable to conduct a similar search for adjustment disorder and readjustment disorder because the NDRBS does not separately track those disorders. While NRDB could find information on adjustment disorder and readjustment disorder separations in individual case files, such a search would "take

considerable expense" and the individual case files are already publicly available online. (Patterson Supp. Decl. ¶ 5).

Patterson's declarations are insufficient to show that BCNR and NDRB conducted adequate searches. The declarations provide insufficient detail about the types of files the boards maintain and how they are organized. While Patterson states that BCNR does not maintain a database that would contain information responsive to the plaintiffs' request, she does not describe whether BCNR maintains any other files that could have been searched for responsive documents. Likewise, while Patterson adequately describes the NDRBS, she does not state whether the NDRB maintains any other filing systems that would potentially contain responsive records, such as policy documents or memoranda. Therefore, the declarations are not sufficiently detailed to show that BCNR and NDRB conducted searches reasonably calculated to uncover all relevant documents.

The Assistant Secretary of the Navy for Manpower and Reserve Affairs ("ASN M&RA") is the separation authority for most officer separations and some enlisted separations. Peter Galindez ("Galindez"), an attorney who works in ASN M&RA, conducted a search of "the entire records database for any documents that fit [the plaintiffs'] request, including electronic folder and emails." (Patterson Decl. ¶ 11). The electronic database search "included all folders and files

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pertaining to the separation of officers and enlisted, folders and files that contain policy memos, as well as current and archived email for these same subjects." (Patterson Supp. Decl. (Doc. No. 45-16) ¶ 8). The electronic search used the search terms "PD," "personality disorder," "disorder," "personality issues," "disorder," "PD policy," "personality policy," "policy," "instructions," and "disorder instructions." (Patterson Supp. Decl. ¶ 8). Galindez also searched all hard copy files relating to policy memos for the separation of officers and enlisted, as well as policy guidance maintained by the ASN M&RA.

ASN M&RA maintains separation records and statistics only in electronic format. The office retains a scanned copy of the final determination memo signed by the Assistant Secretary of the Navy which may or may not reference the specific reason for a service member's separation. However, the signed separation documents are searchable only by officer/enlisted status and by name. Therefore, Galindez was unable to search for individual separation records by separation reason.

The court finds that Patterson's declaration and supplemental declaration sufficiently describe the search that was conducted by the ASN M&RA and shows beyond material doubt that the search was reasonably calculated to uncover all relevant documents. The Patterson declarations contain

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reasonable specificity of detail as to the filing systems ASN M&RA maintains, the kind of information contained in each, and how the searches were conducted for responsive documents. The plaintiffs object to Patterson's declaration on the basis that he did not personally conduct or supervise ASN M&RA's search. However, based on the entirety of Patterson's declarations and his statement that "[a]ll information herein contained is based upon information furnished to me in my official capacity and upon my personal review and supervision of the searches conducted," (Patterson Decl. ¶ 2), the court is satisfied that Patterson was sufficiently familiar with and "learn[ed] enough about [the search] to be able to submit a sufficient declaration based on personal knowledge." SWAN I, 888 F. Supp. 2d at 244. Thus, Patterson's declarations show that ASN M&RA's search was adequate.

The Navy Bureau of Medicine and Surgery ("BUMED") is the "record holding activity" for, inter alia, Navy Medicine personnel records, patient health records, patient insurance information, and health care provider credentialing records. It does not maintain records pertaining to administrative separation of service members. Maida, the FOIA and Privacy Act Officer for BUMED, states that while a medical provider may make a note in a service member's record or correspond with a service member's Command recommending a separation based on personality

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disorder, BUMED does not keep records of or track whether a service member is separated on the basis of personality or adjustment disorder. Additionally, Maida avers that BUMED does not create, maintain or receive reports, documents or memoranda regarding compliance with personality disorder separation requirements.

BUMED conducted a search of its electronic database of all BUMED instructions, directives, policy notes, forms, publications and manuals using the search terms "personality disorder separation" and "adjustment disorder separation." (Maida Supp. Decl. (Doc. No. 45-15) ¶ 3). Maida avers that other than the database that was searched, he, the BUMED Secretariat, and the Mental Health Specialty Leader are not aware of any additional file systems that would contain responsive documents.

Maida's declarations are insufficiently detailed to show that BUMED conducted searches that were reasonably calculated to uncover all relevant documents. Maida summarily states that he and others he consulted are not aware that any file systems other than the database that was searched would contain responsive documents. However, he does not describe any of BUMED's other filing systems or what those systems do contain which would support his assertion that a search of those systems was unlikely to result in responsive documents. As to the

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search itself, while Maida provides the two search terms that were used to search BUMED's database, the search terms appear to the court to be too narrow, such that potentially relevant documents may not have been retrieved by the search. Maida does not aver that those two search terms would capture all responsive documents or state why they would. Thus, Maida's declarations do not establish beyond material doubt that BUMED's search was adequate.

Based on the foregoing, the declarations submitted by the Navy do not meet their burden of showing beyond material doubt that the search conducted by the Navy was adequate. Although the court concludes that ASN M&RA's search was adequate, the declarations describing the other searches are insufficient to show that the entire search conducted by the Navy was reasonably calculated to uncover all relevant documents. Therefore, the motion for summary judgment is being denied as to the adequacy of the search and the plaintiffs are permitted limited discovery concerning the adequacy of the search.

4. Air Force

In support of its motion for summary judgment, the Air Force submitted the declaration of John Espinal ("Espinal"), Freedom of Information Act Manager, Headquarters Air Force, Information Management Operations Branch. After receiving the request, the action officer assigned to the case determined that

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based on the subject matter of the request, the most likely locations to possess responsive records were the Air Force Central, the Air Force Personnel Center, the Air Staff (specifically Air Force Manpower and Personnel), the Air Force Reserve Center, the Secretary of the Air Force for Manpower and Reserve Affairs, and the Air Force Surgeon General.

The Air Force Surgeon General "performed a search of the Air Force Medical Services (AFMS) Knowledge Exchange Website. The AFMS Knowledge Exchange website is the AFMS intranet designed to store and exchange knowledge among all members of the AFMS community. The AFMS Knowledge Exchange website was searched for all policy letters signed by [the Air Force Surgeon General] and DSG from 2001-2011." (Espinal Decl. (Doc. No. 37-14) ¶ 7). The Air Force Surgeon General also searched the AF/SG Task database using "personality" and "disorder" as keywords. (Espinal Decl. ¶ 7). In addition to the electronic searches, the Air Force Surgeon General searched paper files likely to contain responsive material.

Espinal's declaration is not sufficiently detailed to show that the Air Force Surgeon General conducted an adequate search. He does not sufficiently describe the Air Force Surgeon General's filing system, but instead only identifies two electronic databases that were searched. Additionally, Espinal does not describe how the office's paper files are organized.

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Espinal also does not sufficiently describe the searches. He does not state how the AFMS Knowledge Exchange website was searched; he only states that the policy letters are organized by year. With respect to the paper files, he only states that files likely to contain responsive material were searched, but he provides no detail regarding the search.

In the course of responding to the plaintiffs' request, the Air Force Surgeon General forwarded the request to the Air Force Medical Operations Agency. The Air Force Medical Operations Agency did not conduct a search and instead responded that they would not have responsive documents because "the only records or databases they maintain are personal health records related to individual service members." (Espinal Decl. ¶ 9). However, as discussed in Section III.A above, the defendants should have interpreted the plaintiffs' request to include individual service member records. While it is possible that searching the individual service member records would have been unduly burdensome, the Air Force Medical Operations Agency has not made such a representation. Therefore, the agency's failure to search for responsive records was not an adequate response to the plaintiffs' request.

Air Force Central responded to the action officer's "tasking" by stating that "they did not possess any material responsive to the instant FOIA request" because "based on their

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knowledge and familiarity with their systems and records, they do not maintain records or databases relating to the subject matter of the request." (Espinal Decl. ¶ 10). Espinal's description of Air Force Central's response is inadequate because it states in conclusory fashion that Air Force Central does not have responsive documents without even stating what kinds of records or databases it does maintain.

The Air Force Manpower and Personnel office of the Air Staff conducted a search on its "Electronic Shared Drives using the key words: 'Personality Disorder' and 'PD.'" (Espinal Decl. ¶ 11). Five documents were found as a result of this search. Espinal's declaration fails to adequately describe the Air Force Manpower and Personnel office's filing system because he states only that the Electronic Shared Drive was searched. Additionally, the declaration does not adequately describe the search itself. Moreover, Espinal does not provide an explanation for why the used the search terms "personality disorder" and "PD" but did not use other terms, such as "adjustment disorder" or "readjustment disorder," to identify responsive documents. Therefore Espinal's declaration is insufficient to show that the Air Force Manpower and Personnel office of the Air Staff conducted an adequate search.

The Secretary of Air Force for Manpower and Reserve Affairs oversees the Military Review Boards, including the Board for

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Correction of Military Records. The Secretary of Air Force for Manpower and Reserve Affairs responded to the action officer's "tasking" by stating that they did not possess responsive material because "they do not keep records. They stated that they obtain records when an individual petitions the board. Once a decision is made pertaining to that record it is then sent back to AFPC, which maintains the records." (Espinal Decl. ¶ 12). The court construes the statement that the Secretary of Air Force for Manpower and Reserve Affairs does "not keep records" to mean that they do not keep individual records. Espinal's declaration does not address what types of materials or documents the office does maintain and it does not address their filing system. Therefore, the Secretary of Air Force for Manpower and Reserve Affairs's failure to search for responsive records was not an adequate response to the plaintiffs' request.

The Air Force Reserve Center is the command that "supervises the unit-training program, provides logistics support, and ensures combat readiness." (Espinal Decl. ¶ 13). The Air Force Reserve Center informed the plaintiffs that they did not possess any responsive records because they "do not maintain records of former members of the Air Force Reserve." (Espinal Decl. ¶ 13). However, as with the Secretary of Air Force for Manpower and Reserve Affairs, Espinal's declaration does not address what types of materials or documents the Air

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Force Reserve Center does maintain and it does not address the center's filing system. Thus, the Air Force Reserve Center's failure to search for responsive records was not an adequate response to the plaintiffs' request.

After receiving the plaintiffs' request, the Air Force Personnel Center determined that the Separations Programs and Procedures Branch was the office within the Air Force Personnel Center that was the most reasonable and likely location of the information that the plaintiffs sought. The Separations Programs and Procedures Branch is "responsible for implementing separation policy and administrative procedures for all Air Force members." (Espinal Decl. ¶ 16). All files maintained by the Separations Programs and Procedures Branch are in electronic form. "Although some printed (hard copy) material is maintained for reference," Espinal avers that all responsive documents would be maintained electronically. (Espinal Decl. ¶ 17). Thus, the branch "searched the electronic files maintained on their share[d] drive using the keywords 'Personality Disorder' and 'Mental Disorder." (Espinal Decl. ¶ 17). In his supplemental declaration, Espinal states that the Separations Programs and Procedures Branch also searched using the keyword "Adjustment Disorder." (Espinal Supp. Decl. (Doc. No. 45-1) ¶ 2(e)). In addition to the shared drive, the branch obtained electronic files from the Air Force E-Publishing website and

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searched for responsive emails. Based on its searches, the Separations Programs and Procedures Branch worked with the Research Analysis & Data Division to create two charts.

Espinal's declaration is insufficiently detailed to show that the Air Force Personnel Center conducted an adequate search. The declaration states that the Separations Programs and Procedures Branch was the most likely to contain responsive documents but does not address whether it was likely that other branches would have responsive documents. The declaration also does not adequately describe the Separations Programs and Procedures Branch's filing system. Although Espinal does state that the branch searched its electronic files and the Air Force E-Publishing website, he does not state how the electronic files are maintained and/or organized. Additionally, he does not state how the search was conducted or which keywords were used to search the Air Force E-Publishing website or the branch's emails. Thus, the court cannot determine whether the Air Force Personnel Center's search was reasonably calculated to uncover all relevant documents.

Espinal's declaration does not show beyond material doubt that the search conducted by the Air Force was adequate. Therefore, the motion for summary judgment is being denied as to the adequacy of the search and the plaintiffs are permitted limited discovery concerning the adequacy of the search.

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5. *Marine Corps*

In support of its motion for summary judgment, the Marine Corps submitted the declaration of Teresa Ross ("Ross"), Head of the Freedom of Information Act (FOIA)/Privacy Act (PA) Section at Headquarters, U.S. Marine Corps (HQMC). After receiving the plaintiffs' request letters, Ross determined that the HQMC Manpower and Reserve Affairs ("M&RA") department was the Marine Corps department that would contain responsive documents because it is responsible for policy regarding military personnel matters. Ross contacted Tom Damisch ("Damisch"), counsel for the M&RA Policy Branch for assistance in determining which branches of the M&RA department would have responsive documents. Based on the input she received from Damisch and other "knowledgeable M&RA personnel," Ross concluded that the Manpower Separations and Requirement Branch was the appropriate department to respond to the plaintiffs' request. (Ross Decl. (Doc. No. 37-15) ¶ 10). Specifically, Ross recommended that the M&RA Manpower Information Technology Branch compile the numbers requested by Items 1 and 2 of the plaintiffs' request and that the Manpower Separations and Retirements Branch respond to Items 3-11.

The Manpower Information Technology Branch generated information responsive to Items 1 and 2 of the requests by querying the Marine Corps Total Force System ("MCATS") and the

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Operational Data Storage Enterprise ("ODSE") databases. In conducting the queries, the Manpower Information Technology Branch used the following criteria: "Separation Program Designator (SPD) codes, characterization of discharge codes, separation dates, Primary Reporting Unit codes (RUCs), Monitor Command Codes (MCCs), unit discharged from, IDP From Date (if deployed to a combat zone), IDP country, combat award, Purple Heart recipient, and fiscal year." (Ross Decl. ¶ 14).

In addition to the database search conducted by the Manpower Information Technology Branch, the Manpower Separations and Retirements Branch "conducted a search of their office paper files and desk drawers for any item related to personality disorder." (Ross Decl. ¶ 15). The Manpower Information Technology Branch also conducted an electronic search: "staff searched their MSOutlook accounts, to include saved .pst files, and their computer hard drive and shared drive electronic folders for any electronic documents pertaining to personality disorder issues using search terms reasonably calculated to uncover responsive information, such as the term 'personality disorder' and within the relevant time frame." (Ross Decl. ¶ 15). The branch advised Ross that they were not the proper office to address Items 3, 8 and 11 and informed Ross that departments and officials outside of the Marine Corps would have responsive documents.

Ross's declaration is insufficient to meet the Marine Corps's burden of showing beyond material doubt that it conducted a search reasonably calculated to uncover all relevant documents because it is not sufficiently detailed. With respect to the search conducted by the Manpower Information Technology Branch, she does not state what types of information are contained in the MCATS and ODSE databases or whether searches of other databases would have provided responsive information. With respect to the Manpower Separations and Retirements Branch, Ross's declaration does not adequately describe the branch's filing system. While she states that computer hard drives, shared drives, and email accounts were searched, the court is unable to discern whether there are other electronic files which were not searched, and if there are, why they were not searched. Additionally, Ross does not aver that she took any steps to determine whether there were other branches within the Marine Corps which could respond after the branch informed her that they were unable to respond to Items 3, 5, 8 and 11. Therefore, the motion for summary judgment is being denied as to the adequacy of the search and the plaintiffs are permitted limited discovery concerning the adequacy of the search.

6. National Guard

In support of its motion for summary judgment, the National Guard submitted the declaration of Jennifer Nikolaisen

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("Nikolaisen"), Chief of the Office of Information and Privacy at the National Guard Bureau and the Chief Freedom of Information Act and Privacy Officer for the National Guard. Nikolaisen states that her office construed the plaintiffs' FOIA requests as seeking records from the Air National Guard, the Army National Guard and the National Guard Bureau. Based on her knowledge of the National Guard Bureau's organization and in coordination various National Guard Bureau staff, Nikolaisen identified the National Guard Bureau offices most likely to have responsive documents. She also had the Army National Guard and Air National Guard coordinate searches for responsive records.

With respect to the National Guard Bureau, Nikolaisen states that the offices searched included the Joint Manpower and Personnel Directorate, Psychological Health Division and the Joint Surgeon Office. The Joint Manpower and Personnel Directorate, Psychological Health Division, "conducted a physical and visual search of its files and its contractor-operated SharePoint database." (Nikolaisen Decl. (Doc. No. 37-16) ¶ 12(a)). Likewise, the Joint Surgeon Office "conducted a physical and visual search of its files and its shared network hard drive . . . . The specific key word used to conduct electronic searches was 'mental health.'" (Nikolaisen Decl. ¶ 12(b)). Neither search produced any responsive documents.

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Nikolaisen's declaration is insufficient to satisfy the National Guard Bureau's burden because it is not reasonably detailed and does not show that the National Guard Bureau conducted a search that was reasonably calculated to uncover all relevant documents. Nikolaisen states that the National Guard Bureau's search included the Joint Manpower and Personnel Directorate, Psychological Health Division and the Joint Surgeon Office, but she does not state which, if any, other offices were searched and what their search entailed. The declaration also does not adequately describe either office's filing system or the search that was conducted. Simply stating that the database and hard drive were searched does not provide any indication of whether there are other files that the offices maintain that could have been searched. With respect to the Joint Manpower and Personnel Directorate, Psychological Health Division, Nikolaisen does not state how the database was searched or which search terms were used. With respect to the Joint Surgeon Office, Nikolaisen states that the hard drive was searched using the term "mental health." She does not state why only that search term was used, as opposed to personality disorder, adjustment disorder or readjustment disorder, or that "mental health" was reasonably likely to produce relevant documents. Thus, Nikolaisen's declaration is insufficient to show that the National Guard Bureau conducted an adequate search.

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With respect to the Air National Guard, Nikolaisen states that searches were conducted at the Air National Guard Readiness Center of offices including the Air National Guard, Manpower, Personnel and Services and the Air National Guard, Office of the Air Surgeon. These offices were selected "because it was believed that they may have responsive personnel or medical data, administrative separations regulations, or medical policy documents associated with the separation of Air National Guard personnel, to include separations based on personality disorder, adjustment disorder, or readjustment disorder." (Nikolaisen Decl. ¶ 11). The Air National Guard, Manpower, Personnel and Services "conducted a physical and visual search of its files and its shared network hard drive . . . . Specific key words used to conduct electronic searches included 'adjustment disorder,' [']readjustment disorder,' and 'personality disorder.'" (Nikolaisen Decl. ¶ 12(f)). The Air National Guard, Office of the Air Surgeon did not conduct a search because the office "does not maintain medical records and does not make decisions or maintain records concerning discharges of any kind," and therefore it determined that it had no records to search that would be potentially responsive. (Nikolaisen Decl. ¶ 12(g)).

Nikolaisen's declaration is insufficiently detailed to meet the Air National Guard's burden of showing that its search was

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adequate. As with the National Guard Bureau, Nikolaisen states that the offices searched included the Air National Guard, Manpower, Personnel and Services and the Air National Guard, Office of the Air Surgeon, but she does not provide which, if any, other offices were searched or that the two offices she identifies were the only ones reasonably likely to contain responsive documents. Additionally, the declaration does not adequately describe the filing system of either office such that the plaintiffs, or the court, would be able to determine whether the search conducted, or in the case of the Air National Guard, Office of the Air Surgeon, the failure to search, was reasonable. The individual who conducted the search at the Air National Guard, Manpower, Personnel and Services informed Nikolaisen that certain responsive documents are "under the control and possession of either [the] Air Reserve Personnel Center (ARPC) or National Personnel Records Center (NPRC)." (Nikolaisen Decl. ¶ 12(f)). Nikolaisen does not state that either of these offices were searched for responsive documents or state why they were not searched. The Air National Guard's failure to search these two offices suggests that its search for responsive documents was inadequate. Thus, Nikolaisen's declaration is insufficient to show that the Air National Guard conducted an adequate search.

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With respect to the Army National Guard, Nikolaisen states that searches were "conducted by offices at the Army National Guard Readiness Center, including the Army National Guard, Human Resources Management Division . . . ; Army National Guard, Human Resources Policy Division . . . ; and Army National Guard, Office of the Chief Surgeon." (Nikolaisen Decl. ¶ 10). The Human Resources Management Division "conducted a physical and visual search of its files and the personnel databases it is authorized to access, including the Total Army Personnel Data Base - Guard (TAPDB-G) . . . . To obtain responsive data from these personnel databases, data was extracted using the following 'loss reason codes': Personality Disorder (PA), Other Disqualifying Patterns or Acts of Conduct (OC), and Other Reasons Approved by the Chief, NGB (OE)." (Nikolaisen Decl. ¶ 12(c)). The Human Resources Policy Division "conducted a physical and visual search of its files, its shared network hard drive . . . , and the policy databases it is authorized to access, including the Army National Guard G1 Portal . . . and the Guard Knowledge Online Portal . . . . Specific key words used to conduct electronic searches included 'separation,' 'mental,' 'health,' and 'disorder.'" (Nikolaisen Decl. ¶ 12(d)). The Office of the Chief Surgeon "conducted a visual check of the electronic records maintained on its shared network drive." (Nikolaisen Decl. ¶ 12(e)). The search produced no

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responsive documents and explained that result by stating that the office does not contain any individual medical records or make decisions concerning discharges.

Nikolaisen's declaration is insufficiently detailed to meet the Army National Guard's burden of showing that its search was adequate. Nikolaisen states that the offices searched included the Army National Guard, Human Resources Management Division, the Army National Guard, Human Resources Policy Division and Army National Guard, Office of the Chief Surgeon, but she does not state which, if any, other offices were searched or that the offices she identifies were the only ones reasonably likely to contain responsive documents. Additionally, the declaration does not adequately describe the filing system of the offices such that the plaintiffs, or the court, could determine whether the searches conducted were reasonable. The declaration states that both the Human Resources Management Division and the Human Resources Policy Division maintain databases. However, Nikolaisen does not describe the different kinds of information stored in the various databases and whether all or only some of the databases were searched for responsive documents. Thus, Nikolaisen's declaration is insufficient to show that the Army National Guard conducted an adequate search.

Nikolaisen's declaration does not show beyond material doubt that the searches conducted by the National Guard Bureau,

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Air National Guard and Army National Guard were adequate. Rather, her declaration shows that several of the searches were not reasonably calculated to uncover all relevant documents. Therefore, the motion for summary judgment is being denied as to the adequacy of the searches conducted by the National Guard Bureau, Air National Guard and Army National Guard and the plaintiffs are permitted limited discovery concerning the adequacy of the search.

7. *Veteran's Health Administration*

The VHA submitted the declaration of Timothy Graham ("Graham"), Director of the Freedom of Information Act Office for the Veterans Health Administration at the Department of Veteran Affairs Central Office. Upon receiving the plaintiffs' request letter, Graham determined, based on his expertise and knowledge of the mission, programs and operations of VHA, that the benefits claim information sought by the plaintiffs was a benefit claim that would have been administered by the Veterans Benefits Administration, rather than the VHA. However, when he searched the requestors' name in the VA's electronic FOIA tracking system, Graham saw that VBA had already received the same request, and therefore he did not need to send the request to the VBA.

Although VHA's function is "to provide a complete medical and hospital service for the medical care and treatment of

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veterans" and it is not responsible for providing services related to the determination of benefits, Graham determined that the VHA Chief Business Office (CBO) Business Policy component and the VHA CBO Health Eligibility Center (HEC) may have responsive documents. (Graham Decl. (Doc. No. 37-17) ¶ 10). Graham avers that this determination was "specifically made based on [his] extensive experience in handling agency records searches, coupled with a thorough understanding of the operations and activities of all VHA programs, offices and records systems." (Graham Decl. ¶ 10). He further states that those two offices were specifically chosen because they "deal with eligibility for health care benefits" within the larger VHA CBO which is responsible for the "development of administrative processes, policy, regulations, and Directives associated with the delivery of VA health benefit programs." (Graham Decl. ¶ 10). Based on his experience, Graham determined that the VHA CBO was the only VHA office responsible for the implementation of eligibility for health care benefits.

The CBO Business Policy component does not own any databases. Instead, the component "issues policy documents such as Directive and Handbooks utilized to provide guidance to the VHA medical centers to assist them in implementing" the statutes and regulations that guide the programs operated by the CBO. (Graham Decl. ¶ 11).

The CBO HEC is responsible for managing the Enrollment and Eligibility System. The Enrollment and Eligibility System collects information provided by veterans who submit VA Form 10-10EZ, Application for Health Benefits. While the form does ask whether a veteran's discharge from the military was "for a disability incurred or aggravated in the line of duty," the veteran may only respond "yes" or "no." (Graham Supp. Decl. (Doc. No. 45-18) ¶ 3). The form does not ask, and thus the database does not contain, "information related to benefits determinations made by VBA on the basis of personality disorders." (Graham Decl. ¶ 11). The other database that the HEC owns is an Income Verification Match database which is used to match veteran reported income with the Internal Revenue Service and the Social Security Administration. Graham determined that this database would not contain responsive information, and therefore it was not searched. While it is unclear whether the HEC owns any other databases, because the VHA does not collect or maintain information related to a service member's discharge diagnosis, Graham averred that no other VHA database or system "contains the information [that the plaintiffs' seek regarding] discharge diagnosis or reason for separation." (Graham Supp. Decl. ¶ 6).

The staff at the CBO Business Policy component and the HEC searched the two VA websites likely to contain responsive

material for policy documents, forms, fact sheets, directives, and handbooks to find responsive documents. They informed Graham that their searches did not result in any responsive documents. While veterans are encouraged to submit form DD-214, which may contain a discharge diagnosis, with their VA Form 10-10EZ, not all veterans do so, and even when they do, the form is not available in a searchable format. Thus, to determine whether a given veteran was discharged for personality disorder, adjustment disorder or readjustment disorder, the VHA would have to conduct a manual search of over four million electronic medical records.

The court finds that Graham's declaration sufficiently describes the search that was conducted by the VHA and shows beyond material doubt that the search was reasonably calculated to uncover all relevant documents. Graham describes in detail why the CBO Business Policy component and the CBO HEC offices were selected to conduct the searches and averred that based on his experience, no other office was likely to maintain responsive records. He describes the kinds of information each office maintains and how such information is stored. While Graham does not state the search terms that were used to search the VA's websites for responsive documents, he provides the Internet addresses for the websites; a visit to each shows that they are not searchable by keyword. Additionally, the court

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credits Graham's statement that the VHA does not maintain information on discharge diagnoses because it is not relevant to the VHA's mission. Thus, the court finds that Graham's declaration was not conclusory but instead contained reasonable specificity of detail as to the search undertaken by VHA for responsive documents. Because Graham's declaration shows that VHA's search was adequate, the motion for summary judgment is being granted as to the adequacy of the search conducted by VHA.

8. Veterans Benefits Administration

The Veterans Benefits Administration submitted the declaration of Sean Burns ("Burns"), Chief of Administration for the Office of Facilities, Access and Administration with the U.S. Department of Veterans Affairs, Veterans Benefits Administration. Although the declaration is submitted by Burns, it was originally drafted and executed by Francis Victoria Hudzik ("Hudzik") who was the VBA FOIA Officer who coordinated and supervised the search. Hudzik passed away prior to the date the declaration was submitted. Thus, the declaration is submitted by Burns because he was Hudzik's immediate supervisor and he was "familiar with the steps she took in locating documents responsive to the plaintiffs' FOIA request." (Burns Decl. (Doc. No. 37-18) ¶ 1).

Upon receiving the request, Hudzik contacted the FOIA Officer for the Compensation & Pension Service. Because

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Compensation & Pension Service is the office within VBA responsible for establishing policies and procedures associated with disability and compensation pension benefits, it was determined that it was the appropriate and only office to respond to the plaintiffs' request.

The Compensation & Pension Service "sets policy and promulgates regulations associated with benefits, establishes procedures for processing benefits, creates business requirements for information technology systems, manages special initiatives, assesses and improves the quality of field operations and generates training provided to field staff." (Burns Decl. ¶ 9). In order to administer its benefits programs, the Compensation & Pension Service gathers and creates records. The records the office "owns" include "documents (written or electronic) associated with programs (including analyses), policies, procedures, training, information technology, management, facilities of VBA, reporting, FOIA, etc. as well as electronic database[] entries associated with the management of VBA staff (such as employee workload) or associated with the management of VBA information systems (e.g. security databases)." (Burns Decl. ¶ 10 n.2).

VBA uses several technology systems and databases to track, process and pay disability compensation and pension benefits. These systems and databases are the Beneficiary Identification

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and Records Locator System; the Corporate Database; the Virtual VA, which is the VBA's document depository; and the Veterans Service Network. While these systems contain some information relating to a veteran's claim, the VBA's information technology systems do not include a veteran's service medical records. In addition to the technology systems and databases, the VA maintains an Internet website and a number of Intranet sites. The VBA Intranet site links to the Intranet sites for the various VBA offices.

The Compensation & Pension Service Intranet "has links to [Compensation & Pension Service] divisions including: Policy, Procedures, Training and Contract Management, Quality Assurance, and Business Management, plus a miscellaneous category that lists links to that division's major responsibilities, items of interest, and staff." (Burns Decl. ¶ 12). The Compensation & Pension Service Intranet search page allows a user to search by word or phrase and by subject.

The Compensation & Pension Service FOIA Officer searched the Compensation & Pension Service Intranet for responsive documents using "personality disorder," "adjustment disorder," and "readjustment disorder" as keywords. "The terms 'discharge' and 'separation' were used as additional identifiers." (Burns Decl. ¶ 13). The FOIA Officer also searched the Compensation & Pension Service's internal computer shared drive where employees

store work product; the VA Internet, where the VA published publicly available information; and the Consolidated VBA reports listing, which is a record of all of the reports that were run on the database that preceded the Veterans Service Network database.

The searches run by the Compensation & Pension Service did not result in any responsive documents. Burns states that VBA does not track discharge diagnoses in its information technology systems or databases. While discharge diagnoses may be found in veterans' service medical records, those records are generally not maintained electronically, and when they are, they are not in a searchable format. Discharge diagnoses are also likely found on form DD-214. Some DD-214 forms are maintained electronically but the VBA technology systems do not contain a data field to search by discharge diagnosis. Other DD-214 forms are found in individual veterans' physical claims files.[12]

After the plaintiffs appealed VBA's response, VBA contacted to Office of Performance, Analysis and Integrity and the Office of Field Operations to conduct additional searches. The Office of Performance, Analysis and Integrity maintains the Enterprise Data Warehouse (EDW), which collects and retains data from VBA systems on a nightly basis. However, because VBA's systems from

[12] As discussed in Section III.A.2, the court finds that searching the individual claims files would be unduly burdensome, and therefore the VBA and VHA were not required to search those files.

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which the data is collected do not contain discharge diagnoses, the EDW could not contain that information either. The Office of Field Operations directs the operations of VBA field offices. The office searched its Intranet site, which resulted in one responsive document.

The court finds that Burns's declaration sufficiently describes the search that was conducted by the VBA and shows beyond material doubt that the search was reasonably calculated to uncover all relevant documents. Burns describes why the Compensation & Pension Service was selected as the only office within VBA to conduct the search. He describes the kinds of information and documents that the Compensation & Pension Service maintains and the various places that such information is stored. Burns provides the terms that were used to search the Compensation & Pension Service's various electronic data systems and explains why VBA was largely unable to find responsive documents, i.e. it does not track discharge diagnoses and it would be unduly burdensome to search the only places where such information could be found. Additionally, the court credits Graham's statement that the VHA does not maintain information on discharge diagnoses because it is not relevant to the VHA's mission.

In addition to their other objections to VBA's search and the Burns declaration, the plaintiffs argue that there is

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countervailing evidence that VBA's search was inadequate. They state that the Veterans Service Network database "includes a variable for Military Separation Reason. It appears that a simple electronic search will provide non-identifying data precisely responsive to Plaintiffs' request, by revealing the amount of VBA compensation or pension received by veterans whose military separation reason was [personality disorder] or [adjustment disorder] . . . ." (Pls.' Mem. Opp. Mot. Summ. J. at 46). Burns filed a supplemental declaration to in response to the plaintiffs' critique. Burns states that there are two types of records in the Veterans Service Network database: "(1) Veteran records, which contain information about benefits paid to Veterans; and, (2) beneficiary records, which contain information about benefits paid to surviving spouses, children and parents." (Burns Supp. Decl. (Doc. No. 45-17) ¶ 2). Contrary to the inference, drawn by the plaintiffs, that the Military Separation Reason field would relate to the reason for a service member's separation, and therefore reveal whether a service member was separated for personality disorder or adjustment disorder, the field corresponds to the Separation Reason Code in the Beneficiary Identification and Records Locator Subsystem. The only possible entries in that field are codes that mean "Development may be required," "Satisfactory;" or "Administrative Decision." (Burns Supp. Decl. ¶ 4). Thus,

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the military separation reason field could not be searched for responsive documents.

Based on the foregoing, the court finds that Burns's declaration was not conclusory but instead contained reasonable specificity of detail as to the search undertaken by VBA for responsive documents. Because Burns's declaration shows that VBA's search was adequate, the motion for summary judgment is being granted as to the adequacy of the search conducted by VBA.

D. **Exemptions**

The defendants move for summary judgment as to the propriety of their redaction of various documents pursuant to FOIA Exemption 6.[13]

Exemption 6 exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 6 is intended to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." U.S. Dep't of State v. Washington Post Co., 456 U.S. 595, 599 (1982). "To determine whether identifying information may be withheld pursuant to Exemption 6 [the court] must: (1) determine whether

[13] The plaintiffs originally objected to the Air Force withholding information in document 11-L-0109 VVA (AF) 1279-1303. However, in their memorandum in opposition to the instant motion, the plaintiffs state that they "agreed not to challenge [those] redactions . . . ." (Pls.' Opp. Mot. Summ. J. at 48 n.24).

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the identifying information is contained in personnel and medical files and similar files; and (2) balance the public need for the information against the individual's privacy interest in order to assess whether disclosure would constitute a clearly unwarranted invasion of personal privacy." Associated Press v. U.S. Dep't of Def., 554 F.3d 274, 291 (2d Cir. 2009) (internal quotation marks omitted).

"The balancing analysis for FOIA Exemption 6 requires that we first determine whether disclosure of the files would compromise a substantial, as opposed to de minimis, privacy interest, because if no significant privacy interest is implicated FOIA demands disclosure." Long v. Office of Pers. Mgmt., 692 F.3d 185, 191 (2d Cir. 2012) (quoting Multi Ag Media LLC v. Dep't of Agric., 515 F.3d 1224, 1229 (D.C. Cir. 2008). "But the bar is low: FOIA requires only a measurable interest in privacy to trigger the application of the disclosure balancing tests." Id. (internal quotation marks omitted).

"[W]hen an agency seeks to withhold information, it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." Morley, 508 F.3d at 1122 (internal quotations omitted). "This justification typically takes the form of a Vaughn index, named for the case

that introduced it." El Badrawi, 583 F. Supp. 2d at 310 (citing Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)). "The Vaughn index must explain specifically which of the nine statutory exemptions to FOIA's general rule of disclosure supports the agency's decision to withhold a requested document or to delete information from a released document." Founding Church of Scientology, Inc. v. Bell, 603 F.2d 945, 947 (D.C. Cir. 1979). Furthermore, the Vaughn index must provide "information that is not only specific enough to obviate the need for an in camera review, but that also enables the court to review the agency's claimed redactions without having to pull the contextual information out of the redacted documents for itself." Halpern, 181 F.3d at 294.

1. Sufficiency of Vaughn Index

The plaintiffs contend that the defendants "have failed to produce an adequate Vaughn index sufficient to allow Plaintiffs to contest, and this Court to determine, the applicability of the claimed exemption." (Pls.' Mem. Opp. Mot. Summ. J. at 49). The plaintiffs' argument lacks merit. The defendants' Vaughn index identifies each document where information was redacted, the type of document it is, the claimed exemption and the basis for redacting the information pursuant to that exemption. As shown below, based on the Vaughn index, the court is able to

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determine whether the redaction was proper based on the claimed exemption. Therefore the Vaughn index is sufficient.

2. Redaction of Sample Separation Packets

The defendants released several heavily redacted sample separation packets to the plaintiffs. The defendants state that the redactions were made pursuant to Exemption 6. While the plaintiffs agreed that most of the redactions were proper, they disagreed with the defendants' redaction of service members' rank, dates of service and place of last assignment.

It is undisputed that the files at issue here constitute "personnel and medical files and similar files" in which the individual service members have a significant privacy interest. Associated Press, 554 F.3d at 291. However, the plaintiffs argue that a service member's rank, dates of service and place of last assignment does not constitute personally identifying information, and as such, could not have been redacted.

The Supreme Court has held that "what constitutes identifying information regarding a subject [individual] must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar . . . with other aspects of [the individual]." Dep't of Air Force v. Rose, 425 U.S. 352, 380 (1976). In Rose, New York University law students sought Air Force Academy Honor and Ethics Code case summaries for a law review project on military discipline. The

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Academy had already publicly posted these summaries on forty squadron bulletin boards, usually with identifying names redacted (names were posted for cadets who were found guilty and who left the Academy), and with instructions that cadets should read the summaries only if necessary. The court noted, however, that even with names redacted, the subjects of the summaries could likely be identified through other, disclosed information. Therefore, the Rose Court recognized that "[e]ven though the summaries, with only names redacted, had once been public, [there was] the potential invasion of privacy through later recognition of identifying details." U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 769 (1989). Thus, the other identifying information could be redacted, particularly in light of the fact that the redacted information was "irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code; leaving the identifying material in the summaries would therefore have been a 'clearly unwarranted' invasion of individual privacy." Id. at 773-74.

The reasoning of Rose and the explanation in Reporters Comm. is applicable here. The defendants state that they redacted information regarding rank, dates of service and place of last assignment because although, standing alone, those items do not invoke privacy concerns, "in the aggregate this information could be used to identify the individuals,

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especially by members of the public who have knowledge of the individual or the circumstances surrounding the individual's military career." (Defs.' Mem. Supp. Summ. J. at 23). The information contained in the separation packets is highly sensitive[14] and the individual service members' have a strong interest in not having that sensitive information linked them. Additionally, the plaintiffs do not articulate and it is not apparent how information in a service member's separation packet regarding rank, dates of service and place of last assignment would be relevant to "the use by [the defendants] of personality disorder discharges and adjustment disorder or readjustment disorder discharges to separate [service members]." (Am. Compl. Ex. A at 1, Ex. C at 1).

Thus, in light of the fact that rank, dates of service and place of last assignment could be used by knowledgeable individuals to link the service member to highly sensitive material and it is not apparent how this information would shed light on the defendants' use of personality and adjustment disorder discharges, the court finds that redaction was

[14] The separation packet "includes documentation of the discharge itself, pre-service interviews and evaluations, medical records, performance evaluations, psychological treatment records, and counseling or disciplinary records. The medical records contained in the files often reveal the most intimate details of a service member's life -- such as descriptions of personal conflict with family, friends, and co-workers; discussions of suicidal thoughts; descriptions of the service member's attempts to harm him or herself; and physicians' diagnoses and treatment recommendations." (Herrington Decl. ¶ 12).

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appropriate. Therefore, the motion for summary judgment is being granted as to the defendants' redaction of rank, dates of service and place of last assignment in the sample separation packets pursuant to Exemption 6.

3. Redaction of DoD Employee Information

Invoking Exemption 6, the DoD redacted the names, other identifying information and contact information of low-level DoD officials in the documents that were released to the plaintiffs.

"It is not uncommon for courts to recognize a privacy interest in a federal employee's work status (as opposed to some more intimate detail) if the occupation alone could subject the employee to harassment or attack." Long, 692 F.3d at 192. Here, the court finds that the low-level DoD officials have more than a de minimis privacy interest in their names and identifying information because their employment with the DoD could subject them to harassment or attack. In his declaration, Herrington, an Associate Deputy General Counsel in the Office of General Counsel Office of the United States Department of Defense, avers that the "DoD policy is to withhold names of all military personnel at the rank of Colonel and below, and all civilians at the rate of GS-15 and below. . . . These individuals have a legitimate privacy interest that would be threatened if this information was publicly disclosed and there is no public interest in having this information disclosed."

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(Herrington Decl. ¶ 16). Moreover, courts routinely hold that lower-level DoD employees have more than a de minimis interest in not having their names disclosed. See, e.g., Carmody & Torrance v. Def. Contract Mgmt. Agency, No. 3:11-CV-1738, 2014 WL 1050908, at *13 (D. Conn. Mar. 13, 2014) (finding that DoD employees' interest in not having their names disclosed in connection with a defense contract was more than de minimis); Amnesty Int'l USA v. C.I.A., 728 F. Supp. 2d 479, 523-25 (S.D.N.Y. 2010) (finding that "DOD personnel below the office-director level, or officers below the rank of Colonel" had a legitimate privacy interest in not having their names and email addresses disclosed); Schoenman v. F.B.I., 575 F. Supp. 2d 136, 160 (D.D.C. 2008) ("Air Force members whose names and other identifying information was redacted from the Intelligence Information Reports have a significant -- i.e., more than de minimis -- privacy interest in that information."); Kimmel v. U.S. Dep't of Def., No. 04-1551, 2006 WL 1126812, at *3 (D.D.C. Mar. 31, 2006) ("[T]he court has little difficulty concluding that the name of an individual employed by DoD is the type of information that the exemption seeks to protect.")

Because the court finds that the DoD employees have a privacy interest in not having their names disclosed, the court must balance that interest against the public's interest in disclosure. Where the agency has demonstrated a privacy

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interest sufficient to implicate Exemption 6, the burden falls to the requesting party to establish that disclosure "would serve a public interest cognizable under FOIA." Carmody & Torrance, 2014 WL 1050908, at *13 (quoting Associated Press, 554 F.3d at 66). "The only public interest cognizable under FOIA is the public understanding of the operations or activities of the government." Long, 692 F.3d at 193.

The public interest in this case is negligible or nonexistent. The plaintiffs have articulated no public interest that would be served by releasing the employees' names. "In many contexts, federal courts have observed that disclosure of individual employee names tells nothing about what the government is up to." Id. Because the plaintiffs have not articulated how disclosure of the lower-level DoD employees' names would serve the public interest or show "what the government is up to," the court finds that the public's interest in disclosure does not outweigh the employees' privacy interest.

Therefore, because the defendants properly invoked Exemption 6 in redacting individual DoD employees' names, other identifying information and contact information, the motion for summary judgment is being granted as to the propriety of the redactions.

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IV. CONCLUSION

Therefore, Defendants' Motion for Summary Judgment (Doc. No. 37) is hereby GRANTED in part and DENIED in part. The motion is being granted as to the defendants' argument that they were not required to produce the individual service member files; the adequacy of the searches conducted by VHA and VBA; and the propriety of the defendants' redactions pursuant to Exemption 6. The motion is being denied as to the adequacy of the searches conducted by the DoD, Army, Navy, Air Force, Marine Corps and National Guard.

It is so ordered.

Signed this 31st day of March, 2014 at Hartford, Connecticut.

/s/

Alvin W. Thompson
United States District Judge

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Message

From: Clarke, Victoria [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CLARKE, VICTORIA]
Sent: 3/1/2018 2:20:51 PM
To: Walker, Denise [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b10d83a48a5e4af7a9b1f01465330ff2-Walker, Den]; Kibler, Virginia [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a216f188758b46b490a179ef520fd889-Kibler, Vriginia]; Curtin, James [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=728048227d024e0cb67932883007a4f9-JCURTIN]
CC: Brennan, Ross [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4321e5dd218d46e381dbbd92ca1779aa-Brennan, Ross]; Weiss, Kevin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=793bc48d7a6743dcabff30de8c2175dd-keweiss]
Subject: RE: FOIA: draft letter to John Hall
Attachments: clarification letter Hall 2-27-18-RB - VKC Edits.docx

Hello!

Deliberative Process Privilege / Attorney-Client / Ex. 5

Thank you!

Victoria

Victoria Clarke
Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. | 7348 WJCN
202-564-1149

From: Walker, Denise
Sent: Wednesday, February 28, 2018 4:54 PM
To: Kibler, Virginia <Kibler.Virginia@epa.gov>; Curtin, James <curtin.james@epa.gov>; Clarke, Victoria <clarke.victoria@epa.gov>
Cc: Brennan, Ross <Brennan.Ross@epa.gov>; Weiss, Kevin <Weiss.Kevin@epa.gov>
Subject: RE: FOIA: draft letter to John Hall

Ross & Virginia:

Victoria will be working with you on the review. Ross, you may remember Victoria from our work together previously.

Denise A. Walker
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. | 7308A WJCN
Office: 202-564-6520
EPA Cell: 202-816-9872

Have a FOIA question? Try here first!

From: Kibler, Virginia
Sent: Wednesday, February 28, 2018 2:55 PM
To: Walker, Denise <Walker.Denise@epa.gov>; Curtin, James <curtin.james@epa.gov>
Cc: Brennan, Ross <Brennan.Ross@epa.gov>; Weiss, Kevin <Weiss.Kevin@epa.gov>
Subject: RE: FOIA: draft letter to John Hall

Here is the letter.

From: Kibler, Virginia
Sent: Wednesday, February 28, 2018 2:56 PM
To: Walker, Denise <Walker.Denise@epa.gov>; Curtin, James <curtin.james@epa.gov>
Cc: Brennan, Ross <Brennan.Ross@epa.gov>; Weiss, Kevin <Weiss.Kevin@epa.gov>
Subject: FOIA: draft letter to John Hall

Dense and Jim,

Deliberative Process Privilege / Attorney-Client / Ex. 5 I am asking for you to review this before I send it out.

Thank you for your time,

Ginny

Ginny Kibler
Water Quality Team Lead
State and Regional Branch
Water Permits Division
Office of Wastewater Management
MC4230M
Washington, DC 20460
202-564-0596

APPENDIX

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Initial Short FOIA Response Template

This template is a short initial note that you can send via FOIAonline, letting the requester know your contact information, that you are reviewing the request and that you will be back in touch promptly once you have had a chance to review fully the request. This can be accomplished by clicking the "Create Correspondence" tab in FOIAonline or by sending via e-mail and then uploading into FOIAonline.

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Dear [FOIA Requester]:
Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*,

My office has received your FOIA request. I will contact you again after we have had the opportunity to fully review your request. I will be your point of contact. Please feel free to contact me directly with questions or concerns.

Additionally, at any time, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS).

You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[Your Name]
[Your Phone Number]

Initial Detailed Response Template

This template provides optional sections and language to fit the circumstances of any particular request. If the requester provides telephone contact information, it is always a ***best practice*** *to accompany the initial response letter with a telephone call to the requester. When using this template, read the sections below carefully and edit the bracketed portions consistent with the request at issue. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.*

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*, Initial Response

Dear Mr./Ms. *[Last name]*:

Thank you for your Freedom of Information Act request. This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on *[MONTH DAY, YEAR]*, in which you requested

> *[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].*

Opportunity to Discuss and Modify *(if needed)*

> *[Edit as appropriate]*

Your request is *[too broad to be completed within 20 days and/or does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them.]*

For example, we would like to discuss the types of records you are interested in, and the possible locations of these records. We would like to further understand the specific subject matter of the records so that we are able to craft a search and provide you with the records you seek. *[TO MAKE THIS STATEMENT DEFENSIBLE IT IS ESSENTIAL TO EXPLAIN WHY YOU CANNOT IDENTIFY AND LOCATE THE RECORDS].*

In addition, requests phrased as legal discovery, e.g., for all records "including but not limited to" and "pertaining to" a subject with no further limitation, do not provide adequate information to allow a professional employee to determine which records you wish EPA to provide.

EPA's FOIA regulations state:

> "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." 40 C.F.R. § 2.102(c).

We would like to provide you the opportunity to discuss the request with us and clarify the records that you are seeking so that EPA can process your request. As indicated in 40 C.F.R. § 2.102(c), please include or be prepared to discuss any specific information about the records you seek, including time period, authors, or a more detailed description of the records' subject matter.

Unusual Circumstances and Extension of Time *(if needed)*

[Edit as appropriate]

Pursuant to 40 C.F.R. § 2.104(d), an extension of time to respond to your request is necessary. Given the scope of the request, EPA anticipates that

[…the response will require significant amount of EPA's resources and time to search for, and appropriately examine the voluminous amount of records to complete this request and/or

…to search for and collect the requested records from multiple EPA offices that are separate from the office processing the request" and/or

…the need for consultation with another agency having a substantial interest in the determination of the request."]

EPA has initiated the coordination of and search for responsive records in our files. Because of the circumstances described above, it is difficult to predict with certainty how many records may be involved. [Optional: *Nonetheless, at this time, EPA estimates the Agency will be able to complete this request by [DATE, MONTH, YEAR]. We appreciate your patience.*]

[*Only if Relevant: Since the time of your request and as of today's date, EPA has received additional FOIA requests about [Topic] including several requests that were approved for expedited processing. These expedited requests will be processed before your request. However, many of the documents that are responsive to those requests will also be responsive to your request. These documents will be made publicly available on a rolling basis as they are produced.]*

Processing Fees *(if needed)*

[Edit as appropriate]

[Option 1: On [DATE], the EPA's National Freedom of Information Office granted the fee waiver request that accompanied the FOIA request. Therefore, you will not be assessed fees.

Option 2: On [DATE], the EPA's National Freedom of Information Office denied the fee waiver request that accompanied the FOIA request. Therefore, we must receive an assurance of payment before processing the request.

Option 3: You were placed in the "other" fee category, which means you will be charged for search, and duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A. Therefore, we must receive an assurance of payment before processing the request.

Option 4: You were placed in the commercial fee category, which means you will be charged for search, review, and duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A. Therefore, we must receive an assurance of payment before processing the request.

Option 5: You were placed in the "media/educational" fee category, which means you may be charged for duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A.]

Publicly Available Information *(if needed)*

The following are sources of publicly available information that you can access immediately:
[Edit as appropriate to your request. You may include fire links to other relevant FOIA responses, your Program specific website, and any of the links below]:

- Our website: https://www.epa.gov/home/advanced-search
- FOIAonline for records previously released through FOIA requests: https://foiaonline.regulations.gov/foia/action/public/search/
- Frequently requested records: https://www.epa.gov/foia/national-online-foia-library#request
- Environmental Topics Information repositories: https://www.epa.gov/environmental-topics/z-index
- Technical/scientific/educational publications: https://www.epa.gov/nscep
- Administrative and Environmental Appeals Board cases: https://www.epa.gov/foia/national-online-foia-library#opinions
- Staff Manuals and Guidance: https://www.epa.gov/foia/national-online-foia-library#admin
- Policy Statements: https://www.epa.gov/foia/national-online-foia-library#statement
- Superfund sites and data: https://www.epa.gov/foia/national-online-foia-library#superfund

Next Steps

[Edit as appropriate]

The processing clock is stopped for your FOIA request until we receive *[your assurance of payment [and/or] your clarification or modification.]*

Please respond within ten calendar days from the date of this letter to arrange a time to discuss your [*request and fees]*.

You may contact *[Program Contact]* at (*email address)* or at *(telephone number)* with your response or if you have any further questions. If we do not receive a response from you *[By X Date (at least 20 days from date of letter)]*, we will consider your request to be voluntarily withdrawn. [*Edit as appropriate: Once the request is clarified and we receive a written assurance of payment, we will continue processing your FOIA request*] and provide you with an estimated timeframe for completion. If you wish to request information connected to this request in the future, please reference the FOIA request number.

Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[NAME]
[TITLE]

Closure for Failure to Modify FOIA Request Template

This template is for correspondence to a requester who has failed to modify an improper request. This should be used only after it is clear that the requester will not modify a request. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*, Closure For Failure to Modify

Dear Mr./Ms. *[Last name]*:

Thank you for your Freedom of Information Act request. This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on *[MONTH DAY, YEAR]*, in which you requested

[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].

Your request does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them. The EPA's FOIA regulations explain:

"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." 40 C.F.R. § 2.102(c).

We sent you a letter dated *[DATE]* providing you the opportunity to clarify the records that you are seeking so that EPA can process your request. We asked that you contact us by *[DATE]*, with your clarification, and we have not received additional information from you, so we are administratively closing your request.

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are

submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[NAME]
[TITLE]

Requests Seeking Only Information Publicly Available on EPA's Website Template

This template can be used for responding to requests that seek only information publicly available on EPA's website. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.

Subject: *[FOIA ID # XXX-XXXX]*

Dear *Mr./Ms. [Last Name]:*

This is in response to your Freedom of Information Act (FOIA) request, identified above, dated *[Month, Day, Year],* that you submitted to the U.S. Environmental Protection Agency (EPA). Your request seeks the following documents:

> *[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].*

The information that you are seeking is publicly available on EPA's website *[Describe where on EPA's website material can be found and insert link to that location].* Because this information is publicly available, your FOIA request for this information is being administratively closed, in accordance with EPA's FOIA regulations. See 40 C.F.R. Part 2, Subpart A.

If you consider this response to be a denial of your request, you may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, N.W. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

Thank you for your interest in this information.

Sincerely,

[NAME]
[TITLE]

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Checklist for Clarifying Requests

This checklist is a quick reference for things to consider when attempting to identify components of a request that may be missing or ambiguous and for which clarification is needed.
While EPA's regulations cite the categories below as items that should be included in a request, failure to include one or more of these categories ***does not*** *automatically make the request improper or not reasonably described.*

Categories of Information to Discuss with Requester for Clarification:

The more categories on which you and the requester can agree, the more straightforward processing the request will be.

- ☐ **Type(s) of Records**: Emails, Documents, Memoranda, Notes, Presentations, Text Messages, Schedule, Voicemail, Data, Logs, etc.
- ☐ **Subject Matter/Topic/Search Terms**
- ☐ **Date Range**
- ☐ **Specific Departments/Custodians/Positions**

New Complex FOIA Project: Initial Meeting with Team Checklist

This checklist may assist the Action Office in coordinating the initial meeting with the Contributing Offices and any other necessary parties and begin meaningful collaboration on the FOIA request. This checklist assumes the request has been clarified with the requester.

Participants for an initial discussion: Lead contact and Subject Matter Experts from Action Office and FOIA Coordinator and Subject Matter Experts from Contributing Office(s).

- ☐ Identify and Clarify the following roles:
  - FOIA Coordinator for each office; and
  - Lead contact in the Action Office and any other lead contact(s) from Contributing Office(s) to include on all internal correspondence.

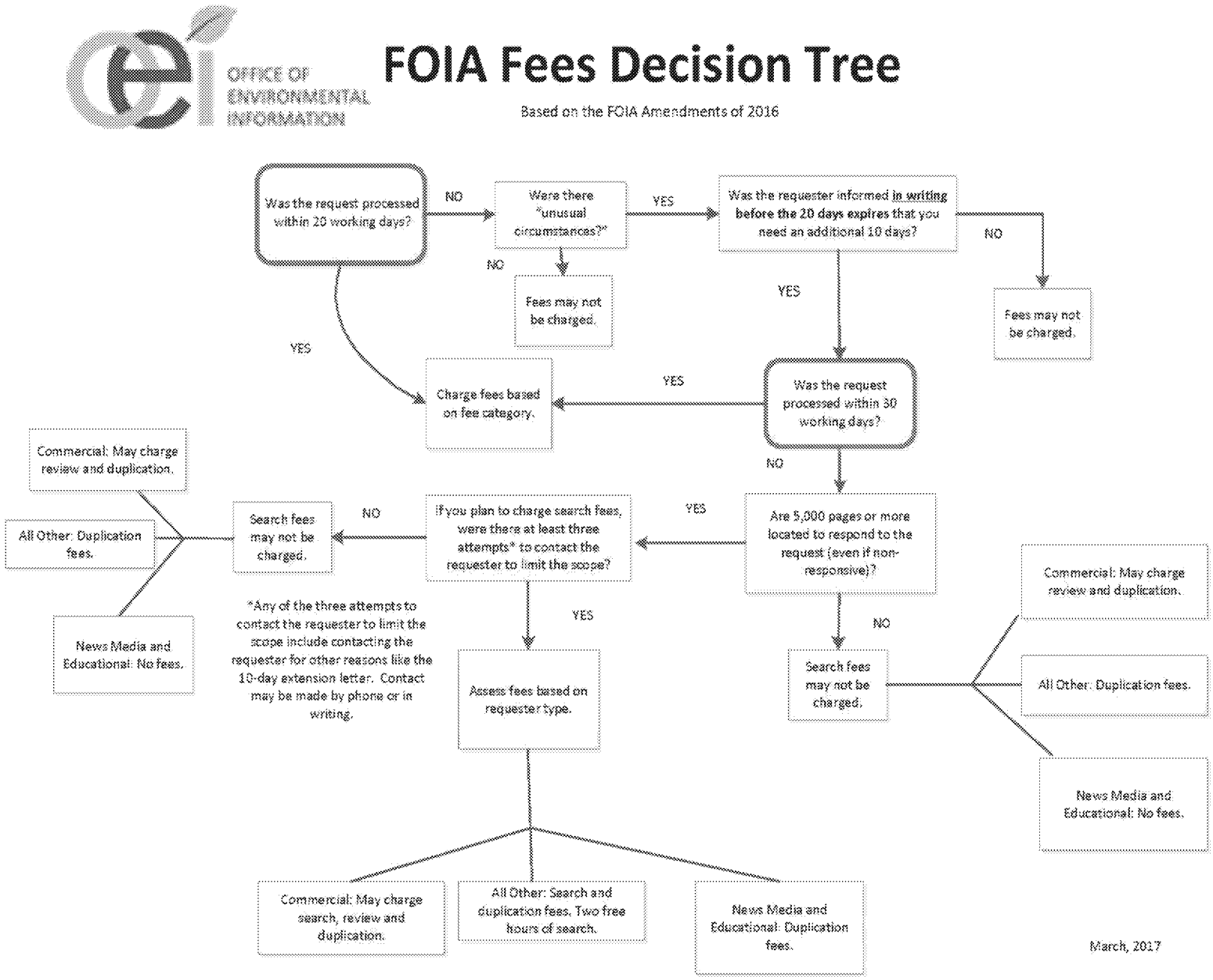
- ☐ Listen carefully and ask questions. Think through:
  - Scope;
  - Time Period;
  - Potential Custodians;
  - Record Types, Locations, and Systems; and
  - Potential Search Terms.

- ☐ Timing
  - FOIA Clock
    - How many days remain on the FOIA clock? and
    - Are there unusual circumstances permitting the Agency to extend the due date?

  - Potential Resource Concerns
    - What do the team's resources look like?
    - Any upcoming large projects?
    - Emergency Project or anticipated resource issues?
    - Familiarity with Relativity?

FOIA Fees Decision Tree

The following flow chart can assist with determining which fees should be charged to the requester.



Confirmation of Clarification Template

This template is to document any clarification that the requester has made regarding a pending FOIA request. It is a best practice to document any modification of the request in writing. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*, Confirmation of Clarification

Dear Mr./Ms. *[Last name]*:

Thank you for your Freedom of Information Act request. This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on *[MONTH DAY, YEAR]*, in which you requested

[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].

Clarification

On *[DATE]* you spoke to *[CONTACT]* regarding the scope of your request. During the conversation you clarified your request as follows:

[*Edit as appropriate to reflect your conversation and the needs of the request… you may wish to include information about:*

Type(s) of Records: *Emails, Documents, Memoranda, Notes, Presentations, Text Messages, Schedule, Voicemail, Data, Logs, etc.*
Subject Matter/Topic/Search Terms:
Date Range:
Specific Departments/Custodians/Positions:

Estimated Date of Completion and Fee Estimate

*[Provide an estimated date of completion and appropriate information regarding fees]***Next Steps**

[Edit as appropriate]

EPA has initiated the coordination of and search for responsive records in our files. During the call, we agreed to set up regular check-in calls to keep you updated. **Our next call is scheduled for *[insert date]*.**

Please contact [Contact] if you have any questions about your request. Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (301) 837-1996 or (877) 684-6448; or fax, (301) 837-0348.

If you wish to request information connected to this request in the future, please reference the FOIA request number.

Sincerely,

[NAME]
[TITLE]

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Search Instruction Template for Potential Custodians

These are model search instructions for the Action Office to provide to potential record custodians, both in the Action Office and Contributing Offices. These instructions should be customized to reflect the search plan that the Action Office and Contributing Office develop to search for and collect all non-Outlook records.

As part of the Search Plan, the Action Office should identify a Point of Contact (POC) who will collect all responsive and nonresponsive records and upload releasable, responsive records to FOIAonline. Each Contributing Office should also identify a POC who will collect records from Contributing Office custodians, propose redactions where appropriate, and transfer both unresponsive records and responsive records to the Action Office POC through an agreed-upon method of transfer.

Search Instructions

You have been identified as a potential custodian of responsive records to a Freedom of Information Act (FOIA) request. The request ***[FOIA Request Number]*** concerns ***[describe the request and any modification agreed upon with the requestor].*** A copy of the request and any relevant communication with the requester is attached for your reference.

Reminder: In accordance with EPA's FOIA Procedures, you should track and record the time spent searching for responsive records.

STEP 1: CONDUCT THE SEARCH

Please search the following locations for responsive records: [*The Action Office should select the appropriate locations from the list below.]*

- Lotus Notes mailboxes or calendars, other Lotus Notes databases*
- Enterprise Content Management System (ECMS)
- Local or shared computer drives (C:, F:, G:, etc.);
- SharePoint sites
- OneDrive
- Mobile devices (e.g., text messages and photographs)
- Voicemail
- External drives and discs
- Hard-copy files
- Other

* Please use the following key words in your Lotus Notes search or other non-Outlook electronic search:

- *[The Action Office should provide search terms here.]*

Attached for your reference are step-by-step instructions for conducting a search of *[Lotus Notes]/ [ECMS]/ [Other Electronic Files]. The Action Office should select and attach applicable instructions.*

STEP 2: CONFIRM THE SEARCH IS COMPLETE

When you have completed your search, please send an email, with the subject line: "Search Response for [FOIA Request Number]" to Action Office Point of Contact@epa.gov. In your email, including the following information:

- The number of records located each search location [If you did not locate any records, please note this in your email];
- The time spent searching for responsive records

STEP 3: TRANSFER SEARCH RESULTS FOR REVIEW

***[For Action Office Custodians]*:** Once you have completed your search of all non-Outlook records, in accordance with Step 1, above, and confirmed that your search is completed (Step 2), you will need to review those records for responsiveness. For both responsive and nonresponsive records, please collect the records in accordance with the instructions below. You may also be asked to review the responsive records for potential FOIA exemptions, once all responsive records are collected.

***[For Contributing Office Custodians]*:** Once you have completed your search of all non-Outlook records, in accordance with Step 1, above, and confirmed that your search is completed (Step 2), you will need to review those records for responsiveness. For both responsive and nonresponsive records, please collect the records in accordance with the instructions below. Contributing Office POC will review responsive records for potential redactions and may seek your input before providing both responsive records and nonresponsive records to the Action Office.

[For Lotus Notes]: As described in the attached Lotus Notes Search Instructions, all Lotus Notes records should be uploaded to the Lotus Notes Collection Database. You will receive an email with a hyperlink that allows you to access the database.

All other records: *[The Action Office Point of Contact (POC) should select from sample instructions provided below]*

For collection via Lotus Notes Collection Database: Please include all other electronic files in the Lotus Notes Collection Database as described in Step 6 of the Lotus Notes Search Instructions.

For collection via email: Consolidate all responsive records in a folder on your computer, labelled as "Your Name, FOIA Request Number, Folder # of #_Responsive" and all non-responsive records in a folder labelled "Your Name, FOIA Request Number, Folder # of #_Nonresponsive." You will send these folders via email to [For Action Office custodians: Action Office POC@epa.gov] or [For Contributing Office custodians: Contributing Office POC@epa.gov]. Due to limitations on file size, you may need to compress the folder(s) and/or send multiple emails. For each email, use the folder label as the subject line.

For collection via OneDrive: Action Office POC and/or Contributing Office POCs will need to create "responsive" and "unresponsive" folders for each custodian on OneDrive. Using the following link: [link to OneDrive folder], upload all responsive and unresponsive records into the corresponding folders.

For collection via thumb drive: Create a folder on the thumb drive titled "Your Name, FOIA Request Number" and separate subfolders for responsive and nonresponsive records. Upload all responsive records and nonresponsive records to corresponding subfolders and save on a thumb drive. Please deliver this drive to Action Office POC or Contributing Office POC.

Note: All hardcopy documents should be scanned into an electronic document and transferred to Action Office POC or Contributing Office POC in accordance with the instructions above.

Search Tracking Memo

This memo provides an example of how the Action Office may document the search plan and track the search process.

Action Office:
Point of Contact:

Contributing Offices or Regions:
Point(s) of Contact:

Requester:

FOIAonline Number(s):

Subject of Request:

Date Range:

Custodians:

Name	Office (If separated N/A)	Tasked (Date)	Completed (Date)

The following databases were searched:

Repository	Repository
□ Outlook	□ SharePoint Sites
□ Lotus Notes	□ OneDrive
□ ECMS	□ Mobile Devices
□ CMS	□ Voicemail
□ Local or shared computer drives	□ External Drives and Discs
□ Hard-copy files	□ Other:

Search Terms Used:

_____

_____

Total Number Responsive Records: _____

Instructions for Searching & Collecting Other Electronic Files

These instructions are for custodians who may be searching and collecting electronic files. If applicable, please include this as an attachment to your Search Instructions for custodians.

Using the search terms provided in the Search Instructions, search for responsive records located in the other computer drives to which you have access. This includes, but is not limited to, your C: drive and your F: drive on your EPA computer. Unless you are designated by the Action Office/ Contributing Office Point of Contact to search a shared drive, such as the G: drive, you should limit your search to those drives to which you have sole access.

Note: Computer drives cannot be collectively searched. For each search term, you will need to conduct a separate search within each drive that you have identified as containing potentially responsive records.

Below are detailed instructions that will guide you through the following steps:

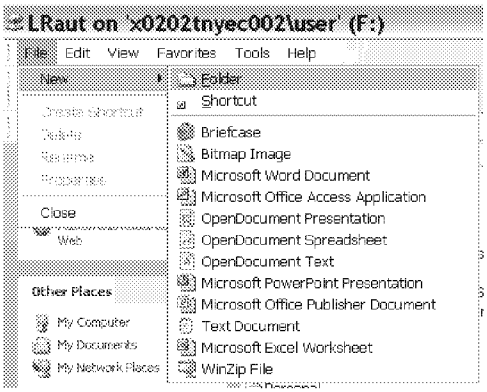
(1) Create search folders to collect search results and final collection folders for responsive and nonresponsive records
(2) Conduct term-specific searches of a single drive, and repeat for each drive
(3) Copy search results into a search folder
(4) Consolidate all search results into the final collection folders and search for duplicates
(5) Review files for responsiveness and sort into subfolders
(6) Optional: upload files to the Lotus Notes Collection Database.

Step 1. Create Search Folders

Before you begin your search for records, you will need to create folders to store the records from each search. You will then consolidate these folders into a "Final Collection" folders for responsive and nonresponsive records. To create and name the "Search Results" folders and "Final Collection" folder, do the following:

- ✓ Select the "**File Explorer**" located on your desktop or on the task bar at the bottom of your screen.

- ✓ Create a folder either by selecting *Home > New Folder* or *File > New > Folder* as shown below. [How to create the folder may vary depending on the computer system]



- ✓ Name the folder using a simple convention, such as "Search Results [insert # of search]." Do NOT use the case name or any search term in the folder name.

- ✓ Repeat this process for each search, and to create a "Final Collection" folder where you will copy all of the records from the search folders.

- ✓ In the "Final Collection" folder, create two subfolders, one for "responsive" records and the other for "nonresponsive" records.

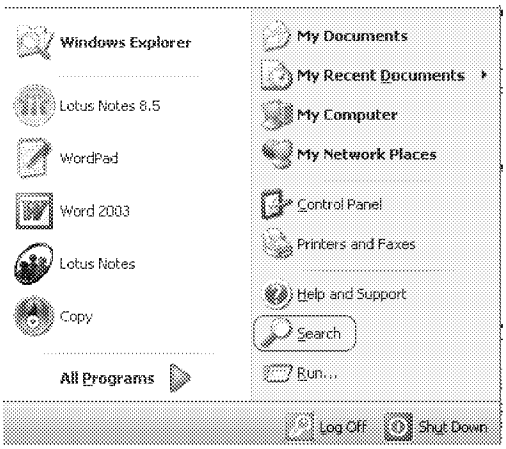
Step 2. Conduct the Search

Below are some tips to assist with your electronic document search. These tips would apply to searches for files located, for example, in Word, Excel, PowerPoint, WordPerfect, Adobe, and .tif documents, saved in your C:drive, F:drive, and G:drive (if applicable).

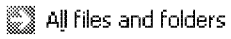
One place to start is with a Windows Search of an entire drive, such as the C:Drive. To perform such a search, follow the steps below.

Windows Explorer Search for Entire Drive

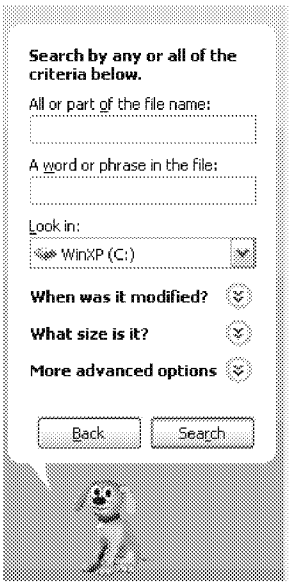
- ✓ From the "Start" menu, select "Search." *Start > Search*



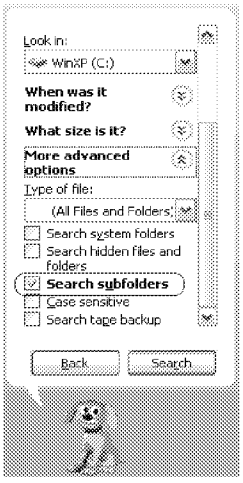
- ✓ Select "**Files and Folders**" (3rd option from the top) from the list at the left side of the screen.



- ✓ Identify the drive that you want to search (C:, F:, etc.).
- ✓ Type the search term in the box entitled "**A word or phrase in the file.**"



- ✓ Click on "**More Advanced Options**" at the bottom of the search menu. Make sure that only "**Search Subfolders**" is checked.
- ✓ Click "**Search**."



Depending upon the number of files, the search may take anywhere from 5 minutes to 40

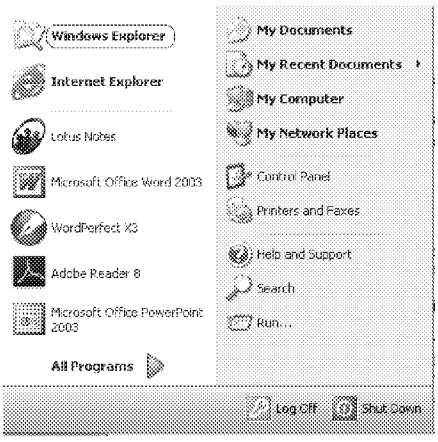
minutes. If the search completes successfully, the search companion will indicate that the search is done and that the search has found a specific number of documents.

- ✓ Record this number for later reference.

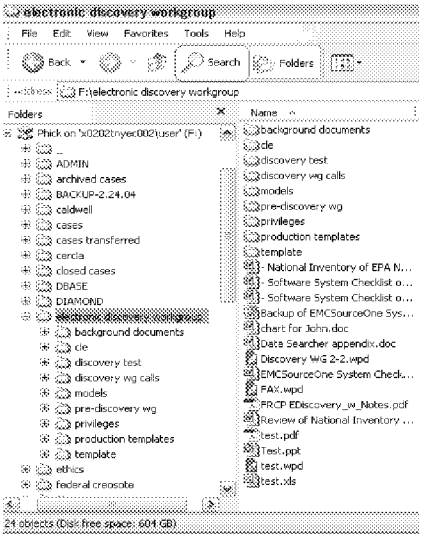
If when searching, the search unexpectedly stops running, the green "progress" bar stops moving, or the search gets stuck in one folder, consider searching each subfolder within a drive separately per the instructions below.

Windows Explorer Search for Subfolders within a Drive

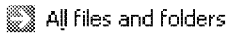
- ✓ Select *Start > Windows Explorer*



- ✓ Highlight the subfolder that you would like to search and click "Search."



- ✓ Select "**All Files and Folders**,"



- ✓ Type the search term into the box entitled "**A word or phrase in the file**"
- ✓ Select "**More Advanced Options**" and select *only* "**Search Subfolders**"
- ✓ Click "**Search**"

Depending upon the number of files, the search may take anywhere from 5 minutes to 40 minutes. If the search completes successfully, the search companion will indicate that the search is done and that the search has found a specific number of documents.

- ✓ Record this number for later reference.

If when searching, the search unexpectedly stops running, the green "progress" bar stops moving, or the search gets stuck in one folder, proceed with a manual search. The instructions below may assist you with performing that search.

Manual Search

In conducting a manual search, review those locations in the drive that are reasonably likely to contain responsive records.

Step 3. Copy Records to Search Folders

- ✓ As you complete each search, go to the Toolbar, click *Edit > Select All*. Right click and drop down to **Copy**.
- ✓ Go to the Search folder created to hold documents pulled from that specific search, open it, right click, and select "**Paste**" from the drop-down menu. The documents will appear in that folder.

Repeat Steps 1 through 3 for each of the drives to which you have sole access.

Step 4. Copy Records from the Search Results Folders to the "Final Collection" Folder

- ✓ Once you have completed your search, you should consolidate all documents collected in your Search Results folders into a Final Collection Folder. Open one Search Folder so that you can see all of the files inside the folder. Go to the Toolbar, click *Edit > Select All*. Right click and drop down to **Copy**.
- ✓ Go to the Final Collection folder created to hold all documents. Open the folder, right click, and select "**Paste**" from the drop-down menu.

- ✓ Repeat for all Search Folders until all files are located in the Final Collection Folder.

Because you will need to search each drive for every search term, it is likely that a file will respond to more than one search and that you will have the same file saved in more than one Search Folder. To eliminate duplicates in your Final Collection Folder, do the following:

- ✓ When you open the Final Collection folder and paste the highlighted documents into that folder, if the document is a duplicate of a document already in the folder you will get a dialog box "**Confirm File Replace**." Click "**No**" for each document for which such a box appears because it is a duplicate.

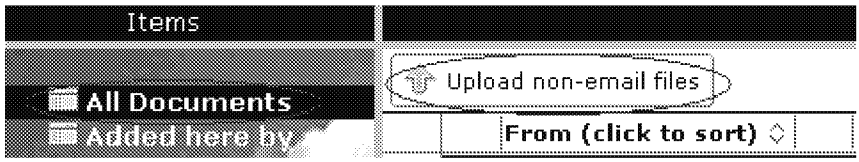
Step 5. Sort Responsive Records from Nonresponsive Records

Review documents in the Final Collection folder for each drive to make sure that they are actually responsive to the FOIA request and were not captured because of the presence of a search term used in another context. All responsive records should be separated into a "Responsive" Subfolder; all nonresponsive records should be separated into a "Nonresponsive" Subfolder.

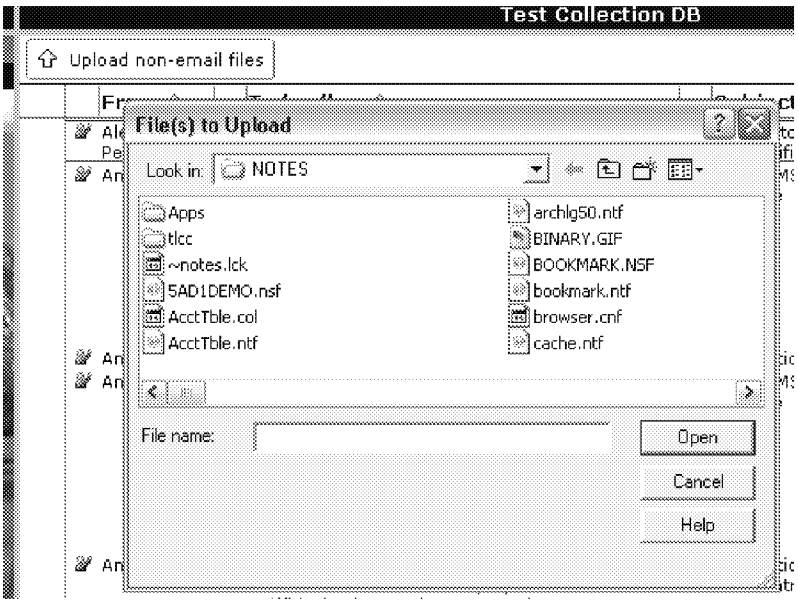
OPTIONAL: Step 6. Upload Documents to Collection Database

Please refer to the Search Instructions for guidance on how to transmit your files to the Action Office/Contributing Office Point of Contact. If the Search Instructions direct you to use the Lotus Collection Database to receive all electronic files, please follow the instructions below.

- ✓ Open the All Documents view of the Collection Database and click on the green button at the top of the view labeled "**Upload non-email files**".



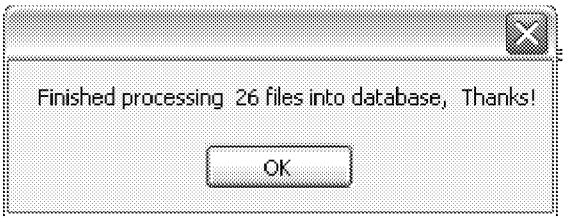
A new box will appear from which you must select your file.



- ✓ Go to the location where you have saved the search results and open that folder.
- ✓ To select more than one file, simply hold down the <Shift> key and click on the first desired filename and then click on the last one. All the files between those will automatically be chosen.
- ✓ If the desired files are not sequential, press <Ctrl> and click on each filename that you wish to include.

<u>If you receive an execution security alert, click on the third option under the "What to Do" heading that says: Start Trusting the Signer to execute this action.</u>

After the files are uploaded you will get the following notice:



Please make note of the confirmed number of items since default setup for a collection database is a "ballot box" style collection where you cannot see any items in the collection, including your own. Refer to Step 3 of the Search Instructions for details on how to transfer your results to the appropriate Point of Contact.

Instructions for Searching & Collecting Lotus Notes Email

These are instructions for custodians who may be searching and collecting electronic Lotus Notes files. If applicable, please include this as an attachment to your Search Instructions for custodians. Note that any request seeking emails sent/received prior to February 2013 require a Lotus Notes search.

Note: These instructions are subject to change as of January 2018. OEI will provide additional guidance on searching Lotus Notes at that time.

To fulfill your responsibility under the FOIA, you will need to manually search your Lotus Notes Email for any potentially responsive records and collect these records in the Collection Database(s). Search terms have been provided to you in the Search Instructions, and you have received an email with the link(s) to the Collection Database(s). If you have not received the link(s) or misplaced the email that includes the link(s), please contact the Action Office/Contributing Office Point of Contact responsible for overseeing this FOIA request in your office.

Below are detailed instructions to guide you through the following steps:

(1) Index your Inbox emails
(2) Access the Collection Database(s)
(3) Create a folder to organize your search results by responsiveness
(4) Perform the search for emails
(5) Review the search for responsiveness and sort into subfolders
(6) Upload records to the Collection Database(s)
(7) Repeat Search, Review, and Collection for Archived emails
(8) Search and print ECMS (EZ Record) emails
(9) Delete indexes

Step 1. Index Your E-mail

Before you search for and collect emails, you *must* index your emails. Indexing your emails ensures that e-mail attachments are included in the search.

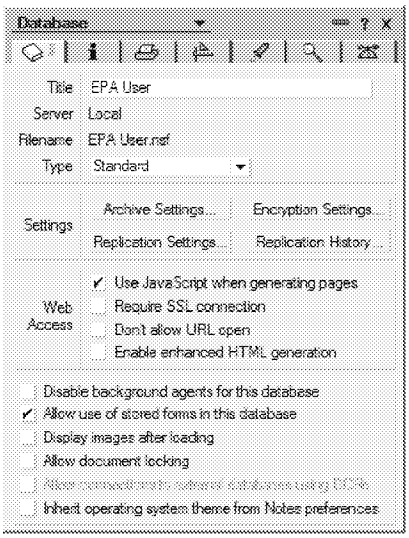
Indexing a large mail file will take several hours. (Most e-mail files are large!)

However, you can continue to use your email normally while the indexing process is running. You may also close your email and/or turn off your computer. This will not interrupt the indexing. Here's how it works:

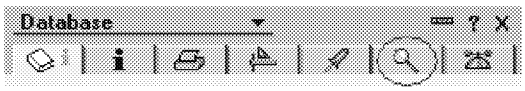
- ✓ Open your Lotus Notes Email Inbox

✓ On the menu bar in the upper left corner of your Notes screen select:

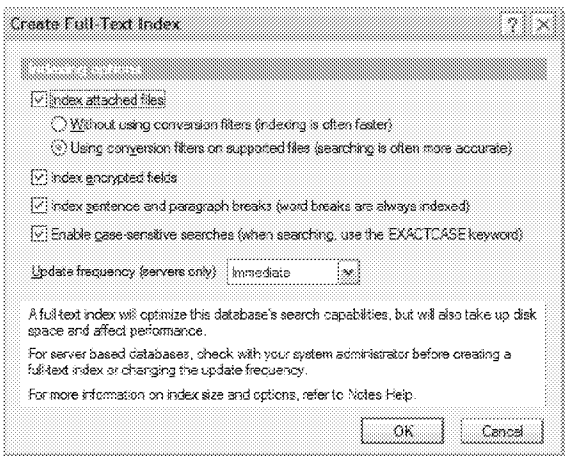
File > Application > Properties in Notes 8



✓ Select the tab with the magnifying glass icon.



✓ Click the **Create Index** button, make the selections below (or follow local instructions), and click **OK.**



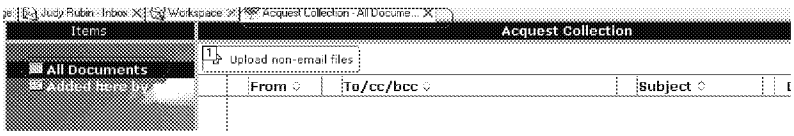
✓ Close the Database Properties box

Step 2. Open the Collection Database(s)

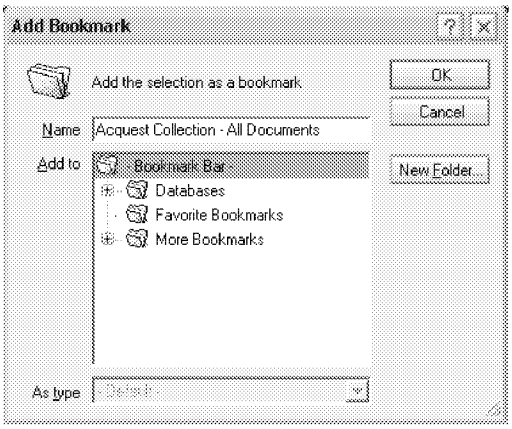
By this point, you should have received an email containing a link to the Collection Database. Follow the instructions below:

- ✓ Click on the link to open the database. For easy access to the database, you will create a bookmark by following the steps below.

- ✓ Right click on the database tab at the top of your screen



- ✓ Select **Create Bookmark.** The following screen will appear:



- ✓ Make sure that "Bookmark Bar" is highlighted and press **OK**. The "Tree" icon will now appear at the bottom of your bookmark bar on the left side of your email Inbox screen.

Both your Email Inbox and the Collection Database(s) are now open, so you can easily switch between your mailbox and the database(s) by selecting the desired tab.

Step 3. Create a "Search Results" Folder and Final Collection Folder

Before you upload emails to the Collection Database, you will transfer the emails from your inbox into a separate "search results" folder and into "responsive" and "nonresponsive" subfolders. To create these folders, do the following:

- ✓ In your Inbox select *Actions > Folder > Create Folder*

- ✓ Name the Folder "Search Results," and click **OK**

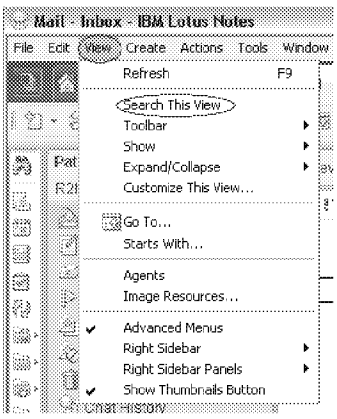
- ✓ Within the "Search Results" Folder, select *Actions > Folder > Create Folder* to create "Responsive" and "Nonresponsive" subfolders.

Step 4. Perform Search for Emails

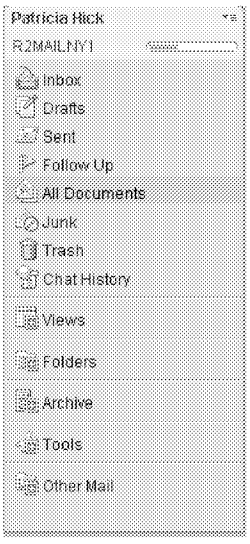
NOTE: Make sure that your e-mail is indexed prior to conducting the search. When indexing has completed, you should see a green ball ● and "Indexed" to the right of the search function.

If you do not see the search box:

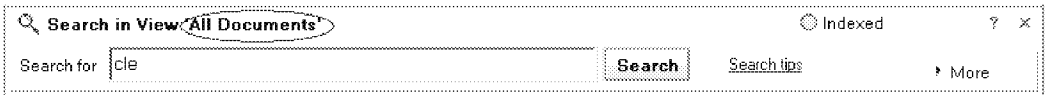
- ✓ Click *View > Search this View* from the menu bar at the top of your Notes screen.



- ✓ On the listings at the left side of your Inbox select *All Documents*. This will capture all potentially responsive documents, even if emails are stored in folders.

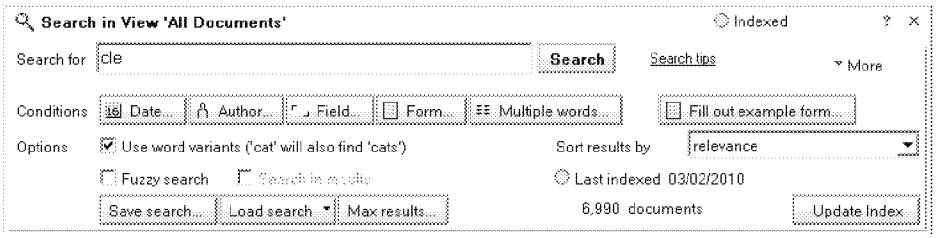


The "Search in View" will now indicate that the search will consider "All Documents."



✓ Click on **More** at the right side of the screen to reveal additional options.

The screen should now look like the snapshot below:



Clicking on the **Multiple words** box will allow you to choose up to eight words for your search.

✓ Enter the search terms provided in the Search Instructions and click **Search**. Your search results will appear below the Search window.

> Note: Lotus Notes has a search limit of 5,000 documents. If your search returns "5,000" documents, there are probably more potentially responsive emails that were not captured. You will need to do one of the following to address this issue:
>
> - Refine your research terms (talk with your POC prior to doing this)
> - Conduct multiple searches using fewer terms
> - Contact your local help desk to request removal of the search limit.

✓ Select *Edit > Select All*, then click *Actions > Folder > Move to Folder* and select the "Search Results" Folder and click the **Add** button.

Do NOT copy and paste search results into the folder. This creates duplicates and will overwhelm future searches.

Repeat these steps above until you have searched for all relevant search terms and have deposited potentially responsive emails in the "Search Results" folder.

✓ Click **<Ctrl A>** to reveal the number of documents collected in the "Search Results" folder in the lower left of the Notes screen. Tip: Record this number so that you can later verify that you have transferred all documents from your Notes to the Collection Database.

Note: The "Search Results" folder will only contain an unduplicated collection of documents. Even if an email responded to multiple searches, it will only appear once in the folder.

Step 5. Review Search Results for Responsiveness

Once you have completed the search, you should review emails and attachments to make sure that they are actually responsive to the FOIA request. It is possible for a search to collect documents that use a search term in context that is outside the scope of the request and are therefore not responsive.

- ✓ On the left side of your in-box in Notes select *Folders > Search Results*
- ✓ If an item is clearly not responsive, select the document and sort into "Nonresponsive" subfolder. Sort responsive records into the "Responsive" subfolder. You will upload all search results into the collection database, but indicate to the document reviewer which records are nonresponsive.

  Do NOT delete any items from folders. Either follow the instruction above or drag and drop documents between folders.

Step 6. Upload Responsive Search Results into Collection Database(s)

After you have reviewed the records in Lotus Notes, you will need to copy them into the Collection Database(s). Depending on the number of records, you may need to copy them in several batches (of no more than 100); copying and pasting a large batch may also take several minutes.

- ✓ Open the "Responsive" and "Nonresponsive" subfolders in the "Search Results" folder and select *Edit > Select All* from the menu bar (at the very top left of your Notes screen)
- ✓ Select *Edit > Copy* from the menu bar
- ✓ Select *Edit > Deselect All* from the menu bar. Do NOT skip this step.
- ✓ Open the Collection Database by selecting the bookmark that you created in Step 2.
- ✓ Open the "**All Documents**" folder
- ✓ Select *Edit > Paste* from the menu bar at the very top left of your Notes screen

Repeat these steps until you have copied all of your search results from your e-mail to the Collection Database.

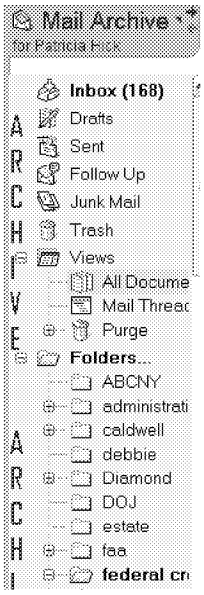
You will receive a dialog box confirming the number of items you pasted. This number should match the number of search results recorded in Step 4.

Step 7. Repeat Search, Review, and Collection for Archived Emails

The search described above will not capture emails that were archived and deleted from the inbox. You will need to repeat Steps 1-5 for emails that you have saved in your Lotus Notes Archive.

- ✓ Access your Archive from your Notes inbox by clicking *Archive > R2 etc. Archive*.
- ✓ Repeat Step 1 to index your Archive.
- ✓ Repeat Step 2 to open the Collection Database.
- ✓ Repeat Step 3 to create a "Search Results" folder.

Before you begin the search, make sure that you are in the All Documents view in Archive, as shown below:



- ✓ Follow the directions in Step 4 to conduct the search(es) using the search terms provided.
- ✓ Repeat Step 5 to review the search results, if applicable.
- ✓ Repeat Step 6 to upload records to the Collection Database(s)

Step 8. Search and Print EZ Record Emails

You will need to manually search ECMS for responsive emails that are not already captured in your Inbox and Archive search. Please visit the following site for further instructions: http://intranet.epa.gov/ecms/guides/search/

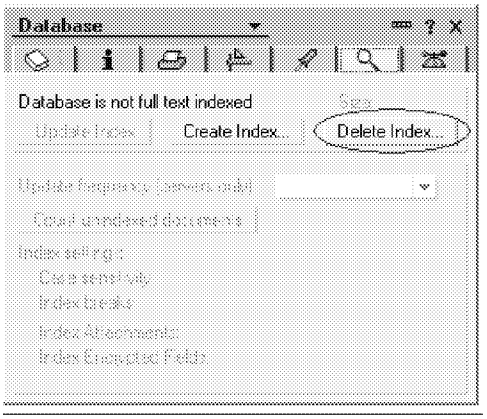
Any responsive emails should be printed and either provided to your FOIA coordinator in hard-copy form or scanned and uploaded/emailed in accordance with Search Instructions.

Step 9. Delete Indexes

Mailboxes that are indexed use substantially more space than an un-indexed mailbox, so you should remove the index once you have completed your search for records.

- ✓ Open your Lotus Notes Email Inbox
- ✓ On the menu bar in the upper left corner of your Notes screen select:

File > Application > Properties in Notes 8 > *Delete Index*



Your Lotus Notes Email Collection is now complete. Please notify the Action Office/Contributing Office Point of Contact.

Access to Absent and Separated Employee Records

This document provides additional guidance for the Action Office for custodians who have departed the agency or who are otherwise unable to conduct their own search.

Access to an Absent or Separated Employee's Email and Data

If a potential custodian of responsive records is on scheduled leave from the Action Office or a Contributing Office during the time of the search, the Action Office must ensure that the employee's records are searched in their absence. The Office of Environmental Information has a procedure on accessing the email and electronic records of separated or absent employees.

To request access, the Action Office processing the request must send an email, requesting access, to the custodian's manager (or former manager, in the case of separated personnel). If the manager approves the request, they then forward the request, via email, to their Information Resources Management Branch Chief (IRM BC) or Information Management Official (IMO). If the IRM BC or IMO approves the request, they forward the request to OEI FILE ACCESS REQUEST@epa.gov.

The email requesting access should include the information in the table below. The email subject line should include the nature of the request (i.e. Access to email). Please note that access to the OEI File Access Request mailbox includes federal and contractor email staff necessary to support the request.

Table must be completed by the Approver (IRM BC or IMO) and submitted in the Email to OEI FILE ACCESS. Email Subject must include the nature of the request (i.e. email access)	
Role	Name
Approver	John Doe (IMO, IRM BCs or their designee whose name has been provided as authorized approvers)
Mail Box Name Employee's full name Employee's LAN ID Telephone number	Doe.Jane@epa.gov Jane Any Doe Jdoe 111-222-3333
Person Receiving Access (Include email address)	Steven Jones (Jones.StevenT@epa.gov)

Access Needed for the Following Applications (as applicable):	o Legacy Notes o Office 365 (Including OneDrive) o Data Files (network drives, (F: and/or G:)(EZ Tech) o HQ Voice mail files o HQ VoIP Call logs o Mobile device data o Login Events (EZ Tech)

Managers may request access to an absent or separated employee's email files (Legacy Notes and Office 365), data files contained on OneDrive or network drives, voice mail files, call logs, and mobile devices by contacting the Office of Environmental Information (OEI). Once the manager has received access to these files, the manager is responsible for manually searching these files. OEI will not perform searches, nor is OEI responsible for data contents of any files. Moreover, OEI will not sign affidavits pertaining to the search or acquisition of files.

The table below depicts the type of information available and the time limit for requesting access to the related data.

Electronic Activities	**Content**	**Request Time Limit**
Legacy Notes	Emails, Calendars	Unlimited
Office 365	Email, Calendar, OneDrive	2/29/2013 - Forward
Data Files (network drives, (F: and/or G:) – EZ Tech Users	File and Folders	Unlimited
HQ Voice mail files	Voice mails	20 days
HQ VoIP Call logs	Outbound call/inbound calls	01/01/2014 - Forward
Mobile device data	Call Detail Reports (including text messages logs)	7 years
Login Events – EZ Tech Users	Login activities	30 days

As each access request is completed, the Action Office requesting the information will be notified and any instructions, if necessary, provided through the IRM BC or IMO. A list of IRM BCs and IMOs, by office, is available at the "SIO Corner" Sharepoint site, accessible through the EPA Intranet.

Quick Reference Guide: How to Save Text Messages

This document offers guidance on how to forward text messages from a mobile device to the EPA email system. These instructions are originally located at: http://intranet.epa.gov/mobiledevices/pdf/Instructions-Saving-Text-Messages.pdf.

EPA discourages the use of text messages for transmitting substantive (or non- transitory) federal records. (Wait, what is a "non- transitory" or "substantive" record?) If a substantive (or non-transitory) text message is sent or received on your government-issued mobile device, it must be saved into an EPA-approved records management system. If you follow the steps below, you can forward the text message into the EPA email system and then later save it as a record using EZ Email Records or another approved recordkeeping system. When forwarding the text message from the mobile device to the EPA email system, you must include contextual information such as the time, date, subject, and sender/recipient of the message. Please follow the instructions below to manage text messages that are substantive (or non- transitory) records.

How to Forward Text Messages to Email from an iPhone

1. Tap the "***Messages***" icon on the device.
2. Find the text message conversation that you need to save as a record.
3. Tap and hold one of the text messages in the conversation.
4. Tap the "***More***" option that appears above the text message.
5. Put a check mark in the circle beside any or all of the text messages that you want to save as records.
6. Tap the blue arrow icon in the lower right corner of the screen.
7. Type your EPA email address in the "***To***" field.
8. After the text message, enter contextual information about the message including: to, from, date, time, and a relevant subject, then tap "Send." For example, add "(To: Susan Employee, From John Worker, Date: 01.01.15, Time: 6:35 PM, Subject: Project Y)." Press ***"Send".***
9. After receiving the email containing the text message, follow the EZ Email Records process in Outlook to save the email as a record. After following these instructions, you may also notice that a copy of the message containing the contextual information created in step 8, appears in your list of messages in the Messages app on your phone.

Note: If you have problems forwarding text messages to email using the above instructions, please try the below options, starting with Option 1, below.

Option 1:

1. Tap the Settings App > Messages > Send & Receive
2. If your email address is listed with a checkmark next to it, tap on it to uncheck.
3. Exit out of Settings and try to forward a text message to your email. If you don't have an email listed or it still doesn't work, try Option 2.
   **Be sure to check your Junk Email folder to ensure it did not route there.*

Option 2:

1. Tap the Settings App > iTunes & App Store > Apple ID > Sign Out
2. Re-enter your Apple ID (work email address) and Apple ID password.
3. Exit out of Settings and try to forward a text message to your email.

How to Forward Text Messages to Email from a Windows Phone

1. On ***Start***, tap "***Messaging***", then tap the thread that contains the text message you want to save as a record.
2. Open the text message, press and hold the message to be forwarded, then click "***Forward***".
3. Type your EPA email address in the "***To***" field.
4. After the text message, enter contextual information about the message including: to, from, date, time, and a relevant subject, then tap . For example, add "(To: Susan Employee, From John Worker, Date: 01.01.15, Time: 6:35 PM, Subject: Project Y)."
5. After receiving the email containing the text message, follow the EZ Email Records process in Outlook to save the email as a record.

Note: This approach for saving text messages on a Windows phone can only be used for forwarding individual text messages. If multiple messages need to be stored as records, forward each message and the related contextual information to EPA's email system individually.

Technical Assistance

If you have questions about managing records on your mobile or portable devices, contact the Records Help Desk, and refer to the Frequent Questions about Mobile and Portable Devices, and Records for more information.

FOIA Search Guide: Best Practices

This document offers simple, take-away tips for conducting a search.

As you oversee the search for records responsive to a FOIA request, keep in mind the following recommended best practices:

- ✓ Do NOT conduct a search for an improper request.
  Before you plan your search, make sure that the request "reasonably describes the records sought." If the request is overly broad, poses questions, or seeks records not yet in existence, contact the requester to modify the request.
- ✓ Document the process from start to finish.
  Any external communications that you have with the requester, as well as any notable intra-agency communication pertaining to the request, should be memorialized in writing. Documented changes to the request and any correspondence that you have with the requester should be uploaded to FOIAonline.
- ✓ Keep an eye on the clock.
  Unless you can identify "unusual circumstances," you will have 20 working-days to conduct a reasonable search and provide the requester with responsive records. Remember, you can stop the clock ***once*** to seek clarification from the requester, but remember to re-start the clock once the request is clarified and keep track of the amended due date on FOIAonline.
- ✓ Planning your search is essential.
  Before you begin your search, you should compile a search plan that identifies the relevant offices, repositories, and custodians. Do not forget about absent or former employees!
- ✓ Maximize the Centralized Search.
  OEI's Centralized Search will only capture records in EPA's Microsoft Office 365 system, including Outlook email/calendar and Skype/Lync Chats. As soon as you distribute the Search Instructions, remind custodians to transfer any potentially responsive records from, for example, mobile devices (e.g. text messages and photos) to Outlook Email so that they will be captured in the centralized search.
- ✓ Remember to Conduct a Defensible Search.
  Remind Custodians to search all locations where they are reasonably likely to find responsive records. This may include lesser-used locations, including CMS and external drives.
- ✓ Prepare for Collection.
  Once custodians complete their search, you will need to collect and review records. Consider using a cloud-based collection option, such as OneDrive, for the collection of documents that are not sourced from Lotus Notes and not captured in OEI's centralized search.

✓ When in Doubt, Ask.

The General Law Office's Information Law Practice Group, the FOIA Expert Assistance Team within the Office of General Counsel, the Office of Regional Counsel, if the matter concerns a Regional FOIA, and the National FOIA Program Office are available to assist you.

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Proprietary Business Information (PBI) Case Tracking Standard Operating Procedures (SOP)

PROPRIETARY BUSINESS INFORMATION CASE TRACKING

A. Purpose:

a. Ensure proper tracking in FOIA Online of all Freedom of Information Act (FOIA) requests for records containing PBI.

B. Procedures:

Headquarters Request where program withholds information under FOIA Ex. 4:

1. Include the following language in the initial denial letter:

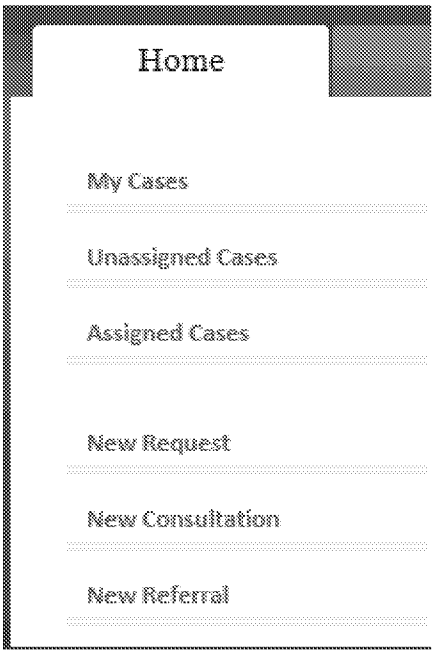
> The information withheld under Exemption 4 will be sent to the appropriate legal office to issue a final confidentiality determination. The appropriate legal office will contact you to confirm your continued interest in receiving a final confidentiality determination and provide you with a fee estimate, where appropriate. Therefore, you do not need to appeal the information withheld pursuant to Exemption 4. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholding, you may appeal this response… [FOLLOWED BY APPEAL LANGUAGE]

2. Notify the National FOIA Office to create a PBI tracking number in FOIAonline:

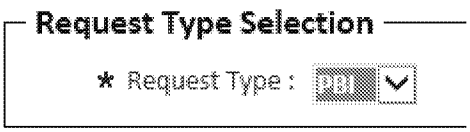
a. Email FOIA_HQ@epa.gov
b. Email Template:
Subject: PBI Case Tracking number for **[EPA-HQ-20XX-XXXXXX]**
Please create a PBI case tracking number for the following initial FOIA request:
Initial Request Number: **[EPA-HQ-20XX-XXXXXX]**
Requester Name: **[NAME]**
Requester Address: **[ADDRESS]**
Requester Email Address: **[EMAIL]**

3. National FOIA Office creates PBI case and assigns to OGC/GLO:

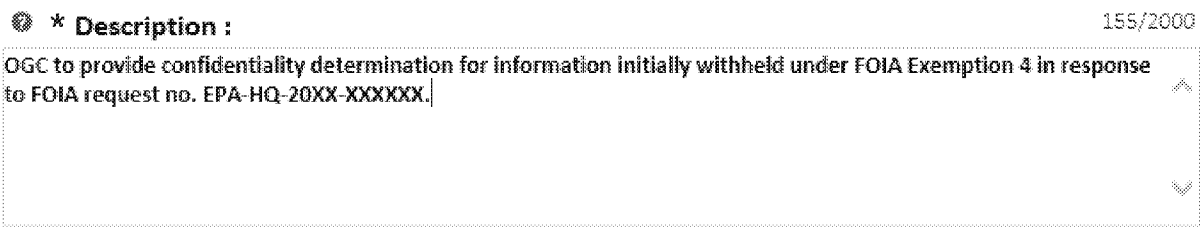
a. Select "New Request"



b. Agency and Submitted Date is pre-populated -> Select "Headquarters" as Sub-Agency
c. Select "PBI" as Request Type:



d. Fill in contact information as provided by program
e. Processing Fees information pre-populated
f. Fill in Description (OGC to provide confidentiality determination for information initially withheld under FOIA Exemption 4 in response to FOIA request no. EPA-HQ-20XX-XXXXXX.):



g. Select Preview -> Submit

4. National FOIA Office assigns PBI Case to OGC

5. ILPG Appeal Team Leader or Assistant General Counsel will assign PBI Case to ILPG Attorney

6. ILPG Attorney is responsible for:

a. Contacting requester to:

1. Confirm continued interest in receiving a final confidentiality determination;
2. Closing out PBI request if requester fails to confirm interest or is not interested in receiving a final confidentiality determination;
3. Providing an estimate of fees where appropriate;
4. Closing our PBI request if requester fails to assure payment of fees;
5. Notifying program office of need to request substantiation from affected business(es) and provide program recommendation where appropriate;
6. Issue final confidentiality determination;
7. Provide updated response/records to requester;
8. Close our PBI appeal.

Regional Request where regional program withholds information under FOIA Ex. 4:

1. Include Initial Denial language in decision:

   The information withheld under Exemption 4 will be sent to the appropriate legal office to issue a final confidentiality determination. The appropriate legal office will contact you to confirm your continued interest in receiving a final confidentiality determination and provide you with a fee estimate, where appropriate. Therefore, you do not need to appeal the information withheld pursuant to Exemption 4. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholding, you may appeal this response… [FOLLOWED BY APPEAL LANGUAGE]

2. Notify the Region FOIA Coordinator to create a PBI tracking number in FOIAonline:

   a. Email FOIA_HQ@epa.gov

   b. Email Template:

   Subject: PBI Case Tracking number for **[EPA-RX-20XX-XXXXXX]**

   Please create a PBI case tracking number for the following initial FOIA request:

   Initial Request Number: **[EPA-RX-20XX-XXXXXX]**

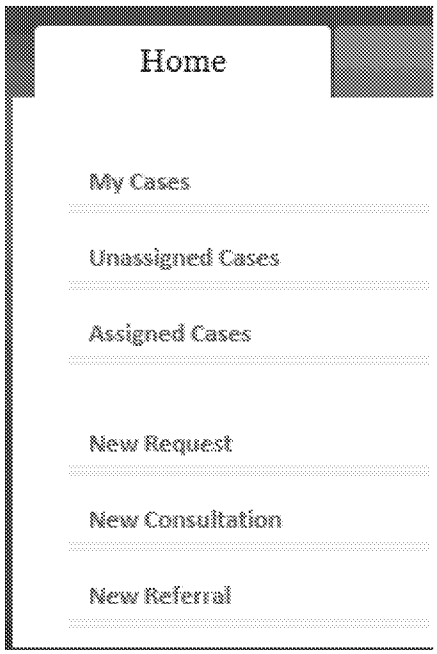
   Requester Name: **[NAME]**

   Requester Address: **[ADDRESS]**

Requester Email Address: **[EMAIL]**

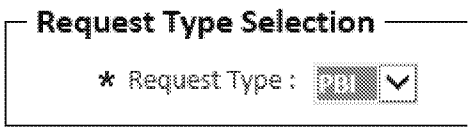
3. Region FOIA Coordinator creates PBI case and assigns to appropriate ORC contact

   a. Select "New Request"



   b. Agency and Submitted Date is pre-populated -> Select appropriate Region as Sub-Agency

   c. Select "PBI" as Request Type



   d. Fill in contact information as provided by program

   e. Processing Fees information pre-populated

f. Fill in Description (ORC to provide confidentiality determination for information initially withheld under FOIA Exemption 4 in response to FOIA request no. EPA-RX-20XX-XXXXXX.)

*** Description :** 155/2000

OGC to provide confidentiality determination for information initially withheld under FOIA Exemption 4 in response to FOIA request no. EPA-HQ-20XX-XXXXXX.

g. Select Preview -> Submit

Substantiation Request Letter Sample A- Generic CBI Substantiation, FOIA

Approved OMB 2020-0003
Approval expires 05-31-2020

Request for Substantiation in Response to a Request Under the Freedom of Information Act

By Certified U.S. Mail; Return Receipt Requested

(*Name, title, and address of the [designated] representative of the affected business*)

Re: Freedom of Information Act (FOIA) Request [INSERT FOIA #]

Dear [*Addressee*]:

The U.S. Environmental Protection Agency ("EPA" or "Agency") has received a request under the FOIA for certain records [*if submitted by the business whose information it is:* that you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* in EPA's possession] pertaining to [*a detailed description of the information or specific list of documents that is/are the subject of the advance or final confidentiality determination*]. [*If information has been claimed as CBI:* You have claimed (all *or* part) of this information as confidential business information ("CBI").] [*If no claim has been made:* In accordance with applicable EPA regulations, 40 C.F.R. Part 2, Subpart B, the EPA has determined that you might be expected to assert a claim that some or all of [*if submitted by the business whose information it is:* the information you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* this information in EPA's possession] is confidential business information ("CBI").] Under the EPA regulations at 40 C.F.R. Part 2, Subpart B, the FOIA request has been initially denied to afford you an opportunity to provide comments to [*If no claim has been made:* claim this information as CBI and] substantiate your claim(s) as described below.

The purpose of this letter is to notify you that the EPA (*appropriate legal office*) will be making a(n) (*advance* or *final*) confidentiality determination concerning the information you have claimed as CBI. If you feel that some or all of the information is entitled to confidential treatment, you must make the showings below with specific reference to those portions of the information you consider confidential.

Please be specific by page (including Bates Stamp, if applicable), paragraph, and sentence when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that

you claim to be CBI. Please note that if a page, document, group, or class of documents claimed by you to be CBI contains a significant amount of information which (*appropriate legal office*) determines is not CBI, your CBI claim regarding that page, document, group, or class of documents may be denied. Any information not specifically identified as subject to a confidentiality claim and substantiated as such in your response to this letter may be disclosed to the requester without further notice to you.

For each item or class of information that you continue to claim as CBI, please answer the following questions, giving as much detail as possible. Your comments in response to these questions will be used by the EPA to determine whether the information has been shown to be entitled to confidential treatment:

1. For what period of time do you request that the information be maintained as confidential, e.g., until a certain date, until the occurrence of a specified event, or permanently? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

2. Information submitted to the EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question #1?

3. What measures have you taken to protect the information claimed as confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information be considered confidential?

4. Is the information contained in any publicly available material such as the Internet, publicly available databases, promotional publications, annual reports, or articles? If so, specify which.

5. Is there any means by which a member of the public could obtain access to the information? Is the information of a kind that you would customarily not release to the public?

6. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

7. For each item or category of information claimed as confidential, *explain with specificity* why release of the information is likely to cause substantial harm to your competitive position. Explain the specific nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

8. Do you assert that the information is submitted on a voluntary or a mandatory basis? Please explain the reason for your assertion. If you assert that the information is

voluntarily submitted information, please explain whether the information is the kind that would customarily not be released to the public.

9. Whether you assert the information as voluntary or involuntary, please address why disclosure of the information would tend to lessen the availability to the EPA of similar information in the future.

10. If you believe any information to be (a) trade secret (s), please so state and explain the reason for your belief. Please attach copies of those pages containing such information with brackets around the text that you claim to be (a) trade secret (s).

11. Explain any other issue you deem relevant (including, if pertinent, reasons why you believe that the information you claim to be CBI is not emission data or effluent data).

[*For contract-related CBI:* Enclosed is the EPA Class Determination 1-95 entitled, Confidentiality *of Certain Business Information Submitted by Contractors and Prospective Contractors,* which addresses the treatment of different types of information related to contracts. You may consider reviewing Class Determination 1-95 as you develop your response.]

[*If applicable to another EPA class determination*: Enclosed is the EPA Class Determination [*class determination number*] entitled, [*name of the class determination*], which addresses the treatment of [*description of class determination*]. You may consider reviewing Class Determination [#] as you develop your response.]

Please note that *you bear the burden of substantiating your confidentiality and trade secret claim(s).* Generalized or conclusory statements will be given little or no weight in EPA's determination on the confidentiality of the information you claim to be CBI.

Your comments must be postmarked or hand delivered to this office, or emailed to [*email address*], by the 15th working day after your receipt of this letter. You may seek an extension of time to submit your comments to this office, but the request must be made before the end of the 15-day period. Except in extraordinary circumstances, no extension will be approved without the consent of the FOIA requester. Failure to submit your comments within that time will be regarded as a waiver of your confidentiality claim or claims, and the EPA may release the information.

If you wish to claim any information that you provide in your response to this letter to itself be confidential, you must mark the response "**CONFIDENTIAL**" or with a similar designation, and must bracket all text in the response that you so claim. Information so designated will be disclosed by the EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2, Subpart B. If you fail to claim the information provided in your response as confidential, it may be made available to the public without further notice to you.

Should you have any questions concerning this matter, please call me at [*telephone number*].

Sincerely,

[NAME]
[Title]
[Office Name and Address]

[Enclosure]

Substantiation Request Letter Sample B-Generic CBI Substantiation, Non-FOIA

Approved OMB 2020-0003
Approval expires 05-31-2020

Request for Substantiation from an Affected Business

By Certified U.S. Mail; Return Receipt Requested

[*Name, title, and address of the [designated] representative of the affected business*]

Re: _____

Dear [*Addressee*]:

The U.S. Environmental Protection Agency ("EPA" or "Agency") is seeking to determine the entitlement to confidentiality of [*description of the information that is the subject of the advance or final confidentiality determination*] [*if submitted by the business whose information it is:* that you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* in EPA's possession.] [*If information has been claimed as CBI:* You have claimed (all *or* part) of this information as confidential business information ("CBI").] [*If no claim has been made:* In accordance with applicable EPA regulations, 40 C.F.R. Part 2, Subpart B, the EPA has determined that you might be expected to assert a claim that some or all of [*if submitted by the business whose information it is:* the information you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* this information in EPA's possession] is confidential business information ("CBI").]

The purpose of this letter is to notify you that the EPA [*appropriate legal office*] will be making a(n) [advance *or* final] confidentiality determination concerning the information you have claimed as CBI. If you feel that some or all of the information is entitled to confidential treatment, you must make the showings below with specific reference to those portions of the information you consider confidential.

Please be specific by page (including Bates Stamp, if applicable), paragraph, and sentence when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that you claim to be CBI. Please note that if a page, document, group or class of documents claimed by you to be CBI contains a significant amount of information which our [*appropriate legal office*] determines is not CBI, your CBI claim regarding that page, document, group, or class of documents may be denied. Any information not specifically identified as subject to a confidentiality claim and substantiated as such in your response to this letter may be disclosed without further notice to you.

For each item or class of information that you continue to claim as CBI, please answer the following questions, giving as much detail as possible. Your comments in response to these questions will be used by the EPA to determine whether the information has been shown to be entitled to confidential treatment:

1. For what period of time do you request that the information be maintained as confidential, e.g., until a certain date, until the occurrence of a specified event, or permanently? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

2. Information submitted to the EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question #1?

3. What measures have you taken to protect the information claimed as confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information be considered confidential?

4. Is the information contained in any publicly available material such as the Internet, publicly available databases, promotional publications, annual reports, or articles? If so, specify which.

5. Is there any means by which a member of the public could obtain access to the information? Is the information of a kind that you would customarily not release to the public?

6. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

7. For each item or category of information claimed as confidential, *explain with specificity* why release of the information is likely to cause substantial harm to your competitive position. Explain the specific nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

8. Do you assert that the information is submitted on a voluntary or a mandatory basis? Please explain the reason for your assertion. If you assert that the information is voluntarily submitted information, please explain whether the information is the kind that would customarily not be released to the public.

9. Whether you assert the information as voluntary or involuntary, please address why disclosure of the information would tend to lessen the availability to the EPA of similar information in the future.

10. If you believe any information to be (a) trade secret(s), please so state and explain the reason for your belief. Please attach copies of those pages containing such information with brackets around the text that you claim to be (a) trade secret(s).

11. Explain any other issue you deem relevant (including, if pertinent, reasons why you believe that the information you claim to be CBI is not emission data or effluent data).

[*For contract-related CBI:* Enclosed is the EPA Class Determination 1-95 entitled, Confidentiality *of Certain Business Information Submitted by Contractors and Prospective Contractors,* which addresses the treatment of different types of information related to contracts.

You may consider reviewing Class Determination 1-95 as you develop your response.]

[*If applicable to another EPA class determination*: Enclosed is the EPA Class Determination [*class determination number*] entitled, [*name of the class determination*], which addresses the treatment of [*description of class determination*]. You may consider reviewing Class Determination [#] as you develop your response.]

Please note that *you bear the burden of substantiating your confidentiality and trade secret claim(s).* Generalized or conclusory statements will be given little or no weight in EPA's determination on the confidentiality of the information you claim to be CBI.

Your comments must be postmarked or hand delivered to this office, or emailed to [*email address*], by the 15th working day after your receipt of this letter. You may seek an extension of time to submit your comments to this office, but the request must be made before the end of the 15-day period. Except in extraordinary circumstances, no extension will be approved. Failure to submit your comments within that time will be regarded as a waiver of your confidentiality claim or claims, and the EPA may release the information.

If you wish to claim any information that you provide in your response to this letter to itself be confidential, you must mark the response "**CONFIDENTIAL**" or with a similar designation, and must bracket all text in the response that you so claim. Information so designated will be disclosed by the EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2, Subpart B. If you fail to claim the information provided in your response as confidential, it may be made available to the public without further notice to you.

Should you have any questions concerning this matter, please call me at [*telephone number*].

Sincerely,

[NAME]
[TITLE]
[Office Name and Address]

[Enclosure]

CBI Substantiation Request Letter Sample C- FIFRA, FOIA

OMB 2020-0003
Expires: 05-31-2020
Inert Ingredients

Request for Substantiation from an Affected Business

By Certified U.S. Mail; Return Receipt Requested

[*Name, title, and address of the [designated] representative of the affected business*]

RE: Confidential Business Information Determination

Dear [*Addressee*]:

The U.S. Environmental Protection Agency ("EPA") Office of Pesticide Programs has received a request under the FOIA for certain records [*if submitted by the business whose information it is:* that you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* in EPA's possession] pertaining to [*a detailed description of the information or specific list of documents that is/are the subject of the advance or final confidentiality determination*]. [*If information has been claimed as CBI:* You have claimed (all *or* part) of this information as confidential business information ("CBI").] [*If no claim has been made:* In accordance with applicable EPA regulations, 40 C.F.R. Part 2, Subpart B, the EPA has determined that you might be expected to assert a claim that some or all of [*if submitted by the business whose information it is:* the information you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* this information in EPA's possession] is confidential business information ("CBI").] Under the EPA regulations at 40 C.F.R. Part 2, Subpart B, the FOIA request has been initially denied to afford you an opportunity to provide comments to [*If no claim has been made:* claim this information as CBI and] substantiate your claim(s) as described below.

The purpose of this letter is to notify you that the EPA Office of General Counsel will be making a(n) [advance *or* final] confidentiality determination concerning the information you have claimed as CBI. If you feel that some or all of the information is entitled to confidential treatment, you must make the showings below with specific reference to those portions of the information you consider confidential.

Please be specific by page (including Bates Stamp, if applicable), paragraph, and sentence when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that

you claim to be CBI. Please note that if a page, document, group, or class of documents claimed by you to be CBI contains a significant amount of information which the Office of General Counsel determines is not CBI, your CBI claim regarding that page, document, group, or class of documents may be denied. Any information not specifically identified as subject to a confidentiality claim and substantiated as such in your response to this letter may be disclosed to the requester without further notice to you.

1. For what period of time do you request that the information be maintained as confidential? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

2. Information submitted to EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question #1?

3. What measures have you taken to protect the information claimed as confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information still be considered confidential?

4. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

5. Is the information contained in any publicly available material such as promotional publications, annual reports, articles, etc.? Is there any means by which a member of the public could obtain access to the information?

6. For each category of information claimed as confidential, discuss with specificity why release of the information is likely to cause substantial harm to your competitive position. Explain the nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

7. Do you assert that the information is "voluntarily submitted" as defined at 40 C.F.R. § 2.201(i)? If so, explain why and how disclosure would tend to lessen EP A's ability to obtain similar information in the future.

8. Any other issue you deem relevant.

Please note that you bear the burden of substantiating your confidentiality and trade secret claim(s) pursuant to 40 CFR § 2.208(e). Generalize or conclusory allegations will be given little or no weight in EPA's determination on the confidentiality of information you claim to be CBI.

If you wish to claim any information that you provide in your response to this letter to itself be confidential, you must mark the response "**CONFIDENTIAL**" or with a similar

designation, and must bracket all text in the response that you so claim. Information so designated will be disclosed by the EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2, Subpart B. If you fail to claim the information provided in your response as confidential, it may be made available to the public without further notice to you.

Your reply can be mailed to the following address:

Or your reply can be delivered to the following address:

Your comments must be postmarked or hand-delivered by the 15th working day after your receipt of this letter. If you intend to submit timely comments, please notify by phone at [TELEPHONE NUMBER], by email at or by mail at the address above. Failure to submit timely comments will be regarded as a waiver of your confidentiality claim and EPA will release the information. You may request an extension of the 15-day deadline. Except in extraordinary circumstances, no extension will be granted without the permission of the requestor.

Should you have any questions in this matter, please contact [CONTACT NAME].

Sincerely,

[NAME]
[TITLE]

Enclosures

CBI Substantiation Request Letter Sample D- FIFRA, Non-FOIA

OMB 2020-0003
Expires 05-31-2020

Request for Substantiation from an Affected Business

By Certified U.S. Mail; Return Receipt Requested

[*Name, title, and address of the [designated] representative of the affected business*]

Re: Freedom of Information Act Request [INSERT NUMBER]

Dear [*Addressee*]:

The U.S. Environmental Protection Agency ("EPA") Office of Pesticide Programs is seeking to determine the entitlement to confidentiality of [*description of the information that is the subject of the advance or final confidentiality determination*] [*if submitted by the business whose information it is:* that you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* in EPA's possession.] [*If information has been claimed as CBI:* You have claimed (all *or* part) of this information as confidential business information ("CBI").] [*If no claim has been made:* In accordance with applicable EPA regulations, 40 C.F.R. Part 2, Subpart B, the EPA has determined that you might be expected to assert a claim that some or all of [*if submitted by the business whose information it is:* the information you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* this information in EPA's possession] is confidential business information ("CBI").]

The purpose of this letter is to notify you that the EPA Office of General Counsel will be making a(n) [advance *or* final] confidentiality determination concerning the information you have claimed as CBI. If you feel that some or all of the information is entitled to confidential treatment, you must make the showings below with specific reference to those portions of the information you consider confidential.

Please be specific by page (including Bates Stamp, if applicable), paragraph, and sentence when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that you claim to be CBI. Please note that if a page, document, group, or class of documents claimed by you to be CBI contains a significant amount of information which the Office of General Counsel determines is not CBI, your CBI claim regarding that page, document, group, or class of documents may be denied. Any information not specifically identified as subject to a

confidentiality claim and substantiated as such in your response to this letter may be disclosed to the requester without further notice to you.

Questions 1-7 must be answered with respect to any confidentiality claims pertaining to the enclosed product chemistry information.

1. What value can your competitors derive from knowing the identity, percent by weight, certified limits, or parent process of each impurity? Is this impurity unique to your manufacturing process? Why would your competitors find this impurity preferable over whatever impurity results from their equivalent process?

2. Does published analytical methodology exist that could identify and quantify this impurity? If so, why do you believe that your competitors have not already performed such analysis?

3. What value can your competitors derive from knowing the description of materials used to produce the product, the description of the production process, or the preliminary production analysis? Why would your competitors find these processes preferable over their equivalent processes?

Questions 4-7 must be answered with respect to any confidentiality claims pertaining to the inert ingredients. Each question must be answered separately with respect to each inert ingredient:

4. What is the value that this inert ingredient brings to the product formulation? What characteristics of this ingredient are unique such that competitors might prefer it over whatever ingredients perform the equivalent function in their formulations? Is the use of this ingredient limited to your product, or does it have broader applications?

5. Why is it unlikely that your competitors have not already discovered the value of this ingredient? Are you aware of the use of this ingredient as an inert by your competitors?

6. To your knowledge, has the use of this inert ingredient in a pesticide been disclosed in a patent? If so, how would disclosure of the identity of the ingredient assist your competitors beyond what is already available through a patent?
7. Can the identity of this inert ingredient be determined by product sample analysis? If so, why do you believe that your competitors have not already performed such analysis?

Question 8 must be answered with respect to any confidentiality claims pertaining to the enclosed records:

8. For each category of information claimed as confidential, discuss with specificity why release of the information is likely to cause substantial harm to your competitive position. Explain the nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

Questions 9 through 15 must be answered for each type of information that you claimed as confidential:

9. For what period of time do you request that the information be maintained as confidential? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

10. Information submitted to EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question number 9?

11. What measures have you taken to protect the information? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose it further? If so, why should it still be considered confidential?

12. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

13. Is the presence of this information disclosed in any publicly available material such as Material Safety Data Sheets, promotional publications, annual reports, articles, etc.? Is there any means by which a member of the public could obtain access to the information?

14. Do you assert that the information is "voluntarily submitted" as defined at 40 CFR § 2.201(i)? If so, explain why, and how disclosure would tend to lessen EPA's ability to obtain similar information in the future.

15. Any other issue you deem relevant.

Please note that you bear the burden of substantiating your confidentiality and trade secret claim(s) pursuant to 40 CFR § 2.208(e). Generalize or conclusory allegations will be given little or no weight in EPA's determination on the confidentiality of information you claim to be CBI.

If you wish to claim any information that you provide in your response to this letter to itself be confidential, you must mark the response "**CONFIDENTIAL**" or with a similar designation, and must bracket all text in the response that you so claim. Information so designated will be disclosed by the EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2, Subpart B. If you fail to claim the information provided in your response as confidential, it may be made available to the public without further notice to you.

Be advised that information described by Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") section 10(d)(l)(A), (B), and (C) is not automatically entitled to confidential treatment. Disclosure of such information would only be prohibited, by FIFRA section (b), if the information is eligible for confidential treatment as described by 40 CFR 2.208.

Your reply can be mailed to the following address:

Or your reply can be delivered to my attention at the following address:

Your comments must be postmarked or hand-delivered by the 15th working day after your receipt of this letter. If you intend to submit timely comments, please notify by phone: [TELEPHONE], by email: [EMAIL ADDRESS], or by mail at the address above. Failure to submit timely comments will be regarded as a waiver of your confidentiality claim and EPA will release the information. You may request an extension of the 15-day deadline. Except in extraordinary circumstances, no extension will be granted without the permission of the requester.

Should you have any questions in this matter, please contact [CONTACT PERSON].

Sincerely,

[NAME]
[TITLE]

Enclosures

CBI Substantiation Request Letter Sample E- TSCA

OMB 2020-0003
Approval expires 05-31-2020

By Certified U.S. Mail; Return Receipt Requested

MAY CONTAIN CONFIDENTIAL BUSINESS INFORMATION

[*Technical Contact Name, title, Company, and Address*]

Re: Notice of Review and Request for Substantiation of Confidential Business Information Claim(s)

Document Type:
Document Identifying Number:
Date of Submission:
Type of claim(s) to be reviewed: ☐ specific chemical identity
☐ all other CBI claims

Dear [*Addressee*]:

Under the Toxic Substance Control Act (TSCA) most confidential business information (CBI) claims for chemical identity and at least 25% of other CBI claims are subject to a review and final determination. TSCA section 14(g). 15 U.S.C. § 2613(g).

This letter is to notify you that the U.S. Environmental Protection Agency (EPA) Office of General Counsel will be making a final confidentiality determination concerning information you have claimed as CBI, as identified above. All non-exempt CBI claims must be substantiated.

If you feel that some or all of the information checked above is entitled to confidential treatment, you must substantiate as described below with specific reference to those portions of the information you consider confidential.

Note that TSCA section 14(c)(2) generally exempts certain information types from the requirement to substantiate. 15 U.S.C. § 2613(c)(2). *See* EPA webpage [INSERT WEBPAGE] for more guidance on information exempt from substantiation. To the extent that you believe the information that you have claimed as CBI is one of these exempt information types, you may make this assertion in your response by identifying the specific section 14(c)(2) exemption, in lieu of substantiating the CBI claim for that information. If the Agency disagrees with this assertion, you may be asked to provide additional information to support your claim.

Substantiating a CBI Claim.

There are two different sets of substantiation questions for CBI claims: (I) questions for all CBI claims in the submission; and (II) questions for chemical identity CBI claims. Please use the appropriate question set. In some instances, your TSCA submission may contain both types of CBI claims or a CBI claim may require completing both sets of substantiation questions. For example, if you assert a CBI claim to protect a chemical substance's identity, then you must answer both question sets. EPA has identified the appropriate question set(s) via the checkboxes at the top of this letter. In some instances, for example TSCA section 8(a) Chemical Data Reporting (CDR) Rule submissions, you may have already provided up-front substantiations for some of the CBI claims. If you have already substantiated your CBI claim at the time of submission, please refer to or preferably physically attach your substantiation to your response to this letter.

Note also that the providing of incorrect information in this substantiation request may be a failure to comply with TSCA, specifically 15 U.S.C. § 2614.

I. REQUIRED FOR ALL CBI CLAIMS.

If you are asserting ANY information in the submission as CBI, please answer the following questions.

In supporting your CBI claim(s), please be specific by page, paragraph, sentence, or by data element when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that you claim to be CBI.

In some cases, it may be appropriate to group the information into a class of information rather than responding to each item claimed as CBI. *See* EPA webpage [INSERT WEBPAGE] for suggested approaches to providing substantiations of materials grouped. For any information that is not specifically identified as subject to a confidentiality claim and substantiated as such in your response to this letter, it shall be determined that you have waived your CBI claim, pursuant to 40 C.F.R. § 2.205(d).

For each item or class of information that you continue to claim as CBI, please answer the following questions, giving as much detail as possible. Your substantiation response to these questions will be used by the EPA to determine whether the information has been shown to be entitled to confidential treatment:

A. Do you believe that any of the information claimed as CBI is exempt from substantiation pursuant to TSCA section 14(c)(2)[1]? Yes/No.

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[1] TSCA Section 14(c)(2) states:

If you answered yes, please identify the information, provide the specific exemption and answer no further questions related to that information.

If you answered no, please respond to the questions below.

B. Will disclosure of the information likely result in substantial harm to your business competitive position? Yes/No.

If you answered yes, please describe with specificity the substantial harmful effects that would result to your competitive position if the CBI information is made available to the public. In your answer, explain the causal relationship between disclosure and any resulting substantial harmful effects. Consider in your answer such constraints as capital and marketing cost, specialized technical expertise, or unusual processes and your competitor's access to your customers.

C. To the extent you have disclosed information to others (both internally and externally), what precautions has your business taken? Please identify any measures or internal controls your business has taken to protect the information claimed as confidential.

1. Non-disclosure agreement required prior to access. Yes/No
2. Access is limited to individuals with a need-to-know. Yes/No
3. Information is physically secured (e.g. locked in room or cabinet) or electronically secured (encrypted, password protected, etc.). Yes/No
4. Other internal control measure(s). If so, please explain.

D. Does the information claimed as confidential appear in any public documents, including (but not limited to) safety data sheet, advertising or promotional material, professional or

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(2) Information generally not subject to substantiation requirements

Subject to subsection (f), the following information shall not be subject to substantiation requirements under paragraph (3):

(A) Specific information describing the processes used in manufacture or processing of a chemical substance, mixture, or article.

(B) Marketing and sales information.

(C) Information identifying a supplier or customer.

(D) In the case of a mixture, details of the full composition of the mixture and the respective percentages of constituents.

(E) Specific information regarding the use, function, or application of a chemical substance or mixture in a process, mixture, or article.

(F) Specific production or import volumes of the manufacturer or processor.

(G) Prior to the date on which a chemical substance is first offered for commercial distribution, the specific chemical identity of the chemical substance, including the chemical name, molecular formula, Chemical Abstracts Service number, and other information that would identify the specific chemical substance, if the specific chemical identity was claimed as confidential at the time it was submitted in a notice under section 2604 of this title.

trade publication, or any other media or publications available to the general public? Yes/No.

If you answered yes, please explain why the information should nonetheless be treated as confidential.

E. Does the information claimed to be CBI contain (a) trade secret(s)[2] ? Yes/No

If yes, please explain the reason for your belief. Please attach copies of those pages containing such information with brackets around the text that you claim to be (a) trade secret(s).

F. If you assert a claim of confidentiality that is less than 10 years (see TSCA section 14(e)(1)(B)), then please indicate the number of years (between 1-10 years) or specific date of which the claim is withdrawn.[3]

G. Has EPA, another federal agency, or court made any confidentiality determination regarding information associated with this substance? Yes/No.

If yes, please explain the outcome of that determination and provide EPA with a copy of the previous confidentiality determination or any information that will assist the Agency in identifying the prior determination.

II. REQUIRED FOR ONLY CHEMICAL IDENTITY CBI CLAIMS.

If you are claiming a specific chemical identity as CBI, please answer the additional following questions. If you are not substantiating a chemical identity CBI claim, then you do not need to respond to the questions below.

A. Is the chemical substance on the confidential portion of the TSCA Inventory? Yes/No.

B. Commerce:
   1. Has the chemical substance (or mixture) been offered for commercial distribution? Yes/No.

   2. Is the chemical substance known to be in U.S. commerce? Yes/No.

   If you answered yes, please explain why the information should nonetheless be treated as confidential.

C. Disclosure of the specific chemical name would release:

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[2] "Trade secret" is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[3] Information with withdrawn CBI claims will be made available to the public without further notice.

1. Confidential process information. Yes/No.
2. Confidential portion of a mixture information. Yes/No.

If you answered yes to either question, please explain

Asserting a CBI claim in your substantiation response.

Businesses may claim their substantiation response as CBI. Information claimed as confidential should be clearly marked by bracketing, circling, or underlining. All pages containing such information must also be stamped "CONFIDENTIAL BUSINESS INFORMATION" or with similar designation in order to assert a confidentiality claim. Care should be taken to ensure that these markings do not obscure the text.

If you claim your substantiation response as CBI, you must include the following statement in the submission.

> I hereby certify to the best of my knowledge and belief that all information entered on this form is complete and accurate.
> I further certify that, pursuant to 15 U.S.C. § 2613(c), for all claims for confidentiality made with this submission, all information submitted to substantiate such claims is true and correct, and that it is true and correct that
> (i) My company has taken reasonable measures to protect the confidentiality of the information;
> (ii) I have determined that the information is not required to be disclosed or otherwise made available to the public under any other Federal law;
> (iii) I have a reasonable basis to conclude that disclosure of the information is likely to cause substantial harm to the competitive position of my company; and
> (iv) I have a reasonable basis to believe that the information is not readily discoverable through reverse engineering.
>
> Any knowing and willful misrepresentation is subject to criminal penalty pursuant to 18 U.S.C. § 1001.

Timely Responses and Postal Requirements

Your substantiation response must be postmarked or hand delivered to this office **by the 15th working day after your receipt of this letter**. While it is anticipated that there will be a means for sending these to the Agency electronically in the future, at this point substantiations should be sent via US Mail or courier.

Filings should be directed to the below address.

TSCA Confidential Business Information Center (7407M)
WJC East; Room 6428; Attn: TSCA CBI Substantiations
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0001

Courier Deliveries:

U.S. EPA
Office of Pollution Prevention and Toxics
Confidential Business Information Center (CBIC)
Attn: TSCA CBI Substantiations
1201 Constitution Avenue, NW
WJC East; Room 6428
Washington, DC 20004-3302
(202) 564-8930

You may seek an extension of time to submit your substantiation response to this office, but the request must be made before the end of the 15-day period. Requests for an extension may be directed to Ms. Quoc Nguyen, Office of General Counsel, Nguyen.Quoc@epa.gov.

Failure to timely submit your substantiation response will be regarded as a waiver of your confidentiality claim or claims, and the EPA may release the information.

Should you have any questions concerning this matter, please contact Mr. Scott Sherlock at (202) 564-8257 or Sherlock.Scott@epa.gov; or Ms. Jessica Barkas at (202) 250-8880 or Barkas.Jessica@epa.gov.

Sincerely,

[NAME]
[TITLE]
[OfficeName and Address]

OGC Relativity Guidance

Use this guidance to familiarize yourself with the Relativity platform, including how to redact documents. Remember that before you can use Relativity for the first time, you need to contact EZ-tech (or technical support for your office) to install the Relativity Web Viewer Plugin.

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ONLINE RESOURCES

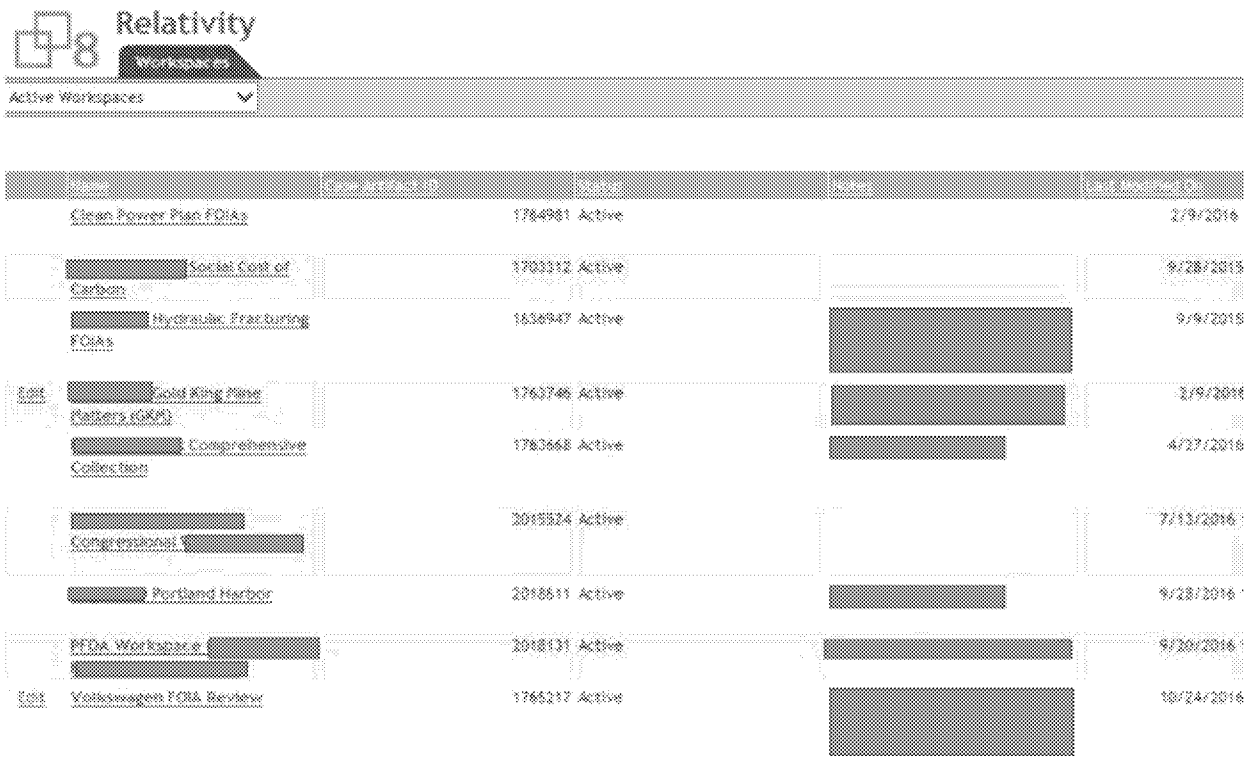
EPA uses Relativity version 8.2. There are a number of video trainings and other resources available here: https://www.kcura.com/relativity/ediscovery-resources/training/. Below are some tutorials that you may find useful.

1. Getting Started (3:41): https://www.kcura.com/relativity/ediscovery-resources/training/on- demand/getting-started/
2. Redactions and Annotations (6:46): https://www.kcura.com/relativity/ediscovery- resources/training/on-demand/adding-redactions-and-annotations-8-2/
3. Coding and Tagging Documents (5:15): https://www.kcura.com/relativity/ediscovery- resources/training/on-demand/coding-and-tagging-documents/

4. Reviewer Training (36:33): https://www.kcura.com/relativity/ediscovery-resources/training/on- demand/reviewer-training/

SIGNING IN, FINDING YOUR WORKSPACE

If you are a first-time user, your sign in credentials will be emailed to you along with a link to EPA's Relativity viewer. It is a good idea to save or bookmark this link. If you have password issues or cannot find the link, email your case manager. Once you sign in, you will see the workspace list. Click on the name of your case to enter your workspace.



(sample screenshot of a Workspace List, some information removed)

BATCHES

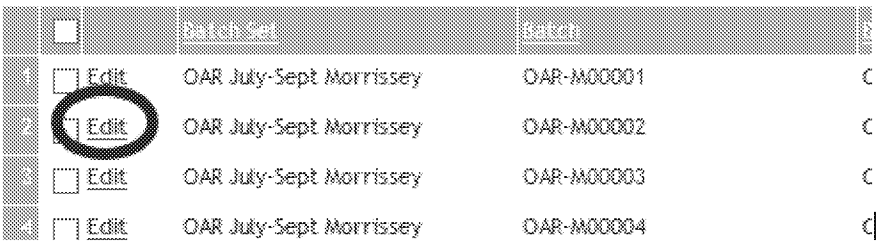
Documents are organized into groups called batches. To review documents, you must have a batch assigned to you. No one else will work on documents in your batch while they are assigned to you. To check out a batch, follow the instructions below. If you are done working, your batch will remain assigned to you unless you check it back in, even if you sign out of Relativity and sign back in later.

1. At the top of your screen, you will see tabs. Every database is different, but you will likely have a *Documents* tab and a *Review Batches* tab. Click the *Review Batches* tab.

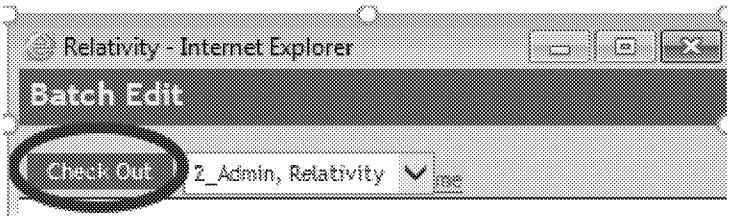
2. This will bring you to a list of batches. There will be several fields of information displayed in the columns.

    a. The *Batch Status* column will tell you whether a batch has been completed, is in progress, or if the field is blank, the batch is open and may be checked out.
    b. If a batch is assigned to a reviewer, their name will be displayed in the *Assigned To* column.
    c. The columns should display how many documents have been reviewed in a batch as well as the total size of the batch.

3. To check a batch out, look to the left of the screen. Next to the batch names, there will be a blue hyperlink *Edit* button. Once you have selected your batch, click this edit button to begin the checkout process.

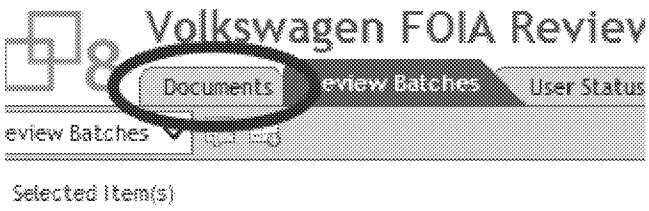


4. Click the "Check Out" button to check the batch out to yourself.

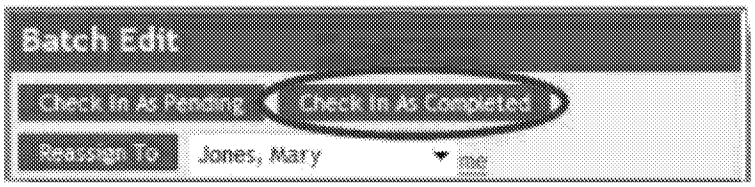


5. Once a batch is checked out, you will notice that it is assigned to you in the *Assigned To* column.

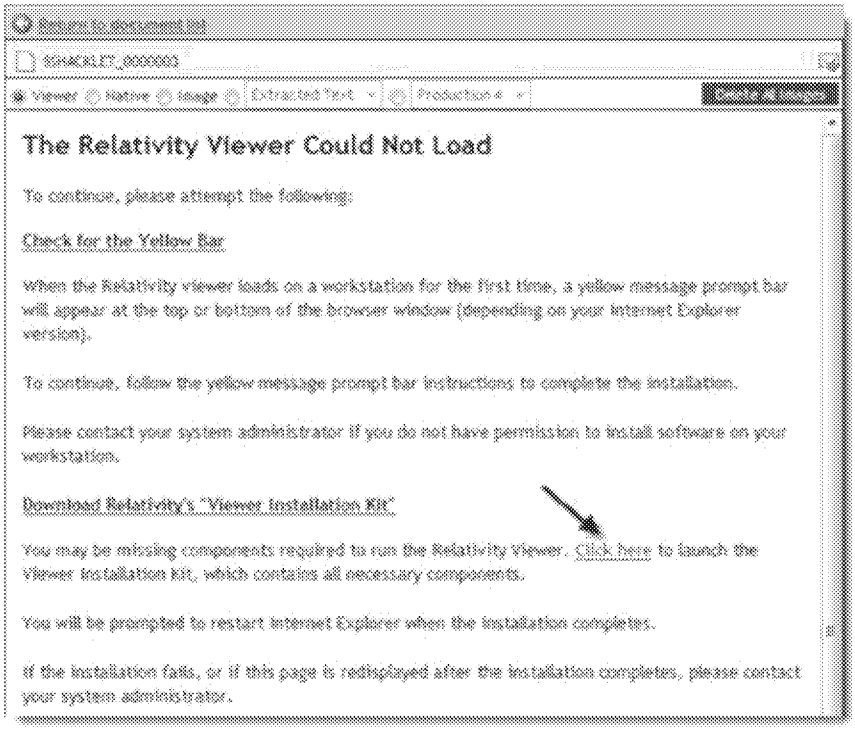
6. To view the documents in the batch you have checked out, you must look again to the tabs at the upper left of your screen. Click back to the documents tab to view the documents.



7. Follow the same steps to check a batch back in. (Go to the batches tab, find your batch, press the *Edit* button). You may check the batch back in as *Pending* if it is not complete. But if all documents have been reviewed, check it back in as *Completed.*



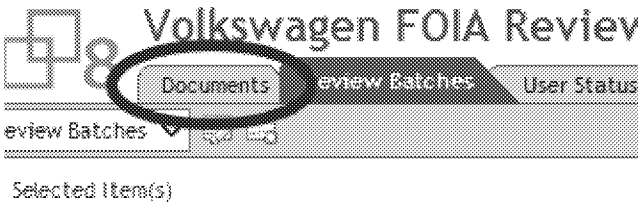
INSTALLING THE WEB VIEWER



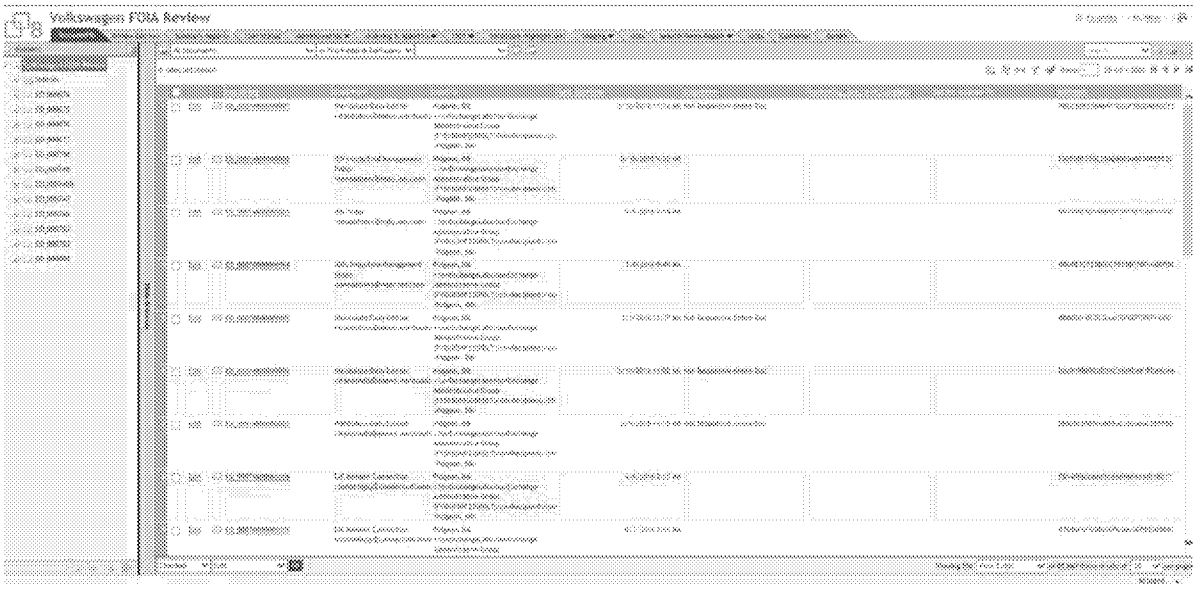
If this is the first time you are using Relativity on your machine, you will likely need to install a plugin before being able to view documents. If you are prompted with the below error or a similar message when you try to open a document, then you will need someone with administrator rights to download the Relativity Viewer and install it. Call your technical support line and ask for assistance installing the Relativity Viewer plugin. Your technician will be able to remotely download and install the plugin, usually in a matter of minutes. This should only need to be done once.

OPENING AND VIEWING A DOCUMENT

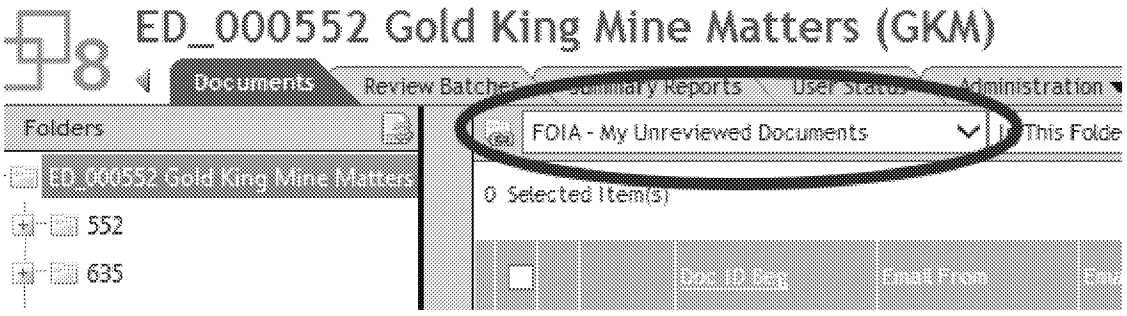
1. Make sure you are in the *Documents* tab.



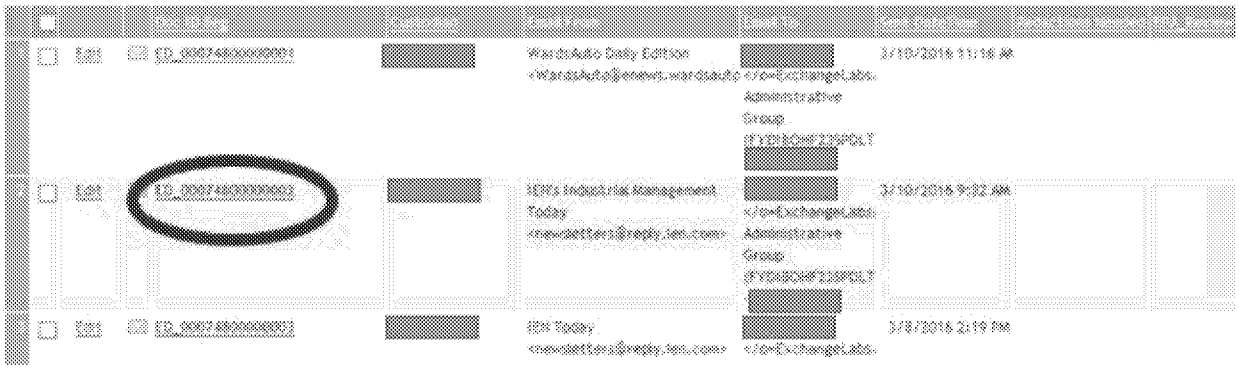
2. Your screen should look something like this:



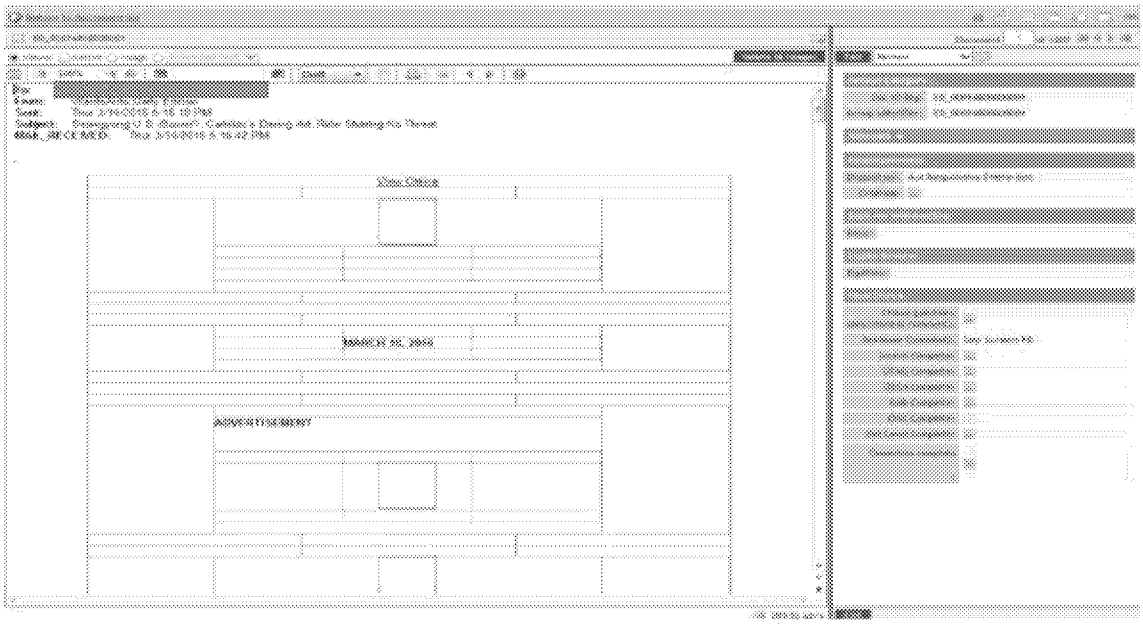
3. Look at the drop down menu towards the upper left of your screen. It will likely say "All Documents" or "unreviewed documents" or have similar choices. Your case manager should give you guidance as to what view to use, or they may limit your access to a single useful view.



4. You will see a list of documents with columns of information. One of the leftmost columns will contain links to the documents themselves. Click the blue hyperlink Doc ID number of the document you would like to open.



5. Opening a document will take you to the reviewer interface, it should look like this:



6. You should have access to three views depending on the type of document you are looking at and how it has been processed. To change to a different view, click the radial button.

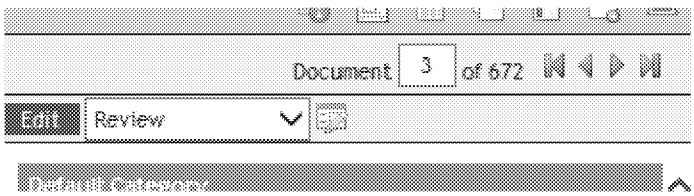
   a. Viewer Mode: Default view which contains the rendered version of the native file. This view will display the entire content of the document in one continuous view. If persistent highlighting is used, certain terms may be

highlighted to aid in your review.

b. Native Mode: Clicking on the native viewer will open the file in a separate window in its native form. If you are looking at an email, it will open the file in outlook, if you are looking at a spreadsheet, excel will open. This can be useful for certain file types, but should generally be avoided.

c. Image Mode: This view will only be available if the document set you are working with has been processed to be "imaged." If you need to use image mode but your documents are not imaged, talk to your case manager. Image mode shows you the document as it will be produced to the requester. The document may contain several pages that you will need to click through. This is the view you will use to make redactions.

7. To move on to the next document in your list automatically, or back to a previous document, use the navigation arrows in the upper right corner of your screen.

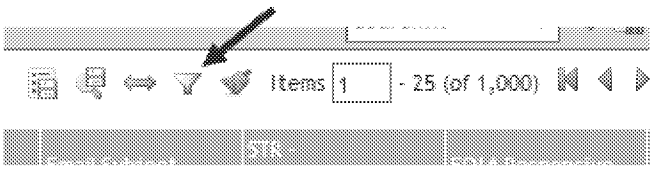


8. To return to your document list from a document view, look to the upper left of your screen and select *Return to document list*.

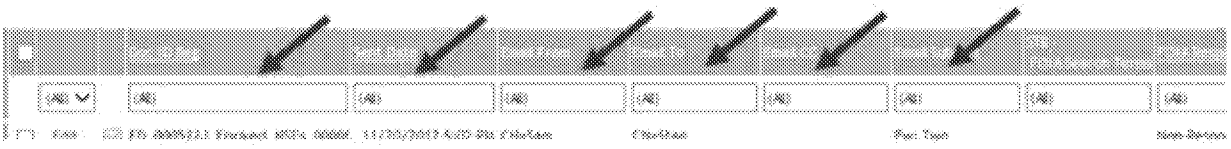
SORTING AND FILTERING DOCUMENTS

1. Your document list should have several columns. If a column title is underlined, like *Sent Date* is in the image below, you can slick on the title and your documents will be sorted by that column.

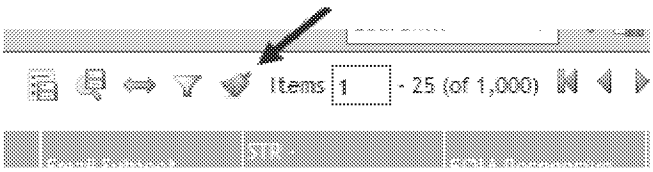
2. Clicking on the filter icon above your document list will allow you to filter the documents you are viewing. For example, you could limit your view to only documents from a particular sender.



3. Text boxes will appear below the headings of each column. Type the terms you want to use to filter in the text box of the relevant column.

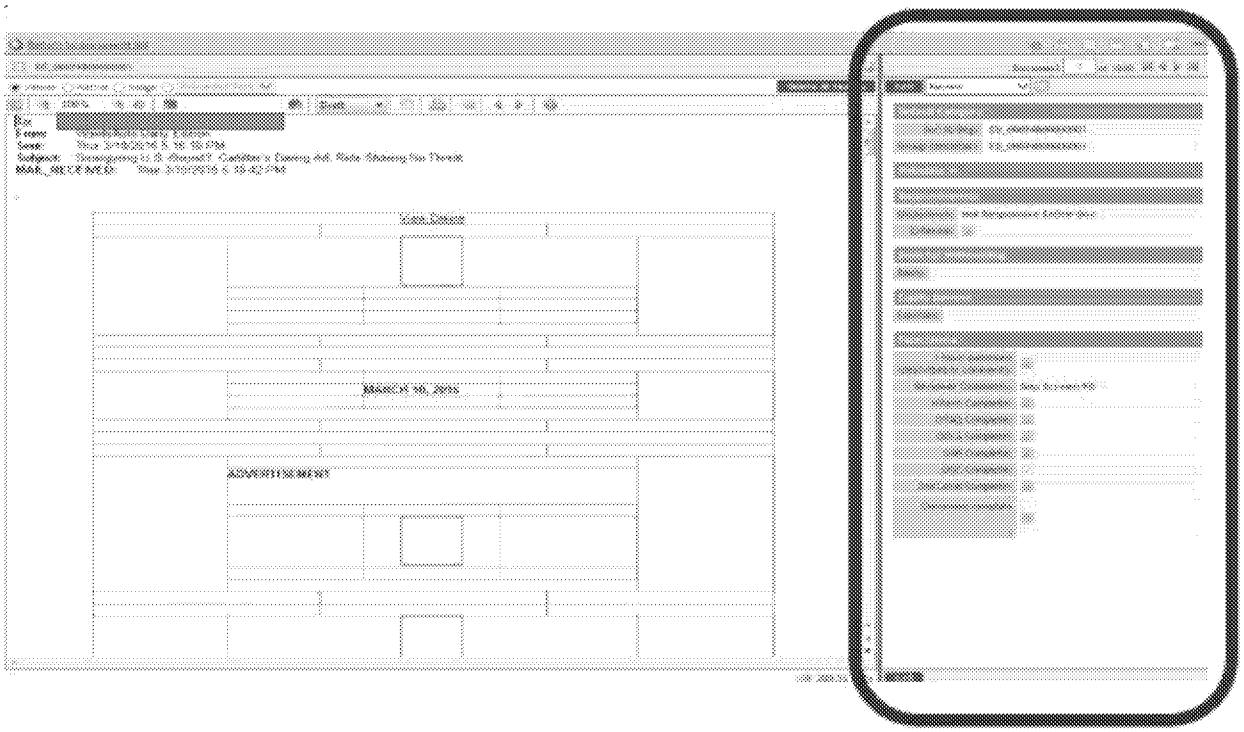


4. To clear your filters, click the sweep icon next to the filter icon.

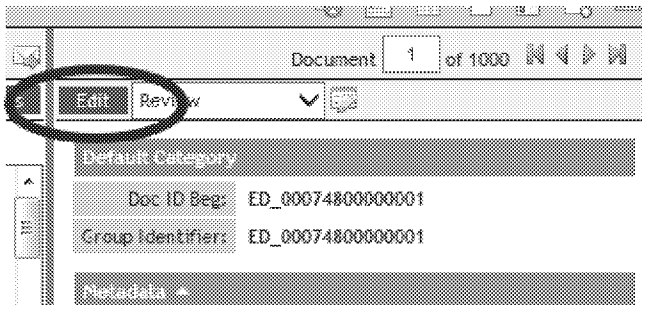


CODING A DOCUMENT

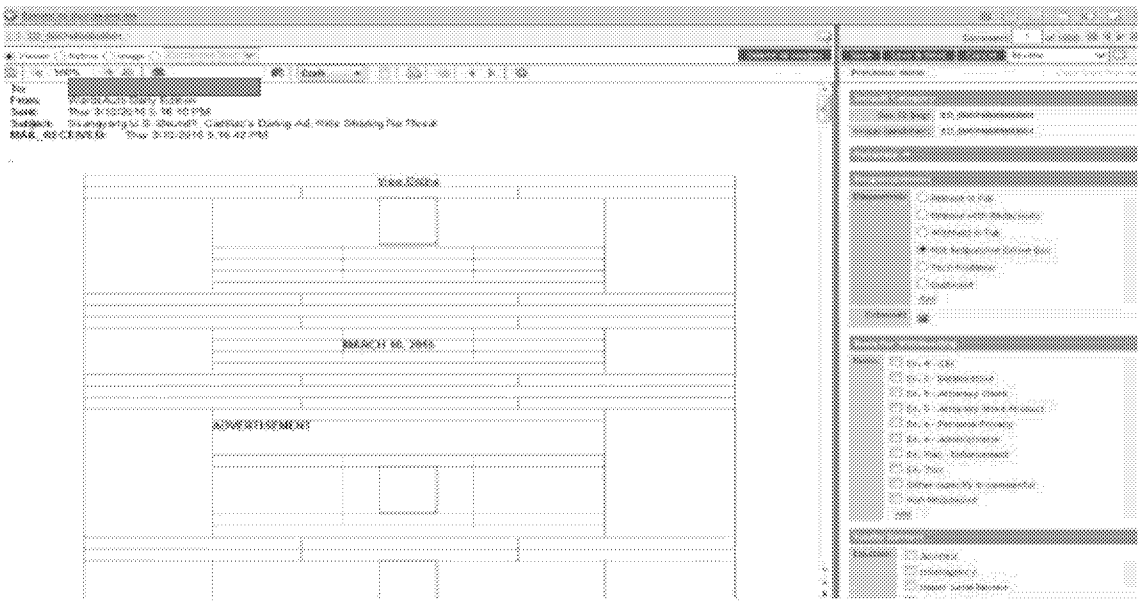
"Coding" is a term we use to describe the process of adding information to the documents that you review. To do this, when viewing a document, use the coding pane on the right side of your reviewer interface.



1. To begin coding, you must select the edit button in the upper left of your coding pane.

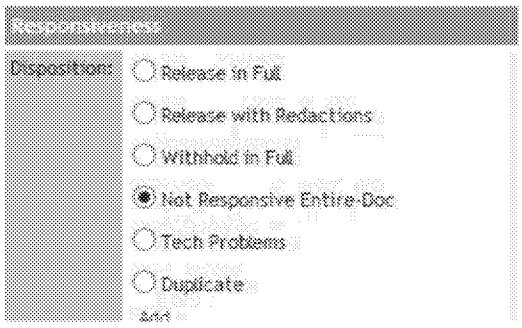


2. This will bring your coding pane to life and allow you to make edits. Your reviewer interface should now look like this:



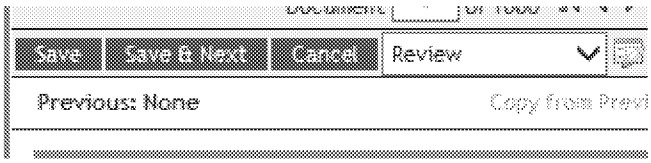
3. Follow the instructions provided by your case manager for coding your documents. You will find that some fields of information use radial buttons that only allow you to make one choice, and other fields use check boxes which allow you to select more than one item.

Radial Buttons:



Check Boxes:

4. After you have finished coding a document, remember to save. If you plan to move on to the next document in your set, clicking "Save and Next" will save and take you there automatically. The save buttons are located above and below your coding pane.

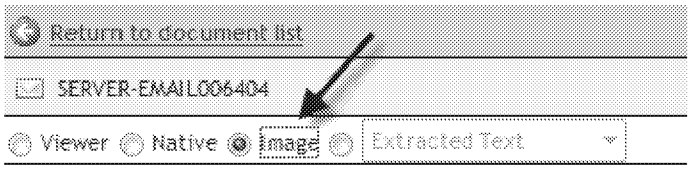


5. When you move onto another document, your coding pane will remain in edit mode, and you should be able to begin coding right away.

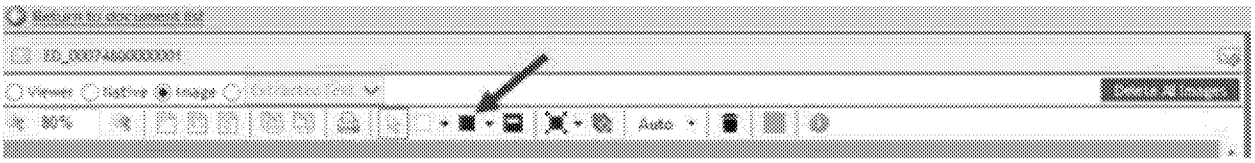
REDACTING

In general, when a FOIA exemption applies to part of a document, we have an obligation to release reasonably segregable material within that document. This is accomplished by redacting the exempt part of the document. You should redact as needed according to the instructions below. Redactions are automatically saved.

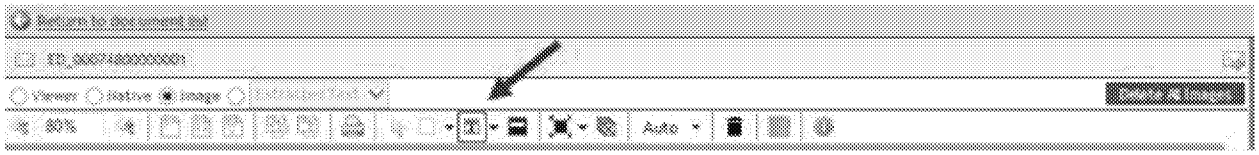
1. To create a redaction, make sure you are in Image mode in the Document viewer.



2. Look to the toolbar at the top of your screen. See the solid black square with the drop down menu. If you hover your cursor over it, it will display "*Redact*".



3. The drop down options when you click on the down arrow will be *Black, Cross, Text, or White*. Always select *Text*. When you have *Text* selected, the icon will look like below. Once this is selected, it will remain in *Text* mode unless you change it or sign out.



4. To make a redaction, click on your document and drag to create a square text

box. You will be able to resize or move this text box so that it conceals the information that is exempt from disclosure.

5. To change the text that is displayed in the box, right click on the box. This will allow you to select the appropriate basis for withholding from a series of drop down choices.

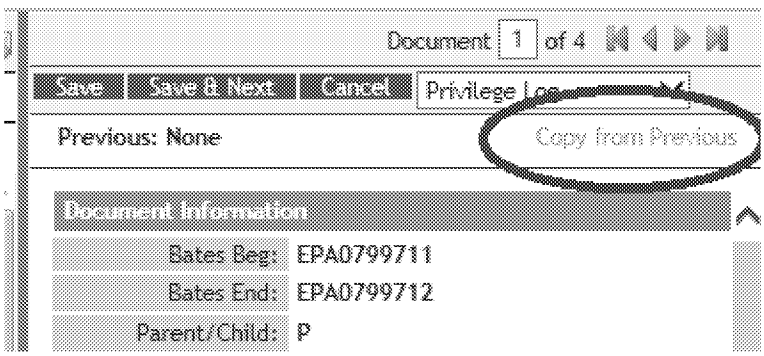
6. To delete a redaction, right click on the redaction and select delete.

7. Remember that the coding pane will not be automatically updated when you make a redaction. Be sure to code which exemptions you are asserting.

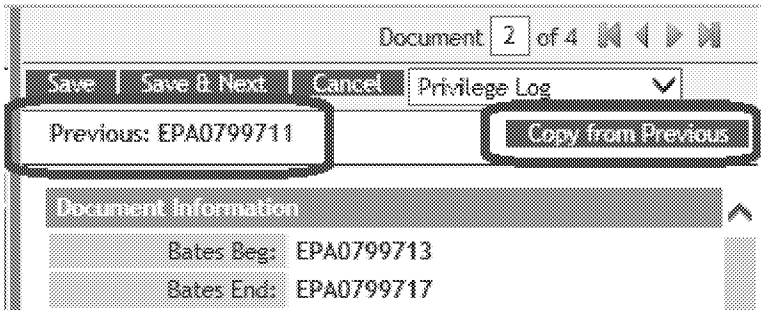
COPY FROM PREVIOUS

At the top right-hand side of the coding pane, there is a "Copy from Previous" button on the Relativity review screen, which will allow you to copy the coding from the most recently coded document in your current review session. This button may save time if you are working in a sequence of similar documents.

1. To use Copy from Previous, you must first code at least one document. If you have not yet coded a document in your current session, or if you click Save (as opposed to Save & Next) or Cancel after reviewing a document, the layout is displayed as read-only and the Copy from Previous button is disabled:



2. Once you have coded a document in the current session and hit Save & Next, the Previous field will show the document identifier of the document that you last coded, and the Copy from Previous button will be enabled:



3. Relativity will also display a gray arrow icon next to the fields with values that will be copied from the previous document when you use Copy from Previous (Document Status, Privilege Basis, and Reviewer Comments). After you click Copy from Previous, the gray arrow icon will be replaced with a green arrow icon. The icon redisplays next to a copied field that you have modified. You must still click Save or Save & Next to apply the changes that you have copied into the document.

How to effectively use Copy from Previous

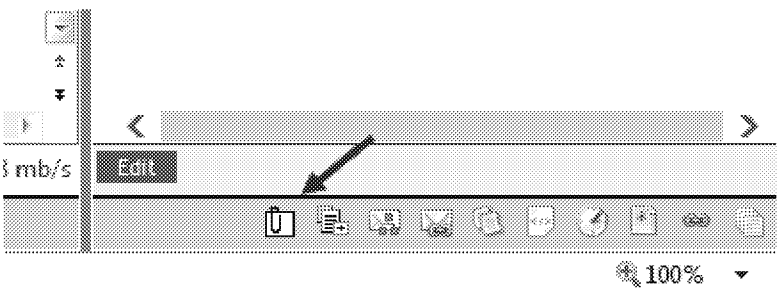
Use the Copy from Previous function when you want to copy the coding values of the designated fields from the last-saved document to the current one, like in cases where you have a series of similar documents one after another. After Relativity populates the layout with these coding values, you can still modify them (as you might need to, for instance, when copying a Privilege Basis description from an email into one of its attachments). After making any necessary changes, click the Save & Next button to save your changes and review a new document.

REVIEWING FAMILY MEMBERS AND DUPLICATES

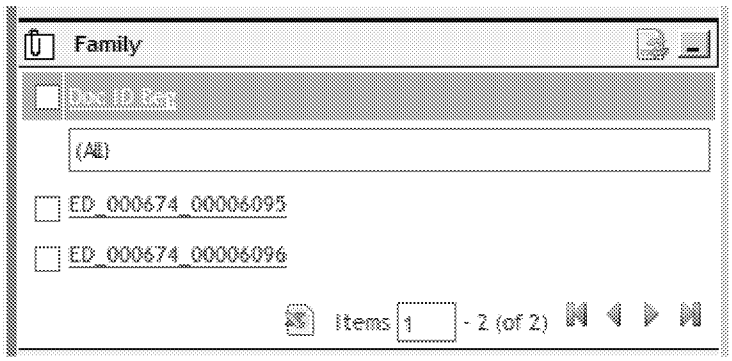
When looking at an attachment, it can be helpful to view the parent email to gain important context. When looking at an email communication, it may be helpful to view the attachments that are referenced. To view a document's family, follow the steps below.

1. FAMILY MEMBERS

    a. Find the paperclip icon in the bottom right corner of your screen. Click it.



b. This will provide you with a small viewing pane that contains list of documents, likely titled with a series of Doc ID numbers. Each number is a hyperlink to a document.

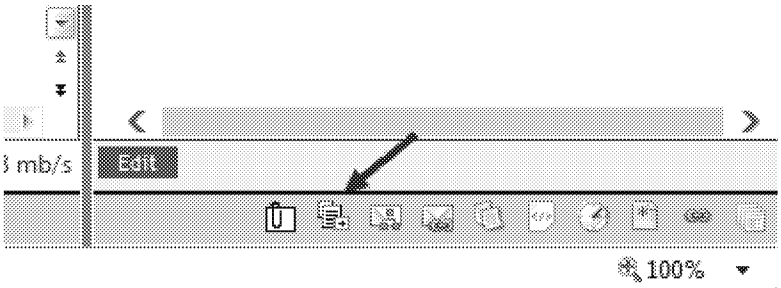


c. The uppermost document will be the parent email. The descending documents are attachments.

d. After clicking through the family and making coding changes or gathering information, to return to your original document, look to the upper left of your screen and click *Return to review queue*.

2. DUPLICATES

a. The Duplicates Icon should be located next to the paperclip icon,



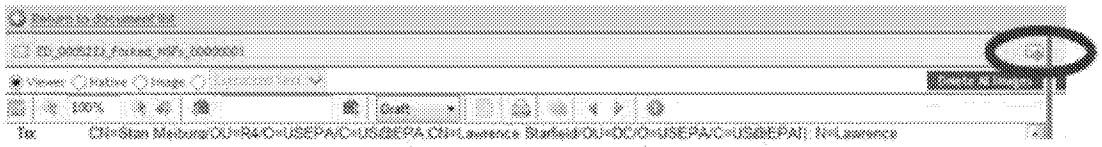
b. Just like with family members, you will see a small viewing pane that will display any duplicates. It can be navigated similarly, and when you are finished coding any duplicates, you can return to your initial document by selecting return to review queue.

EMAILING A DOCUMENT TO YOUR CASE MANAGER

If you have a question about a document, it is often easiest to send a link to the case manager.

Relativity has an easy tool to help with this.

1. Locate the email icon with the green arrow in the upper right of your viewing pane



2. Click the icon, this will open up an outlook message with a direct link to the document. Send the document to your case manager with a note about your question and they will be able to open up the document themselves to help with your issue.

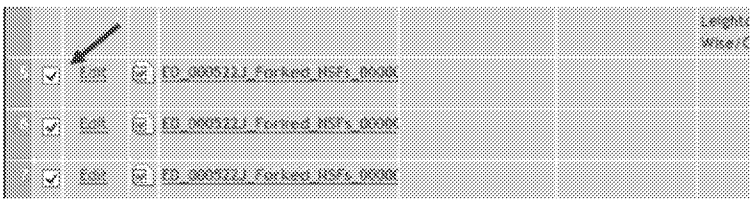
GETTING DOCUMENTS OUT OF RELATIVITY

If you are a first line reviewer, there is likely no reason for you to print or produce documents from Relativity. If you are helping with case management, you may need to get documents out of the database for a number of reasons.

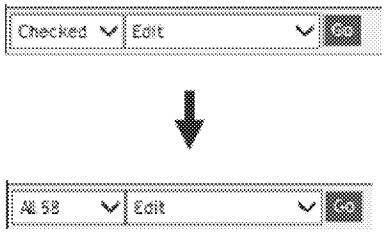
1. *Running a Production*: You may be at the end of your review and ready to deliver your final product to a requester. This will require the help of the e-discovery team in OEI. When you are ready to run a production, send an email to ediscovery@epa.gov. You should describe which documents need to be produced, if you would like them to be produced as images or in native format, and how you would like the documents to be stamped. The E-discovery team may follow up to clarify those and other details. If you know that you are going to request a large production, it can be helpful to reach out in advance.

2. *Printing Images*: If you are not running a final production, but rather need copies of one or more documents for some internal review, you can print images of your documents with or without redactions. Follow the steps below.

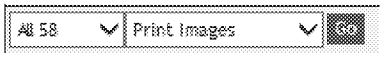
    a. Check the boxes of the documents that you would like to produce.



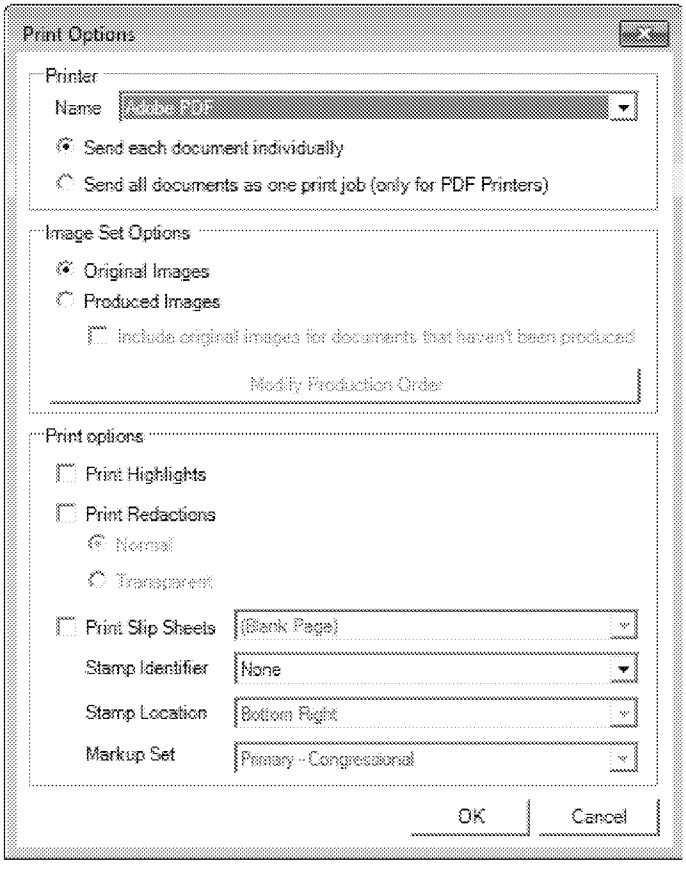
b. Alternatively, if you would like to print all of the documents in a particular saved search or folder, you can select "All" documents from the drop down in the lower left of your screen.



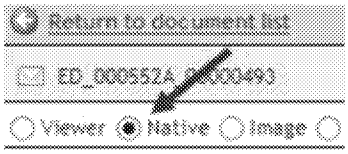
c. Using the second drop down menu, select "Print Images" and then press "Go".



d. You will be prompted with a number of choices. If you are trying to create a PDF, select a PDF printer. You have the options to send multiple documents as a group, print highlights or redactions, and select markup sets. Once you have set up your print job, press "OK" and Relativity will print your images. If you are printing to PDF, you wil be prompted to save the PDF.



3. *Opening in Native*: If you need to view or circulate a native file, open it using the native viewer and proceed from there.



Redacting in Adobe Acrobat Pro DC

Use these instructions to redact content in Adobe Acrobat Pro DC

(1) Choose **Tools** > **Redact**. The Redact toolset is displayed in the secondary toolbar.

(2) In the secondary toolbar, choose **Mark for Redaction** > **Text & Images**.

(3) (Optional) To set the appearance of redaction marks, click **Properties** in the secondary toolbar. (See Change the look of redaction markers.)

Note: The FOIA requires that the Agency provide an estimate of the volume of redacted information to the requester. This includes redaction marks within documents. Therefore, you must always use redaction marks or borders that are visible. In other words, never place a white redaction mark on a white background.

(4) Mark items you want to remove by doing any of the following:

- Double-click to select a word or image.
- Drag to select a line, block of text, object, or area.
- Press Ctrl as you drag to select areas of a page in a scanned document.

Note: To preview how your redaction marks appear, hold the pointer over the marked area.

(5) To apply multiple code entries to a single redaction, right-click a redaction mark and select an option. For more information, see Apply multiple code entries to a redaction. Tip: Use the **Find Text** tool to find and remove words or phrases in one or more PDFs that contain searchable text. (see below)

(6) (Optional) To repeat a redaction mark, right-click it and choose **Repeat Mark Across Pages**. This feature is convenient if a particular header, footer, or watermark appears in the same location on many pages.

(7) When you have finished marking the items you want to redact, click **Apply** in the secondary toolbar to remove the items, then click **OK**. The items aren't permanently removed from the document until you save it.

(8) If you want to search for and remove hidden information in the document by using the **Remove Hidden Information** feature, click **Yes** in the dialog box. Otherwise, click **No**.

(9) Choose **File** > **Save**, and specify a filename and location. The suffix **"_Redacted"** is appended to the filename. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both.

Tip: Use the **Find Text** tool to find and remove words or phrases in one or more PDFs that contain searchable text. (see below)

Search and Remove Text

Note: The **Find Text** tool doesn't search secured (encrypted) PDFs.

(1) Choose **Tools** > **Redact**.
The Redact toolset is displayed in the secondary toolbar.

(2) In the secondary toolbar, choose **Mark For Redaction** > **Find Text**.

(3) In the **Search** dialog box, specify if you want to search the current PDF or all PDFs in another location.

(4) Do one of the following:

- To search for only one word or phrase, choose **Single Word Or Phrase** and type the word or phrase in the text field.
- To search for multiple words, select **Multiple Words Or Phrase**, and then click **Select Words**. Type each word in the **New Word Or Phrase** text field and click **Add**. You can also import a text file with the list of words or phrases to search for.
- To search for a pattern (for example, phone numbers, credit card numbers, email addresses, social security numbers, or dates), click **Patterns**. Choose one of the available patterns. You can change the language version of the patterns. (See Select a different language version for patterns.)

(5) Click **Search & Remove Text**.

(6) In the search results, click the plus sign (+) next to the document name to see all occurrences of the word or phrase. Then, select the occurrences you want to mark for redaction:

- To select all occurrences in the list, click **Check All**.
- To select individual occurrences, click the check box for each one you want to redact. Click the text next to a check box to view the occurrence on the page.
- To mark none of the occurrences, close the **Search** dialog box or click **New Search** to start over.
- To mark whole words or partial words (characters) for redaction, select the option under **Redaction Mark Options**. For partial words, select **Mark Partial Word (s) For Redaction** the **Settings** dialog box appears. In the **Settings** dialog box, specify the number and location of the characters for redaction. Character redaction is useful if you're searching for a pattern, like credit card numbers, and want to leave part of the number visible for identification purposes.

(7) If you selected occurrences that you want to mark for redaction, click **Mark Checked Results For Redaction**. The items you selected in the list are shown marked for redaction.

Note: If you haven't saved the file, you can select redaction marks in the document and press **Delete** to remove the redaction mark. The redaction marks become permanent after you save the file.

(8) To remove the marked items, click **Apply** in the secondary toolbar, and then click **OK**. The items aren't permanently removed from the document until you save it.

(9) If you want to search for and remove hidden information in the document by using the **Remove Hidden Information** feature, click **Yes**. Otherwise, click **No**.

(10) Choose **File** > **Save**, and specify a filename and location. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both.

Find and remove hidden content

Tip: Use the **Remove Hidden Information** feature to find and remove content from a document that you don't want, such as hidden text, metadata, comments, and attachments. When you remove items, additional items are automatically removed from the document. Items that are removed include digital signatures, document information added by third-party plug-ins and applications, and special features that enable Adobe Reader users to review, sign, and fill PDF documents.

Note: To examine every PDF for hidden content before you close it or send it in email, specify that option in the **Documents** preferences using the **Preferences** dialog box.

(1) Choose **Tools** > **Redact**.
The Redact toolset is displayed in the secondary toolbar.

(2) In the secondary toolbar, click **Remove Hidden Information**.
If items are found, they are listed in the **Remove Hidden Information** panel with a selected check box beside each item.

(3) Make sure that the check boxes are selected only for the items that you want to remove from the document. (See Remove Hidden Information options.)

(4) Click **Remove** to delete selected items from the file, and click **OK**.

(5) Choose **File** > **Save**, and specify a filename and location. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both.
The selected content is permanently removed when you save the file. If you close the file without saving it, repeat this process, making sure to save the file.

Tip: Use this function to take file attachments you intend to withhold based on a FOIA exemption out of Adobe documents.

<u>Note: When marking documents for redactions in Adobe, always save 2 versions of the document</u>:

- One version with the redaction marks unapplied
  - This version will be the "review" version. The redaction marks will be visible along with the content you intend to apply the redaction mark to.
  - This version will also be uploaded to FOIAonline but not released to the requester.
- One version with the redaction marks applied
  - This will be your production version that will be released to the requester.

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Checklist: What to Include in a Final Response Letter

The checklist below details items to be included in a final response letter and provides sample language that may be useful. Draft your closeout letter to fit the particular needs of a request, but be sure it includes the key components below. Following signature of the letter, the letter should be scanned into FOIAonline even if it is not being delivered electronically.

Print on Agency Letterhead
[Date Stamp]

[Name
Organization
Street
City, State Zip Code]

Re: Freedom of Information Act Request No. EPA-***[XX-XXXX-XXXXXX]***, Final Response

Dear ***Mr./Ms. [Last name]:***

1. *SUMMARY OF REQUEST*
   - *Your letter should begin with the request number and summary of the request*
   - *Sample language:*

   This letter concerns the above-referenced FOIA request, received by the U.S. Environmental Protection Agency (EPA or Agency) on ***[Month, Day, Year]***, in which you requested, ***[INSERT a description of the FOIA request. If the request has been clarified, include the most recent clarification and note when it was clarified. Note key correspondence or communication with the requester, provide a timeline of EPA's response.]***.

2. DISPOSITION
   - *State which one of the following dispositions applies:*
     - *Granted. The records, in their entirety, may be released to the requester.*
     - *Partial Grant/Partial Denial. Portions of the record will be withheld from the requester if covered by either one or multiple FOIA exemptions. The portions of the record that are not redacted are released to the requester.*
     - *Denial. The record, in its entirety, will be withheld from the requester if covered by either one or multiple FOIA exemptions.*
     - *No Record. If, after a reasonable search likely to uncover all responsive documents, no records are located that are responsive to the request, the requester will be informed in writing.*

3. DESCRIPTION OF RECORDS

   - *Next, if the request is being granted in full, describe the records being provided*
   - *Sample language:*

The Agency has concluded its search for records responsive to your request and is providing the requested records in full. ***[INSERT a description of the records that are being provided]***.

   - *If records are being withheld in full or in part, describe the records. If there is a large volume of records that are being withheld, include an index of those records.*
   - *Sample language:*

The Agency has concluded its search for records responsive to your request and is ***[providing a portion of the requested records, [INSERT a description of the records that are being provided] / withholding all responsive records].*** The EPA is withholding # records in full and # records in part.

   - *If records are being withheld in whole or in part, you must note which FOIA exemptions are the basis for the withholding(s).*
   - *Sample language:*

Records are being withheld pursuant to: 5 U.S.C. § 552(b)***(#), [shorthand description of applicable exemption, such as: 552(b)(5), the Deliberative Process Privilege / 552(b)(5), the Attorney Client Privilege/552(b)(5), the Attorney Work Product Privilege / 552(b)(6) Personal Privacy].*** The records are exempt from disclosure because they ***[briefly describe reason for withholding such as: are predecisional and deliberative and would harm agency decision making if released (DPP)/ are confidential communications between an agency attorney and client concerning legal advice (ACP)/ are documents prepared by, or at the direction of, an attorney in contemplation of litigation(AWP)/ contain personal information which would be an unwarranted invasion of personal privacy if released (PP)].*** The attached index of withholdings provides further information concerning the withheld records ***[or if voluminous – "The attached appendix contains a categorical description of withholdings and a volume estimate."]***.

4. COST INFORMATION

   - *Inform the requester of the fees that are being assessed for the request and how to pay them.*
   - *Sample language:*

The cost to process your request was $***[#]***. Please see the attached invoice for billing and payment instructions.

5. FINAL APPEAL RIGHTS AND CONTACT INFORMATION

   - *Inform the requester that they may appeal the request, and provide them contact information for the appeal, the FOIA Public liaison, and OGIS. Also include the relevant staff person's contact information. The requester may want to simply seek clarification about something they don't understand rather than go through the appeals process.*
   - *Sample language (NOTE: THE FOLLOWING APPEAL LANGUAGE HAS BEEN RECENTLY UPDATED CONSISTENT WITH THE FOIA IMPROVEMENT ACT OF 2016):*

APPEAL LANGUAGE FOR ALL FINAL FOIA RESPONSES, EXCEPT AS NOTED BELOW:

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8610 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

If you have any questions concerning this response, please contact ***[Staff contact]*** of my staff at ***[###-###-####]***.

APPEAL LANGUAGE IF THERE IS AN INITIAL WITHHOLDING BASED ON EXEMPTION 4:

This letter concludes our response to your request. As noted above, the information withheld under Exemption 4 will be reviewed by the appropriate legal office, which will issue a final confidentiality determination. Therefore, you do not need to appeal the withholding of information under Exemption 4. Once the legal office issues a final confidentiality determination, EPA will notify you whether the information qualifies for confidential treatment or may be released. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholdings, you may appeal this response

by email at hq.foia@epa.gov or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service or overnight delivery you must address your correspondence to 1301 Constitution Avenue, N. W., Room 6416J, Washington, DC 20004. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. Appeals received after 5:00 pm EST will be considered received the next business day. The Agency will not consider appeals received after the 90-calendar-day limit. The appeal letter should clearly identify the determination being appealed, including the assigned FOIA tracking number shown above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail to the Office of Government Information Services, National Archives and Records Administration, 8610 Adelphi Road, College Park, MD, 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

If you have any questions concerning this response, please contact ***[Staff contact]*** of my staff at ***[###-###-####]***.

6. SIGNATURE

   - *Be sure your letter is signed at the Division Director level or above.*

Interim Response Letter Template

The below template is one way to correspond with a requester concerning an interim production. You may send an email, letter, or message through FOIA Online, and there are many different ways to communicate about an interim response. Just be clear that the production is interim and ensure that you are including the following components in your correspondence:

- Request information (number, date received, summary)
- Description of the interim production (number of records, general description)
- Anticipated closeout date/upcoming productions
- Notice that appeal information will be provided at close out
- Contact information

[Print on Agency Letterhead]

[Date Stamp]

[Name
Organization
Street
City, State Zip Code]

Re: Freedom of Information Act Request No. EPA-***[XX-XXXX-XXXXXX]***

Dear ***Mr./Ms. [Last Name]***:

This letter concerns the above-referenced FOIA request, received by the U.S. Environmental Protection Agency (EPA or Agency) on ***[Month, Day, Year]***, in which you requested, ***[INSERT a description of the FOIA request. If the request has been clarified, include the most recent clarification and note when it was clarified.]*** . The Agency is now releasing records in response to your request. Please note that this is an interim response, and the EPA continues to work on your request.

The records EPA is releasing include ***[INSERT a brief description of the records that are being produced]***.

The Agency expects to complete its response to your request by ***[Month, Day, Year]***. ***[OPTION: INSERT a description of a rolling production schedule or when the next interim production is expected if there will be additional interim productions.]***

Again, your request is not being closed at this time. When your request is closed, you will receive information concerning your appeal rights for any part of EPA's response. If you have

any questions about this interim production or your request generally, please contact ***[First Name Last Name]*** at [***xxxxxxx]***@epa.gov or by phone at [***XXX-XXX-XXXX]***. Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or call (202) 566-1667. Last, you may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8610 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[NAME]
[TITLE]

Message

From: Clarke, Victoria [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CLARKE, VICTORIA]
Sent: 4/16/2018 6:23:38 PM
To: Ward, Valerie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6731fbf4dfad49c0a174f9f0168bb4bf-VWARD]
CC: Hill, Kevin W. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=39972377481a439bb895d784a2159393-Hill, Kevin]; Walker, Denise [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b10d83a48a5e4af7a9b1f01465330ff2-Walker, Den]; Barr, Linda [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ce32bbe21e94644a9484cace9f978d4-LBARR02]; Stachowiak, Robert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2710013bd33a44ab823c8e6d9b94275a-RSTACHOW]
Subject: RE: FOIA Request EPA-HQ-2018-004659 - Letter from Amanda Goodin
Attachments: FOIA Toolkit Appendix .docx; Unusual Circumstances and New Deadline Template.docx

Hi Valerie,

This follow up on my voicemail to you earlier today about this FOIA. Attorney Client / Ex. 5

Deliberative / Attorney Client / Ex. 5

I'm attaching the FOIA Toolkit Appendix, as well as the Unusual Circumstances/Deadline template letter for you to use. This letter is taken from the FOIA Toolkit, Deliberative / Attorney Client / Ex. 5

Deliberative / Attorney Client / Ex. 5

Let me know if you have any questions.

Victoria

Victoria Clarke
Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. |7348 WJCN
202-564-1149

From: Clarke, Victoria
Sent: Monday, April 16, 2018 12:06 PM
To: Ward, Valerie <Ward.Valerie@epa.gov>
Cc: Hill, Kevin W. <hill.kevinw@epa.gov>
Subject: FW: FOIA Request EPA-HQ-2018-004659 - Letter from Amanda Goodin

Hi Valerie,

See the correspondence from EarthJustice about this FOIA. Will you have some time today to speak about next steps?

Victoria

Victoria Clarke
Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. |7348 WJCN
202-564-1149

From: Aanal Patel [mailto:apatel@earthjustice.org]
Sent: Friday, April 13, 2018 5:16 PM
To: Clarke, Victoria <clarke.victoria@epa.gov>
Cc: Amanda Goodin <agoodin@earthjustice.org>; Heather Murphy <hmurphy@earthjustice.org>
Subject: FOIA Request EPA-HQ-2018-004659 - Letter from Amanda Goodin

Good afternoon Ms. Clarke,

Attached please find correspondence from Amanda Goodin regarding FOIA Request EPA-HQ-2018-004659.

Thank you,

Aanal Patel
Litigation Assistant
Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
T: 206.343.7340 Personal Phone / Ex. 6
F: 206.343.1526
earthjustice.org

facebook.com/earthjustice
twitter.com/earthjustice

The information contained in this email message may be privileged, confidential and protected from disclosure.
If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited.
If you think that you have received this email message in error, please notify the sender by reply email and delete the message and any attachments

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*, Initial Response

Dear Mr./Ms. *[Last name]*:

Thank you for your Freedom of Information Act request. This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on *[MONTH DAY, YEAR]*, in which you requested

> *[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].*

Unusual Circumstances and Extension of Time *(if needed)*

[Edit as appropriate]

Pursuant to 40 C.F.R. § 2.104(d), an extension of time to respond to your request is necessary. Given the scope of the request, EPA anticipates that

> *[...the response will require significant amount of EPA's resources and time to search for, and appropriately examine the voluminous amount of records to complete this request and/or*
>
> *...to search for and collect the requested records from multiple EPA offices that are separate from the office processing the request" and/or*
>
> *...the need for consultation with another agency having a substantial interest in the determination of the request."]*

EPA is initiating the coordination of and search for responsive records in our files. Because of the circumstances described above, it is difficult to predict with certainty how many records may be involved. Nonetheless, at this time, EPA estimates the Agency will be able to complete this request by [DATE, MONTH, YEAR]. We appreciate your patience.

[*Only if Relevant: Since the time of your request and as of today's date, EPA has received additional FOIA requests about [Topic] including several requests that were approved for expedited processing. These expedited requests will be processed before your request. However, many of the documents that are responsive to those requests will also be responsive to your request. These documents will be made publicly available on a rolling basis as they are produced.]*

Next Steps

The processing clock has been restarted stopped for your FOIA request.

You may contact Valerie Ward at *(email address)* or at *(telephone number)* if you have any further questions. If you wish to request information connected to this request in the future, please reference the FOIA request number.

Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[NAME]
[TITLE]

Message

From: Clarke, Victoria [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CLARKE, VICTORIA]
Sent: 3/29/2018 4:42:01 PM
To: Rivers, Tahani [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0b83cb290f8b47e79093f897562b2658-Rivers, Tahani]; Bunnell, Julia [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=07e03e4b1d4a4a44be575b8d613c5532-Jbunnell]; Schefski, Melissa [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c5b5d99a44cd491d99fcca65be54e601-Katz, Melissa]; Miller, Kevin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2191d964c6bf4e2fb52817bee20213be-Miller, Kevin]
CC: Hill, Kevin W. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=39972377481a439bb895d784a2159393-Hill, Kevin]
Subject: RE: Please use the following call-in number for the PES FOIA call right now - Non-Responsive / Ex. 6 / Conference Line
Attachments: FOIA Toolkit Appendix .docx

Here is the link to the National FOIA Training Conference! Non-Responsive / Ex. 6 / Internal URL

The FOIA Toolkit Appendix where sample letters can be found is also on that sharepoint site, but is also attached.

Victoria Clarke
Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C. | 7348 WJCN
202-564-1149

From: Rivers, Tahani
Sent: Thursday, March 29, 2018 12:07 PM
To: Bunnell, Julia <Bunnell.Julia@epa.gov>; Clarke, Victoria <clarke.victoria@epa.gov>; Schefski, Melissa <Schefski.Melissa@epa.gov>; Miller, Kevin <Miller.Kevin@epa.gov>
Cc: Hill, Kevin W. <hill.kevinw@epa.gov>
Subject: Please use the following call-in number for the PES FOIA call right now Non-Responsive / Ex. 6 / Conference Line

Tahani Rivers, Attorney-Advisor
U.S. Environmental Protection Agency
5 Post Office Square
Mail Code: OES04-3
Boston, MA 02109-3912
Phone Number: 617.918.1299

Confidential: This transmission may contain deliberative, attorney-client, attorney work product or otherwise privileged material. Do not release under FOIA without appropriate review. If this message has been received by you in error, you are instructed to delete this message from your machine and all storage media whether electronic or hard copy. Thank you.

-----Original Appointment-----
From: Bunnell, Julia
Sent: Tuesday, March 27, 2018 11:35 AM
To: Bunnell, Julia; Rivers, Tahani; Clarke, Victoria; Schefski, Melissa; Miller, Kevin

Cc: Hill, Kevin W.
Subject: PES FOIA Document Search
When: Thursday, March 29, 2018 12:00 PM-1:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: Phone Non-Responsive / Ex. 6 / Conference Line

Message

From: Miller, Patricia G. [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=896D0D2F7BB442EA890E7E7BD7CB4B38-MILLER, PATRICIA]
Sent: 7/23/2018 8:31:43 PM
To: Creech, Christopher [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=87b8993f1a0e42fcb26d654dd8f2e377-Creech, Chr]
CC: Stevens, Edie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4359dac2c45e45428488f7f43de9f88b-STEVENS, EDIE]
Subject: FW: RA/DRA Calendar and Travel FOIA Requests
Attachments: TEMPLATE Unusual Circumstances RA DRA Travel and Calendar FOIAs.docx

Christopher;

I'm working with our FOIA office on the response to the request for RA/DRA calendar & travel records. Deliberative Process / Attorney-Client Privilege Ex. 5

Deliberative Process / Attorney-Client Privilege Ex. 5

To avoid confusion, Deliberative Process / Attorney-Client Privilege Ex. 5

Deliberative Process / Attorney-Client Privilege Ex. 5

Any clarification would be appreciated.
Thanks, Pat

Patricia Gillispie Miller
Office of Regional Counsel
US EPA, Region 7
11201 Renner Blvd.
Lenexa, Kansas 66219

Phone: 913-551-7283
Fax: 913-551-7925

From: Creech, Christopher
Sent: Thursday, July 19, 2018 3:45 PM
To: Calderon, Wanda <Calderon.Wanda@epa.gov>; Engels, Alan <engels.alan@epa.gov>; Glenn, William <Glenn.William@epa.gov>; Hines, Andrea <hines.andrea@epa.gov>; Ho, Nancy <Ho.Nancy@epa.gov>; Johnson, Ivry <Johnson.Ivry@epa.gov>; Kaufman, Alice <Kaufman.Alice@epa.gov>; Kercheval, Stephanie <Kercheval.Stephanie@epa.gov>; Kluesner, Dave <kluesner.dave@epa.gov>; Maso, Carmen <maso.carmen@epa.gov>; Miller, Linda <miller.linda@epa.gov>; Mills, Keith <Mills.Keith@epa.gov>; Nelson, Thomas <Nelson.Thomas@epa.gov>; Schena, Cristeen <Schena.Cristeen@epa.gov>; Stevens, Edie <Stevens.Edie@epa.gov>; Tate, Rita <Tate.Rita@epa.gov>; Tyree, James <Tyree.James@epa.gov>; Wheatley, Jessica <wheatley.jessica@epa.gov>; Albano, Emily <Albano.Emily@epa.gov>
Cc: Deputy Regional Counsels <Deputy_Regional_Counsels@epa.gov>; Person, Linda <Person.Linda@epa.gov>; Schumacher, Wendy <schumacher.wendy@epa.gov>; Gottesman, Larry <Gottesman.Larry@epa.gov>; Simon, Paul <Simon.Paul@epa.gov>; Vander Naald, Breanne <vandernaald.breanne@epa.gov>; Bigioni, Neil <bigioni.neil@epa.gov>; Walker, Denise <Walker.Denise@epa.gov>; Aldinger, Dayle <Aldinger.Dayle@epa.gov>; Boydston, Michael <Boydston.Michael@epa.gov>; Gupta, Kaushal <Gupta.Kaushal@epa.gov>; Prout, Susan <prout.susan@epa.gov>
Subject: RA/DRA Calendar and Travel FOIA Requests

Attorney–Client, Deliberative, Ex. 5

Hello All,

This email pertains to the FOIA requests for Regional Administrators' and Deputy Regional Administrators' Calendar and Travel records.

For those of you that I have not met, my name is Chris Creech. I am an Attorney-Adviser from the FOIA Expert Assistance Team (FEAT) in the Office of General Counsel. My FEAT colleague, Breanne Vander Naald (cc'd), will also be assisting us. The FEAT provides legal counseling and project management for complex and voluminous FOIA requests. A "FEAT light" project involves a member of the FEAT providing occasional, but defined, assistance on a FOIA request or a set of FOIA requests. This is a FEAT light project.

Going forward, **I will assume that I am emailing, setting conference calls with, and working with the FOIA officers**. **If someone other than your FOIA officer has been assigned to your request, the FOIA officer should let me know, and we will swap you two out**.

In this communication, I want to provide feedback on questions that have been posed and offer some suggested immediate steps. The good news: you have FOIA requests with the exact same language. Also the good news: we can overcome hurdles as a group.

Immediate Steps:

Deliberative Process / Attorney-Client Privilege Ex. 5

My next steps:

Deliberative Process / Attorney-Client Privilege Ex. 5

Thank You! I look forward to working with all of you.

Christopher T. Creech
Attorney–Adviser
Office of General Counsel
U.S. Environmental Protection Agency
(202) 564-4286
Room 7353 E
Creech.Christopher@EPA.gov

Q&A:

1. Who will issue responses, produce documents, issue closeout letters, etc.?

   The Regions will handle the administrative tasks in FOIAonline and issue responses to the requester. FEAT is assisting with legal counseling and coordination.

2. How should fees be handled?

Deliberative Process / Attorney-Client Privilege Ex. 5

3. Will the due date be extended?

Deliberative Process / Attorney-Client Privilege Ex. 5

5. What information should we redact from the travel records?

Deliberative Process / Attorney-Client Privilege Ex. 5

6. What if there are sensitive calendar entries or travel records?

Deliberative Process / Attorney-Client Privilege Ex. 5

Attorney–Client, Deliberative, Ex. 5

RA/DRA Calendar/Travel "Initial Response" Template Letter

[Agency Letterhead]

[DATE STAMP]

Eric P. Wolff
Politico
1100 Wilson Blvd
Arlington, VA 22209

Re: Freedom of Information Act Request No. EPA-RXX-2018-0090XX, Initial Response

Dear Mr. Wolff,

Thank you for your Freedom of Information Act (FOIA) request. This letter concerns the above-referenced FOIA request, received by the U.S. Environmental Protection Agency (EPA or Agency) on [MONTH DAY, YEAR], in which you requested

> calendar and schedules of the regional administrator and regional deputy administrator for Region XX, for as much of 2018 as is current when this FOIA is fulfilled. It is also a request for official all travel records for the regional administrator and regional deputy administrator for May 2018 and June 2018.

I. Unusual Circumstances and Extenstion of Time

Pursuant to 40 C.F.R. § 2.104(d), an extension of time to respond to your request is necessary. Given the scope of the request, EPA anticipates that the response may require significant amount of EPA's resources and time to search for and appropriately examine the voluminous amount of records to complete this request, and the need to consult with another agency or two or more agency components having a substantial interest in the determination of the request.

EPA has initiated the coordination of and search for responsive records in our files. Because of the circumstances described above, it is difficult to predict with certainty how many records may be involved.

II. Opportunity to Discuss and Modify

Your request is too broad to be completed within 20 days. For example, we would like to discuss the type of travel records that you are interested in, and the possible location of these records.

EPA's FOIA regulations state:

> 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.

40 C.F.R. § 2.102(c).

We would like to provide you the opportunity to discuss the request with us and clarify the records that you are seeking so that EPA can process your request. As indicated in 40 C.F.R. § 2.102(c), please include or be prepared to discuss any specific information about the records you seek, including time period, authors, or a more detailed description of the records' subject matter.

III. Publicly Available Information *(if necessary)*

The following are sources of publicly available information that you can access immediately: [link to publically available calendar]. Please review the record, as we will discuss whether it satisfies your request for calendar records.

IV. What Happens Next

Please contact [*Insert Contact Person*] or Christopher Creech (creech.christopher@epa.gov or 202-564-4286) to discuss your request. Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (301) 837-1996 or (877) 684-6448; or fax, (301) 837-0348.

If you wish to request information connected to this request in the future, please reference the FOIA request number.

Sincerely,

[MANAGER]
[TITLE]

Message

From: Walker, Denise [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b10d83a48a5e4af7a9b1f01465330ff2-Walker, Den]
Sent: 7/18/2018 3:27:44 PM
To: Creech, Christopher [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=87b8993f1a0e42fcb26d654dd8f2e377-Creech, Chr]; Vander Naald, Breanne [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fca44c233493410fb1d812a5f59374ac-Vander-Naal]
Subject: Flint Water Docs Draft FOIA Template Initial Response 02042016.docx
Attachments: Flint Water Docs Draft FOIA Template Initial Response 02042016.docx

Flint Water "Initial Response" Template Letter

[Print Response on Agency Letterhead]

[DATE STAMP]

[Name
Company
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-XX-XXXX-XXXXXX, Initial Response

Dear Mr./Ms. [Last name]:

Thank you for your Freedom of Information Act request. The Environmental Protection Agency has received numerous Freedom of Information Act Requests pertaining to Flint, Michigan drinking water. We are diligently processing these requests.

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on [MONTH DAY, YEAR], in which you requested

[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].

I. Unusual Circumstances and Extenstion of Time

Pursuant to 40 C.F.R. § 2.104(d), an extension of time to respond to your request is necessary. Given the scope of the request, EPA anticipates that

...the response will require significant amount of EPA's resources and time to search for, and appropriately examine the voluminous amount of records to complete this request and/or
...to search for and collect the requested records from multiple EPA offices that are separate from the office processing the request" and/or
...the need to consultation with another agency having a substantial interest in the determination of the request."

In addition, as of today's date, EPA has received multiple FOIA requests about Flint drinking water including several requests that were approved for expedited processing. These expedited requests will be processed before your request. However, many of the documents that are responsive to those requests may also be responsive to your request. These documents are made publicly available on a rolling basis as they are produced.

EPA has initiated the coordination of and search for responsive records in our files. Because of the circumstances described above, it is difficult to predict with certainty how many records may

be involved. Nonetheless, at this time, EPA estimates the Agency will be able to complete this request by [DATE, MONTH, YEAR]. We appreciate your patience.

II. Opportunity to Discuss and Modify

Your request is *[too broad to be completed within 20 days and/or does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them.]*
For example, *[EXPLAIN WHY YOU CANNOT IDENTIFY AND LOCATE THE RECORDS].*

EPA's FOIA regulations state:

> "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."
> 40 C.F.R. § 2.102(c).

We would like to provide you the opportunity to discuss the request with us and clarify the records that you are seeking so that EPA can process your request. As indicated in 40 C.F.R. § 2.102(c), please include or be prepared to discuss any specific information about the records you seek, including time period, authors, or a more detailed description of the records' subject matter.

III. Processing Fees

Edit as appropriate

Option 1: On [DATE], the EPA's National Freedom of Information Office granted the fee waiver request that accompanied the FOIA request. Therefore, you will not be assessed fees.

Option 2: On [DATE], the EPA's National Freedom of Information Office denied the fee waiver request that accompanied the FOIA request. Therefore, we must receive an assurance of payment before processing the request.

Option 3: You were placed in the "other" fee category, which means you will be charged for search, and duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A. Therefore, we must receive an assurance of payment before processing the request.

Option 4: You were placed in the commercial fee category, which means you will be charged for search, review, and duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A. Therefore, we must receive an assurance of payment before processing the request.

IV. Publicly Available Information

The following are sources of publicly available information that you can access immediately:

- On January 21, 2016 EPA issued a Safe Drinking Water Act Emergency Order. As part of that Order, EPA committed to make its Lead and Copper Rule (LCR) sampling results

available to the public on the Agency's website. The EPA webpage for the Flint Drinking Water Response is: http://www.epa.gov/flint. All of EPA's preliminary and final water quality sampling data will be available via a link at this website once the data is posted.

- You may access Flint drinking water documents, including the Emergency Order, here: http://www.epa.gov/flint/flint-drinking-water-documents

- In addition, there are over 67,000 pages of Flint water records available to the public that were produced in response to prior FOIA requests. You may access these records at the links below:

  https://foiaonline.regulations.gov:443/foia/action/public/view/request/8096d0bb

  https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d280afc35f

  https://foiaonline.regulations.gov:443/foia/action/public/view/request/80b08855

  https://foiaonline.regulations.gov:443/foia/action/public/view/request/80b8f9b7

  https://foiaonline.regulations.gov:443/foia/action/public/view/request/80b2a548

V. What Happens Next

Edit as appropriate.
The processing clock is stopped for your FOIA request until we receive *[your assurance of payment [and/or] your clarification or modification.]*

Please respond within ten calendar days from the date of this letter to arrange a time to discuss your *request and fees.*

Please contact [*Insert Contact Person*] to arrange a time to discuss your request. Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (301) 837-1996 or (877) 684-6448; or fax, (301) 837-0348.

If we do not receive a response from you within 10 days, or by [X Date], we will consider your request to be voluntarily withdrawn. Once the request is clarified, we will continue processing your FOIA request and provide you with an estimated timeframe for completion.

If you wish to request information connected to this request in the future, please reference the FOIA request number.

Sincerely,

[MANAGER]

[TITLE]

Message

From: Walker, Denise [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b10d83a48a5e4af7a9b1f01465330ff2-Walker, Den]
Sent: 8/10/2018 3:50:42 PM
To: Creech, Christopher [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=87b8993f1a0e42fcb26d654dd8f2e377-Creech, Chr]
Subject: Clarification Letter EPA-2018-009756.docx
Attachments: Clarification Letter EPA-2018-009756.docx

Please revise as necessary

Thanks!

Message

From: Walker, Denise [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b10d83a48a5e4af7a9b1f01465330ff2-Walker, Den]
Sent: 8/8/2018 5:42:07 PM
To: Creech, Christopher [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=87b8993f1a0e42fcb26d654dd8f2e377-Creech, Chr]
CC: Miller, Tia [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=342f906fb3e0490c8906e2104397d2cf-Young, Tia]
Subject: FW: FOIA Clarification Letter Follow-up
Attachments: Clarification Leter.docx

Chris- can you please follow up with Tia on this for me?

Thanks!

Denise A. Walker
U.S. Environmental Protection Agency
Acting Director, OGC National FOIA Office
Acting Assistant Director, OGC FOIA Expert Assistance Team
Washington, D.C. | 7308A WJCN
Office: 202-564-6520
EPA Cell: 202-816-9872

Have a FOIA question? Try here first!

From: Miller, Tia
Sent: Wednesday, August 08, 2018 8:59 AM
To: Schwarz, Matthew <Schwarz.Matthew@epa.gov>; Walker, Denise <Walker.Denise@epa.gov>
Subject: FOIA Clarification Letter Follow-up

Good morning,

Thank you both for taking the time to talk with me last week to walk me through the process of clarifying this FOIA. Based on the feedback I received from you both, I have taken a stab at drafting a letter to send to the requester. Can you take a look at the attached and let me know whether this works?

Thanks!

Tia Y. Miller
Attorney Advisor
U.S. Environmental Protection Agency
Office of General Counsel | General Law Office | Employment Law Practice Group
1200 Pennsylvania Avenue, NW
Mail Code 2377A
Washington, DC 20460
(202) 564-8942
(202) 564-5432 - Fax

Message

From: Walker, Denise [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B10D83A48A5E4AF7A9B1F01465330FF2-WALKER, DEN]
Sent: 5/3/2018 8:46:04 PM
To: Creech, Christopher [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=87b8993f1a0e42fcb26d654dd8f2e377-Creech, Chr]
Subject: Draft FOIA Interim Release Letter 05.01.2018 DAW.docx
Attachments: Draft FOIA Interim Release Letter 05.01.2018 DAW.docx

Message

From: Creech, Christopher [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=87B8993F1A0E42FCB26D654DD8F2E377-CREECH, CHR]
Sent: 8/8/2018 10:03:49 PM
To: Miller, Tia [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=342f906fb3e0490c8906e2104397d2cf-Young, Tia]
CC: Walker, Denise [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b10d83a48a5e4af7a9b1f01465330ff2-Walker, Den]
Subject: RE: FOIA Clarification Letter Follow-up
Attachments: Clarification Letter CTC.DOCX

Hi Tia,

Great job on the letter! I made a few minor tweaks.

Deliberative Process / Attorney-Client Privilege Ex. 5

Please let me know if you have any questions. Thanks!

Best,

Christopher T. Creech
Attorney–Adviser
Office of General Counsel
U.S. Environmental Protection Agency
(202) 564-4286
Room 7353 E

From: Creech, Christopher
Sent: Wednesday, August 8, 2018 1:43 PM
To: Walker, Denise <Walker.Denise@epa.gov>
Cc: Miller, Tia <Miller.Tia@epa.gov>
Subject: RE: FOIA Clarification Letter Follow-up

Sure can.

Christopher T. Creech
Attorney–Adviser
Office of General Counsel
U.S. Environmental Protection Agency
(202) 564-4286
Room 7353 E

From: Walker, Denise
Sent: Wednesday, August 8, 2018 1:42 PM
To: Creech, Christopher <Creech.Christopher@epa.gov>

Cc: Miller, Tia <Miller.Tia@epa.gov>
Subject: FW: FOIA Clarification Letter Follow-up

Chris- can you please follow up with Tia on this for me?

Thanks!

Denise A. Walker
U.S. Environmental Protection Agency
Acting Director, OGC National FOIA Office
Acting Assistant Director, OGC FOIA Expert Assistance Team
Washington, D.C. |7308A WJCN
Office: 202-564-6520
EPA Cell: 202-816-9872

Have a FOIA question? Try here first!

From: Miller, Tia
Sent: Wednesday, August 08, 2018 8:59 AM
To: Schwarz, Matthew <Schwarz.Matthew@epa.gov>; Walker, Denise <Walker.Denise@epa.gov>
Subject: FOIA Clarification Letter Follow-up

Good morning,

Thank you both for taking the time to talk with me last week to walk me through the process of clarifying this FOIA reques

Attorney-Client / Deliberative Process / Ex. 5

Thanks!

Tia Y. Miller
Attorney Advisor
U.S. Environmental Protection Agency
Office of General Counsel | General Law Office | Employment Law Practice Group
1200 Pennsylvania Avenue, NW
Mail Code 2377A
Washington, DC 20460
(202) 564-8942
(202) 564-5432 - Fax

Message

From: Creech, Christopher [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=87B8993F1A0E42FCB26D654DD8F2E377-CREECH, CHR]
Sent: 1/22/2018 10:49:56 PM
To: Nicole Rementer (rementer.nicole@epa.gov) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8584caffef2b4418b4e6430198c6355b-Rementer, N]
Subject: Initial Response Template
Attachments: Initial Response Template.docx

Hello Nicole,

Attached is the initial response template, isolated from the rest of the foia toolkit.

Cheers,

Christopher T. Creech
Law Clerk
Office of General Counsel
U.S. Environmental Protection Agency
(202) 564-4286
Room 7309 C
Creech.Christopher@EPA.gov

Initial Detailed Response Template

This template provides optional sections and language to fit the circumstances of any particular request. If the requester provides telephone contact information, it is always a ***best practice*** *to accompany the initial response letter with a telephone call to the requester. When using this template, read the sections below carefully and edit the bracketed portions consistent with the request at issue. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.*

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*, Initial Response

Dear Mr./Ms. *[Last name]*:

Thank you for your Freedom of Information Act request. This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on *[MONTH DAY, YEAR]*, in which you requested

> *[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].*

Opportunity to Discuss and Modify *(if needed)*

> *[Edit as appropriate]*

Your request is *[too broad to be completed within 20 days and/or does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them.]*

For example, we would like to discuss the types of records you are interested in, and the possible locations of these records. We would like to further understand the specific subject matter of the records so that we are able to craft a search and provide you with the records you seek. *[TO MAKE THIS STATEMENT DEFENSIBLE IT IS ESSENTIAL TO EXPLAIN WHY YOU CANNOT IDENTIFY AND LOCATE THE RECORDS].*

In addition, requests phrased as legal discovery, e.g., for all records "including but not limited to" and "pertaining to" a subject with no further limitation, do not provide adequate information to allow a professional employee to determine which records you wish EPA to provide.

EPA's FOIA regulations state:

> "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." 40 C.F.R. § 2.102(c).

We would like to provide you the opportunity to discuss the request with us and clarify the records that you are seeking so that EPA can process your request. As indicated in 40 C.F.R. § 2.102(c), please include or be prepared to discuss any specific information about the records you seek, including time period, authors, or a more detailed description of the records' subject matter.

Unusual Circumstances and Extension of Time *(if needed)*

[Edit as appropriate]

Pursuant to 40 C.F.R. § 2.104(d), an extension of time to respond to your request is necessary. Given the scope of the request, EPA anticipates that

[...the response will require significant amount of EPA's resources and time to search for, and appropriately examine the voluminous amount of records to complete this request and/or

...to search for and collect the requested records from multiple EPA offices that are separate from the office processing the request" and/or

...the need for consultation with another agency having a substantial interest in the determination of the request."]

EPA has initiated the coordination of and search for responsive records in our files. Because of the circumstances described above, it is difficult to predict with certainty how many records may be involved. [Optional: *Nonetheless, at this time, EPA estimates the Agency will be able to complete this request by [DATE, MONTH, YEAR]. We appreciate your patience.*]

[*Only if Relevant: Since the time of your request and as of today's date, EPA has received additional FOIA requests about [Topic] including several requests that were approved for expedited processing. These expedited requests will be processed before your request. However, many of the documents that are responsive to those requests will also be responsive to your request. These documents will be made publicly available on a rolling basis as they are produced.]*

Processing Fees *(if needed)*

[Edit as appropriate]

[Option 1: On [DATE], the EPA's National Freedom of Information Office granted the fee waiver request that accompanied the FOIA request. Therefore, you will not be assessed fees.

Option 2: On [DATE], the EPA's National Freedom of Information Office denied the fee waiver request that accompanied the FOIA request. Therefore, we must receive an assurance of payment before processing the request.

Option 3: You were placed in the "other" fee category, which means you will be charged for search, and duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A. Therefore, we must receive an assurance of payment before processing the request.

Option 4: You were placed in the commercial fee category, which means you will be charged for search, review, and duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A. Therefore, we must receive an assurance of payment before processing the request.

Option 5: You were placed in the "media/educational" fee category, which means you may be charged for duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A.]

Publicly Available Information *(if needed)*

The following are sources of publicly available information that you can access immediately:
[Edit as appropriate to your request. You may include fire links to other relevant FOIA responses, your Program specific website, and any of the links below]:

- Our website: https://www.epa.gov/home/advanced-search
- FOIAonline for records previously released through FOIA requests: https://foiaonline.regulations.gov/foia/action/public/search/
- Frequently requested records: https://www.epa.gov/foia/national-online-foia-library#request
- Environmental Topics Information repositories: https://www.epa.gov/environmental-topics/z-index
- Technical/scientific/educational publications: https://www.epa.gov/nscep
- Administrative and Environmental Appeals Board cases: https://www.epa.gov/foia/national-online-foia-library#opinions
- Staff Manuals and Guidance: https://www.epa.gov/foia/national-online-foia-library#admin
- Policy Statements: https://www.epa.gov/foia/national-online-foia-library#statement
- Superfund sites and data: https://www.epa.gov/foia/national-online-foia-library#superfund

Next Steps

[Edit as appropriate]

The processing clock is stopped for your FOIA request until we receive *[your assurance of payment [and/or] your clarification or modification.]*

Please respond within ten calendar days from the date of this letter to arrange a time to discuss your [*request and fees]*.

You may contact *[Program Contact]* at (*email address)* or at *(telephone number)* with your response or if you have any further questions. If we do not receive a response from you *[By X Date (at least 20 days from date of letter)]*, we will consider your request to be voluntarily withdrawn. [*Edit as appropriate: Once the request is clarified and we receive a written assurance of payment, we will continue processing your FOIA request*] and provide you with an estimated timeframe for completion. If you wish to request information connected to this request in the future, please reference the FOIA request number.

Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[NAME]
[TITLE]

Message

From: Mroz, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=64B0C7F807DF436A9B40CE52F7DEC34C-MROZ, JESSI]
Sent: 6/21/2018 1:56:20 PM
To: Zipf, Lynn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1a79a73cc2ce41738e505a406dc9cb71-LZipf]; Routt, Christiane [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a3f56e3b1e7942c9a9246ef14613deb3-Brown, Christiane]; Schumacher, Wendy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7ae5042e53e943728333b23ca294294f-Schumacher,]; Hopkins, Daniel [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ff90dda6717f4df4b8b78526a0b2a98f-DHopki02]; Farren, Victor [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b4e4ef4434e44bb488ab822e82780809-Farren, Vic]; Lubetsky, Jonathan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e125d09a658e48119789ccae5712b4a5-JLUBETSK]; Derieux, Christine [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ef0c8cd79b0469c8b39865e200c9b8b-Derieux, Ch]
CC: Price, Lisa [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0b4a7d6cc6094c868ffef7fcf3225245-Price, Lisa]; Eagles, Tom [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6e3f422f9a2e4c8a94efdd5871f6cba8-TEagles]; Purifoy, Tiffany [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5c93ed20faf54ae2aaa6dd46313220c2-Purifoy, Ti]; Meekins, Tanya [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b7f46e8a314b46d190b600593fcf4ad3-tmeekins]; Weinstock, Larry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=abf6ef85ed154d13aa590ea7c0addac2-Weinstock, Larry]; Clausen, Rebecca [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d15cb6a579ee467a9c36200052f82533-Clausen, Rebecca L.]; Hamilton, Sabrina [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=68d3167c798743848aafcdfb73bb74f1-shamiltn]
Subject: Relativity expert user training
Attachments: OAR FOIA Toolkit.docx

Here is the FOIA Toolkit we discussed at today's training.

Please let me know if you have any questions.

Best,
Jessie

Jessica C. Mroz
Presidential Management Fellow
Office of Air Policy and Program Support
U.S. Environmental Protection Agency
Telephone: (202) 564-1094

OAR FOIA TOOLKIT

Steps to Efficiently Address both Simple and Complex Requests

Abstract

This document contains best step-by-step instructions, best practices, and guidelines to assist staff in complying with the Freedom of Information Act and EPA Policy without straining office resources. It draws almost in entirety from the Life Cycle of a FOIA – The Key Steps to Processing Any FOIA Request, which can be accessed at intranet.epa.gov/FOIA.

This document contains hyperlinks that allow you to navigate to the part of the document you're looking for. Click Ctrl and then click on one of the sections below be directed to its location.

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FOIAonline

FOIA requesters can submit their written FOIA requests to EPA electronically via FOIAonline. FOIA requesters can also submit written requests to EPA's Headquarters or Regional FOIA Officers, in which case the National FOIA Program Office, or Regional Office, if applicable, will input the request into FOIAonline. All requests are processed through FOIAonline.

Once a request is submitted to FOIAonline, the requester receives notification immediately via the FOIAonline website confirming submission of a request. In this request confirmation, the requester is provided with a tracking number, the date submitted, and a brief description of the request as provided by the requester in the submission. An example of the response a FOIA requester receives upon submission of a request via FOIAonline is below:

FOIAonline then automatically generates an acknowledgement e-mail to the requester like the one below:

Reply Reply All Forward IM

Wed 8/16/2017 2:13 PM

foia_hq@epa.gov

FOIA Request EPA-HQ-2017-010565 Submitted

To Walker, Denise

Retention Policy Inbox (Never) Expires Never

This message is to confirm your request submission to the FOIAonline application: View Request. Request information is as follows:

- Tracking Number: EPA-HQ-2017-010565
- Requester Name: Denise A. Walker
- Date Submitted: 08/16/2017
- Request Status: Submitted
- Description: This is a TEST of EPA's FOIA online system. I am trying to find out what kind of acknowledgement is sent to requesters. This is not an actual FOIA.

The submission confirmation and the acknowledgment email are the first communication the requester receives from the Agency. The acknowledgment email also appears as the first correspondence entry as a system-generated email, which appears under the correspondence tab in FOIAonline.

Be sure to turn on the notification feature under the "My Account" tab in FOIAonline, as the system will then generate e-mails to your Outlook account notifying you to check FOIAonline for requests or tasks that have been assigned to you. Be sure also to check regularly the "My Cases" tab in FOIAonline, as you will find all pending requests and tasks listed here.

Initial Communication from Action Office

When you or your office is assigned as the lead (also known as the Action Office) on a FOIA request, you should immediately review the request and ensure that assignment to your office is appropriate. If you believe that your office should not be the Action Office for a particular FOIA request, immediately notify the FOIA Coordinator or FOIA Officer in the office that you believe should be the appropriate Action Office. If there is agreement, the FOIA request should immediately be reassigned via FOIAonline to the correct office. If you are unsure of the appropriate Action Office, you should immediately work with your office's FOIA Coordinator or FOIA Officer to resolve the issue in conjunction with the National FOIA Program Office. Be sure to communicate with the FOIA Coordinator or FOIA Officer in the other office before re-assigning the matter in FOIAonline.

After ensuring that the request is properly assigned to your office as the Action Office, as a best practice you should reach out to the requester by sending a short note through FOIAonline, letting the requester know your contact information, that you are reviewing the request and that you will be back in touch

promptly once you have had a chance to review the request fully. This can be accomplished by clicking the "Create Correspondence" in FOIAonline. The note might look like this:

Subject: [FOIA ID # XXX-XXXX]

Dear [FOIA Requester]:

My office has received your FOIA request. I will contact you again after we have had an opportunity to review the request fully. I will be your point of contact.

Please feel free to contact me directly with any questions or concerns. Additionally, at any point in time, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail at: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; by email at: ogis@nara.gov; by telephone at: (202) 741- 5770 or (877) 684-6448; or fax, (202) 741-5769

Sincerely, [Your Name]

[Your Phone Number]

Regular communication with the requester is fundamental to good FOIA processing. Start early!

OGIS, which is referenced in the sample noted above, is a FOIA resource for the public and the government. It can be found here. The FOIA Improvement Act of 2016 (hereinafter referred to as "the 2016 Amendments to FOIA") requires agencies to notify requesters of their right to pursue alternative dispute resolution through OGIS at certain points in the FOIA process, as explained below.

How much time do I have to respond to a FOIA request?

Statutory and Regulatory Time Limits

Under FOIA, you have 20 working days to process a request. 5 U.S.C. § 552(a)(6)(A)(i) (2006 & Supp. IV 2010). FOIAonline has a clock in the upper right hand corner that will help you keep track of how many days have passed since the National FOIA Program Office perfected the request. If you believe you can complete the request in 20 working days, let the requester know. If the request is not clear, you should seek clarification of the request.

Tolling Time Limits

You can stop the clock one time while you are waiting for clarification from a requester. 5 U.S.C. § 552(a)(6)(A)(ii). To do this, select "Stop the Clock" in FOIAonline and select the appropriate reason. Although you can only stop the clock once to clarify a request, you can stop the clock as many times as you need for fee-related reasons, including when the requester is required to provide an assurance of payment and has failed to do so. Fees are addressed more fully here.

Once the request is clarified or the fee issue is resolved, be sure to go back into FOIAonline and select "Start the Clock."

How do I get more time to respond to a FOIA request?

Unusual Circumstances and the 10-day extension, as provided in 5 U.S.C. § 552(a)(6)(B)(i). If you think you will need additional time beyond the 20 working days, you can provide the requester with a notice that you are invoking a 10-day extension for "unusual circumstances" per 5 U.S.C. § 552. This will give you a total of 30 days to respond to the request. This notice must: (1) be in writing; (2) include information on how to contact OGIS (as required by the 2016 Amendments to FOIA); (3) provide the requester with an opportunity to narrow the request (5 U.S.C. § 552(a)(6)(B)(ii)); and (4) be for one of the following reasons:

- the request requires EPA to collect responsive records from a field office or other entity separate from the office processing the request;
- the request involves a "voluminous" amount of records that must be located, compiled, and reviewed; or
- the request requires EPA to consult with another federal agency or other EPA components that have a substantial interest in the responsive information. 5 U.S.C. § 552(a)(6)(B)(iii).

As such, these circumstances are not all that unusual.

Extension of Time Beyond 30 days. If there are unusual circumstances and the request cannot be processed in 30 working days, you must provide the requester an opportunity to modify the request so that it can be processed within 30 working days or arrange for an alternative timeframe for completion of processing. 5 U.S.C. § 552(a)(6)(B)(ii). This notice must: (1) be in writing; (2) include information on how to contact OGIS (as required by the 2016 Amendments

to FOIA); (3) provide the requester with an opportunity to narrow the request; and (4) be for one of the unusual circumstances set forth in section 3.a. above. Requests that require the assistance of the Office of Environmental Information's (OEI) Discovery Services Division will likely exceed the 30-day limit. Please see Step 3 for additional information on how to submit search requests to the Discovery Services Division.

Consequences of not responding to a FOIA within time limits

While it's very common to take longer than 20 working days to complete a response, it is important to pay attention to statutory deadlines. Failing to respond to a FOIA within the statutory timeframe enables requesters to go directly to district court for relief, per 5 U.S.C.§ 552(a)(6)(C)(i). Failing to respond within statutory timeframes can also preclude the Agency from being able to charge fees, per 5 U.S.C. § 552(a)(4)(A)(viii).

Best Practice: Be sure to think about whether you will need additional time beyond the statutory 20 working days when you receive the request. Do not wait! Most complex FOIA requests cannot be processed in 30 working days (i.e., 20 working days plus 10 days for unusual circumstances), so take appropriate steps to notify the requester and arrange for additional time as soon as possible.

EVALUATE THE FOIA REQUEST AND DETERMINE FEES TO BE CHARGED, IF ANY

What is a proper FOIA request?

Before commencing a search for records pursuant to the FOIA, evaluate the FOIA request and confirm that it is proper. A proper FOIA request is one that sufficiently describes the records sought, i.e. it enables an Agency employee familiar with the subject area to locate the records with a reasonable amount of effort.

The FOIA was not intended to make government agencies full-time investigators on behalf of requesters or to allow requesters to conduct fishing expeditions through Agency files. The FOIA is about access to Agency records, but does not require the Agency to answer questions or create records to respond to a request. However, the breadth of the FOIA request or its burden on the Agency alone does not make a request improper – requests can be very large, yet still be proper. Instead, the key inquiry is whether the request sufficiently describes the records sought such that you have enough information to begin a search.

Applicable Legal Requirements

EPA's regulations at 40 C.F.R. § 2.102(c) state that the "request should reasonably describe the records you are seeking in such a way that will permit EPA employees to identify and locate them." Further, the regulations state "when possible, your request should include specific information about each record sought." Finally, the regulations state that this specific information should include (whenever possible):

- Date
- Title or name
- Author
- Recipient
- Subject

Requests do not need to have ALL of these elements to be proper requests; however, requests that contain none of these pieces of information (or only one) likely require clarification.

FOIA does not require EPA to do the following:

i. FOIA does not require EPA to create new records by compiling data or manipulating existing records, nor does it require the Agency to re-create records that were properly disposed of. Examples of this type of improper request include:
    a. "Make me a list of all Agency actions that …"
    b. "I want to know what the Agency is doing about …"
    c. "Provide me with information about who is working on …"

ii. EPA does not have to produce records over which it retains no control. An example of this type of improper request includes:
    a. "Provide me emails and communications between staff at XX Contractor" (if Agency employees are not included).

iii. EPA does not have to answer questions, interrogatories, or perform research to answer requests. Examples of this type of improper request include:
    a. "What files does EPA have on . . . ."
    b. "What did the EPA consider or rely on to ..."
    c. "How does EPA justify..."
    d. "Produce any documents that prove or disprove (statement or argument)."

iv. EPA does not have to produce purely personal records. Recall that the FOIA only requires the release of "agency records," *i.e.*, records that are created or obtained by an agency and under the agency's control at the time of the request. More information about what constitutes and "agency record" vs. a "personal record" is available here. An example of this type of improper request includes:
    a. "Please provide me EPA employee John Smith's recent home appraisal."

v. EPA does not have to explain or justify Agency decisions. Examples of this type of improper request:
    a. "Provide the basis for the Agency's decision to ..."
    b. "Provide any records supporting the statement that ..."

vi. EPA does not have to "hold" a request open for FOIA requests that seek records that EPA may create at some point in the future (i.e. records that do not exist at the time the request is received). Example of this type of improper request:
    a. "Provide the final XYZ Report when it is finished next month."

Tip: If, when reading the request, you think "I don't even know how we would begin to search for this", you probably have an improper request. Don't try to guess what the requester is searching for—contact them to clarify. Skip to the section on Communicating with Requesters for more best practices.

Requests that Only Seek Information Already Publicly Available on EPA Websites

These types of requests can be closed once you respond to the requester and direct the requester to the specific location where EPA has made the information publicly available. Locations may include the following:

- EPA's website
- EnviroFacts
- ECHO
- MyProperty
- FOIAonline
- ChemView

Perfecting Requests

Under current EPA procedures, the National FOIA Program Office documents the date on which the request is received as both the "submitted" date and "perfected" date in FOIAonline.

Because the request will be assigned to the Action Office as "perfected", it is that office's responsibility to determine if the request is proper and, if necessary, to seek clarification. Again, you can only stop the clock once to clarify the request during the first 20 working days.

If you determine a request is not proper, below are the steps to take:

1. Prepare the Improper Request/ Seeking Clarification Letter (you can access a template here).

2. Send the letter through FOIAonline or regular mail to the requester, as appropriate. If the letter is sent through regular mail, ensure that a copy is included in FOIAonline under the "correspondence" tab, so all communications can be kept as part of the FOIAonline case file.

3. In the FOIAonline case file, click the "Stop the Clock" button on the Left Navigation.

4. Select "Clarification" in the Reason drop down menu.

5. Explain the reason for stopping the clock in the Notes field. Also, to avoid confusion later, be sure to type in the Notes field the date by which you expect a response from the requester.

6. Click the "Stop the Clock" button on the left side of the page in FOIAonline.

7. Wait for the requester to respond or the due date to pass. When the requester responds and clarifies the request, click the "Start the Clock" button on the left side of the page in FOIAonline.

8. Once you are on the "Start the Clock" screen, press the "Start the Clock" button on the bottom of the page.

9. If the requester does not respond by the due date or fails to provide a clarification that sufficiently describes the records sought, begin the close-out process using the Closure for Failure to Modify Template, accessible here.

10. If the requester responded or you were able to clarify over the phone, confirm the modification or clarification in writing. (For template, see Confirmation of Clarification Template Appendix, Step 2).

11. Once confirmed, go to the "Submission Details" tab in FOIAonline and click the box saying "Has Description Been Modified?"

12. Type the modified description in the box.

13. Click "Save Changes" button at the bottom of the page.

14. Process the request according to the modified description.

If you determine that the FOIA request could be deemed "improper" per EPA's regulations, you **must** contact the requester and ask them to clarify or modify the request. Note that under the FOIA, you have one opportunity to "stop the clock" to clarify.

Evaluate the FOIA Request with Your Review Team and Clarify as Needed

This document will clarify who is on your office's review team for processing a request.

Building your Review Team

For simple FOIA requests:

Your team consists of:

- Your office's FOIA Coordinator or FOIA Officer
- Subject-matter experts (SMEs) of the requested records
- Custodians of the request, or office staff that may have created or handled responsive records
- Anyone else willing to help
  Note: you should coordinate with your SMEs early and often, even on simple requests. They will be able to identify whether, where, and what records exist that need to be reviewed.

For more complex requests:

Your team will consist of:

- The Action Office (who is receiving the request)
- Any contributing offices (including federal agencies other than the EPA, if necessary)
- Subject-matter experts (SMEs) of the requested records
- FOIA Coordinator(s)/Officer(s)
- FOIA Analyst(s), if needed

If your request requires you to work with other offices, coordinate with them every step of the way. Act as a group and regularly check in with each other to avoid redundant actions or unnecessary confusion. The Action Office is responsible for clarifying the FOIA request in such a way that all affected offices agree, so it's imperative to stay in communication with all parties involved.

The most important question you should keep asking as you identify the relevant Contributing Office(s): *Are there any other program office(s) or custodian(s) that are likely to have responsive records?*

With your team, discuss the request and ensure it meets all the requirements of a proper request:

- Does it sufficiently describe the records sought such that your subject matter expert(s) know where to search for records?
- Is the following provided: date range, program office(s), custodian(s), and search terms?
- Can you, as the Action Office, articulate a search plan of action for the records sought?

If the answer to any of these questions is "No", or "I'm not sure", ***reach out to the requester for clarification of the request.*** *Refer to the section on Communicating with Requesters for communication best practices.*

Other questions to consider with your team include:

- Has this information been requested through FOIA previously?
- What, if anything, could be a hurdle to efficient processing of this request?
    - Does it concern any sensitive issue(s)? (*e.g.,* litigation, ongoing rulemaking)
    - Potential resource concerns? (Is your team in the middle of another large project? Is the request unreasonable as is, given the timeframe, cost, etc.?)

From these discussions, your team should have:

- A common understanding of the request
- A plan of action if the team determines the request is improper or requires clarification
- A sense of any obstacles/hurdles going forward that may need to be addressed as a team
- An idea of what needs to be discussed with the requester

COMMUNICATING WITH REQUESTERS

If at any point in processing the request, the team is unsure or feels a sense of hesitation about how to resolve a question about the scope of the request, it is best to reach out to the requester for clarification and discussion. Such an approach will go far in establishing a positive relationship with the requester and is good customer service. Below are some tips for efficient and productive communication with requesters.

Prepare.

Upfront preparation is imperative to ensure efficient and positive communications with requesters.

- If you need clarification about the **type(s)** of records sought, gather information about the types of records the custodians create, the record systems, how the records are organized, and how the records are maintained.
- If you seek clarification on the **topic(s)** of records sought, gather information about the issue(s) on which the relevant office(s) is focused. Consider any relevant/timely issue(s) affecting the office(s), recent or upcoming projects, and similar issues.
    - *Sometimes requesters deliberately submit a very broad request without much direction about a topic because, while they have an idea, they're not quite sure of how to articulate exactly the information they seek. Having current topics on hand when contacting the requester can be useful, so you can ask questions like, "You mention X in your request, but X is a very broad topic. Our office is working on a rulemaking related to issues like X, are you interested in documents about the rulemaking?", etc.*
- If you seek clarification regarding **custodian(s)**, consider who are the individuals in your program office who are most likely to have relevant records. While the entire program office might have response emails, for example, helping the requester to nail down the custodian list to the primary individuals with relevant responsive documents increases the likelihood that the requester will receive the relevant information they seek.

Call.

Most requesters are glad to hear from the Agency about their FOIA requests, even if the discussion might require giving the requester "bad news", such as the length of time needed to process the request. **Calling the requester on the phone** is often a better technique than emailing them, since it is a more personal and, often, a more time-efficient way to clarify uncertainties and expectations.

- Communication with the requester is very important because the Agency can help manage the requester's expectations. Most requesters are not familiar with EPA records, organizational structure, or technical capabilities. Educating requesters about EPA is often productive for the requester and helps inform the public about the Agency.
- This technique can also be a way to reduce the burden of the request on the Agency. Open, verbal communication with the requester about the nature of the request can often reveal more specifically what they're looking for.
    - *Practice Tip: If managing multiple requests on a similar topic, and another requester submits a narrower request or you have worked with another requester to clarify/narrow a request, consider proffering those ideas to other requesters. The more*

similar you can make related requests, the more straightforward your management of the FOIA projects will be.

Engage.

Engage in an open, friendly discussion with the requester. An adversarial approach will not help anyone. Requesters are more likely to participate in some give and take if they trust that the Agency staff want to assist them in fulfilling their FOIA requests.

Document.

If communications occur via email, upload all email communications to FOIAonline. If via telephone, be sure to memorialize your discussion in an email to the requester, and upload the email to FOIAonline. You may also communicate with the requester directly through the correspondence tab in FOIAonline. If for some reason you are unable to document your communications via email with the requester, at the very least, create a comment in FOIAonline recording the details of your communication.

What if the requester does not want to clarify?

- The Office of Government Information Services (OGIS) provides mediation services to resolve disputes between FOIA requesters and Federal agencies. FOIA requesters and agencies may request OGIS's assistance in resolving a dispute at any point in the FOIA process. OGIS works with the parties to attempt to reach a mutually agreeable resolution.
- Remember, under the 2016 Amendments to FOIA, the Agency must notify requesters of their right to pursue alternative dispute resolution through OGIS at three points in the FOIA process in response to:
    - Initial determination letters;
    - Appeal response letters; and
    - Letters regarding requests in which unusual circumstances allow for 10 additional working days to respond.
- Below is the language regarding OGIS to include in letters to the requester:
    - *You may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.*

Remember: We still have an obligation to respond to parts of the request that are unambiguous! One imperfect part of a FOIA request does not permit the Agency to fail to respond to the entire request!

FOIA FEES

The FOIA allows agencies to charge certain fees to requesters to process their FOIA requests. Requesters are placed into one of three fee categories, which determine the types of fees an agency may charge. In some circumstances, the FOIA allows for a waiver or reduction of fees. Below includes an overview as well as certain restrictions that apply to an agency's ability to charge fees.

Types of Fees

- *Search fees* may be charged for the time spent looking for responsive documents, even if the Agency does not locate any responsive documents or if the documents are withheld under a FOIA exemption. Examples of actions that are chargeable as "search fees" include time spent for meetings to discuss search strings/how to conduct searches, time spent searching one's computer and hard copy files, and time spent looking at the records to see if they are responsive.
- *Review fees* may be charged for "direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed." This includes reviewing documents to determine which, if any, exemptions apply. Review fees may *not* be charged for subsequent levels of review.
- *Duplication fees* include the direct costs of making copies of the documents. They also include, if documents are scanned, the staff time spent scanning the documents. For paper copies, EPA currently charges 15 cents per page. For electronic copies, you may charge for a physical medium, such as a CD, but *not* for uploading documents into FOIAonline.
- Some FOIA requesters may also ask that the records be "certified." This is a service for which the OMB Fee Guidelines allows agencies to charge fees. EPA charges $25 to certify records. For certification requests, contact the Program Assistant in the General Law Office in the Office of General Counsel.

Categories of Requesters

Which types of fees an agency may charge for processing a FOIA request further depends on the category into which the requester falls. The FOIA provides three fee categories:

Category 1: Commercial Use Requesters

According to the OMB Fee Guidelines, "commercial use" requesters are those who ask for records for "a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made." The focus is how the requested information will be used, not the identity of the requester. Accordingly, the fact that a requester has been placed in a "commercial use" category in the past does not mean that the requester will be similarly placed in the future. When the intended use of the records is not clear from the wording of the request, an agency can seek additional information from the requester to make a fee category determination. Common uses of the requested records that result in a "commercial use" fee categorization include using the documents in litigation. ***Commercial use requesters are charged all three types of fees (search, review***

and duplication).

Category 2: Educational institutions, noncommercial scientific institutions, and representatives of the news media

Educational Institutions include schools such as universities and vocational institutions. The requirement is that the institution must operate a program of scholarly research. The OMB Fee Guidelines specify that to qualify for this fee category, the purpose of the request must relate to the goal of the educational institution, not the goal of the individual requester. For example, a requester asking for documents to write a term paper would not qualify for the "educational institution" fee category. However, a professor requesting records related to her field of study for use in instructing students might qualify.

Noncommercial scientific institutions are defined by the OMB Fee Guidelines as simply a noncommercial institution that is "operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry."

The FOIA defines a "representative of the news media" as "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." The FOIA also explains that this category includes news agencies as well as freelance journalists if they "can demonstrate a solid basis for expecting publication through [a news media] entity, whether or not the journalist is actually employed by the entity."

Requesters in the Category 2 fee category are only charged duplication fees, but receive the first 100 pages of paper copies for free.

Category 3: Other Requesters

The "other" category is simply a catchall category for any requester that does not fall into either of the other two categories. Requesters in this fee category are charged search fees and duplication fees; however, they receive the first two hours of search time and the first 100 pages of paper copies for free.

The table below summarizes which fees an agency can charge for the processing of a FOIA request based on the fee category of the requester.

Fee Waivers and Determination

The National FOIA Program Office processes initial fee waiver requests. The FOIA provides that agencies should waive or reduce fees "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."

Any FOIA requester may request that EPA waive all fees associated with the request, but the request for a waiver of fees must be submitted with the accompanying FOIA request. The initial fee waiver determination is made by the National FOIA Program Office and may be directly appealed by the requester to the Office of General Counsel by filing an administrative appeal.

Fee waiver determinations are made on a case-by-case basis using the information accompanying the FOIA request and are made based on six factors outlined by the Department of Justice in its January 1, 1987 Fee Waiver Policy Guidance. Those factors take into account the following considerations:

- *The subject of the request*: Whether the subject of the requested records concerns "the operations or activities of the government."
- *The informative value of the information to be disclosed:* Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records are meaningfully informative about government operations or activities and are "likely to contribute" to an increased public understanding of those operations or activities.
- *The contribution to an understanding of the subject by the public is likely to result from disclosure:* Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.
- *The significance of the contribution to public understanding:* Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.
- *The existence and magnitude of a commercial interest:* Whether the requester has a commercial interest that would be furthered by the requested disclosure.
- *The primary interest in disclosure:* Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

Advanced Payments and Assurances of Payment

EPA can ask for an advance payment of fees from the requester in two circumstances:

1. When the fees will exceed $250.
2. When the requester has previously failed to pay fees in a timely fashion.

If you are working with a requester who has a history of prompt payment, you may simply ask for an assurance of payment, discussed below. If you are working with a requester with no history of payment, you may either ask for an assurance of payment or an advance payment. For requesters who have failed to pay in a timely fashion in the past, you should ask for an advance payment.

Per EPA regulations, you must provide written notice to requesters of anticipated fees more than $25 if the requester did not agree to pay a higher amount in the initial FOIA request or subsequently. EPA then requires a written assurance of payment from the FOIA requester, unless an advance payment was received.

A requester can also designate a fee limit with a FOIA request. The main request page in FOIAonline indicates whether a fee limit has been set by the requester. An assurance of payment is required if the estimated costs of processing the request exceed the fee limit.

Changes to fees after the 2016 Amendments to FOIA

The 2016 Amendments to FOIA added a new limitation to the ability of agencies to charge search fees. Generally, agencies can no longer charge search fees if the response is beyond the 20-day deadline (or 30-day in the case of "unusual circumstances"), even with an agreement from the requester.

The exception to this rule is that agencies may charge search fees (or duplication fees for "news media" or "educational" requesters) if:

- "Unusual circumstances" apply; AND
- "More than 5,000* pages are necessary to respond to the request;" IF:
    - Timely written notice has been made to the requester; and
    - "The agency has discussed with the requester how the requester could effectively limit the scope of the request." The agency must make at least three good-faith attempts to discuss limiting the scope of the request with the requester and the communication must be by written mail, electronic mail, or telephone.

*Note: "5,000 pages" refers to the number of pages in the total universe of documents required for review, (i.e., "collected" documents), not the number of pages that will ultimately be released to the requester.

TIP: If you expect the final FOIA response to occur beyond the 10-day extension and more than 5,000 pages are necessary to respond, notify the requester before the 10 days expires and discuss how they can limit the scope of the request.

- If you know that unusual circumstances will apply when you receive the request, invoke the additional 10 days in your acknowledgement letter and invite the requester to narrow.
    - This will satisfy the "timely notice" requirement and will qualify as your first attempt to discuss with the requester how to limit the scope of the request.
- If a fee assurance letter is sent later, include another opportunity for the requester to discuss how to limit the scope.
    - This will qualify as your second attempt to discuss with the requester how to limit the scope of the request if the first request went unanswered. If the requester has not responded to either attempt, you will only need to make one additional attempt to contact them before satisfying the requirement that the Agency make three good-faith attempts.
    - If in response to any attempt to discuss how to limit the scope of the request, the requester refuses to limit the scope, it is not necessary to make any additional attempts.

For fee tips pertaining to more complex FOIAs, skip to the section on Complex FOIA Fees.

Fee Tips for Complex FOIAs

As with processing any FOIA request, when processing complex requests, you should be aware of the requester's fee category (or whether the requester has been granted a waiver) when evaluating the request. When you receive the request, consider whether the fee limit is reasonable considering what's requested. If the fee limit is not reasonable, consider preparing a fee estimate and reaching out to the requester to discuss the issue.

If you have unusual circumstances and followed the steps to extend the due date an additional 10 working days, but you are not confident you can process the request within 30 working days, give notice to the requester *before* the 30th working day of the unusual circumstances! Otherwise, you forfeit the ability to charge certain fees to the requester.

Consequences for failing to assert unusual circumstances:

- If a commercial requester, Agency cannot charge search fees.
- If a media/educational or noncommercial scientific institution, Agency cannot charge for duplication fees.
- If other requester, Agency, cannot charge search fees.

For more information, see the National FOIA Program Office's FOIA Fees Decision Tree here.

PLAN AND CONDUCT A SEARCH FOR RESPONSIVE RECORDS

This document will identify the roles and responsibilities of each office in processing a FOIA request. The ***Action Office****, which is the office that has been assigned the FOIA request, is responsible for taking the lead in developing and implementing the search plan. The Action Office needs to identify the other offices, if any, where responsive records may reasonably be located. If the Action Office determines that other offices may have potentially responsive documents, the Action Office needs to work with those Offices (called* ***Contributing Offices****), as discussed below, to develop and implement a search plan.*

Throughout this section, we will refer to the Action Office and Contributing Office(s) and discuss each office's role in the search process. To ensure efficient processing and avoid duplication, the Action Office should take the lead in developing a search plan and disseminating clear, consistent direction to Contributing Offices. Avoid situations that would allow Contributing Offices to have different interpretations of a FOIA request and thus use different search strategies or terms in processing the request. An effective search requires planning and, most importantly, coordination.

Legal Requirements for a Search under the FOIA

The FOIA requires federal agencies to make available to a requester any agency record that is responsive to a proper request. See 5 U.S.C.§ 552(a)(3)(A). To locate responsive records, agencies must conduct a reasonable search for records, i.e. a search that is reasonably calculated to uncover all relevant documents. A "reasonably calculated" search does not require a "perfect search," and failure to produce "one specific document" does not deem a search inadequate. See e.g., Defenders of Wildlife v. Dep't of Agric., 311 F. Supp. 2d 44, 54 (D.D.C. 2004); Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003).
Rather, the adequacy of the search is examined based on the reasonableness of the search given the totality of the circumstances. Weisberg v. U.S. Dep't. of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The Action Office needs to ensure that the Agency makes a good faith effort to conduct a search through methods that can be reasonably expected to produce the information requested. See Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 67-68 (D.C. Cir. 1990).

1. Develop a Search Plan.

   Before developing a search plan, you should have already confirmed that the FOIA request is a Proper Request and, if it is not, sought clarification from the requester. If not, return to the section on Communication With Requesters.

   a. Review the request again and consider what the request seeks.
   b. Regardless of whether your FOIA involves a request for records in a single office or multiple, you need to:
      i. Identify where to search.
         1. What offices might have documents?
         2. Are the records requested located solely in one office?
            a. If not, the Action Office should identify the offices (both HQ and Regional offices) where responsive records may reasonably be located. If responsive documents are located in more than one office, the Action Office needs to identify those offices

(Contributing Offices) and ensure that those offices understand the scope of the FOIA request.

3. Where are the documents?
    a. Once the Action Office has identified whether records are located in one or multiple offices, it next evaluates where to search for records within each office, e.g. repositories for paper files, emails electronic documents. In doing this, again refer back to the FOIA request. If it asks for documents in only one repository (e.g., Outlook emails) the search can be tailored accordingly. If the request is not limited to a repository but rather seeks topics on a topic in a timeframe, be sure to evaluate the locations where responsive records may be located.

    Potential locations include, for example:
        - Outlook email, calendars
        - Skype/Lync Chats
        - Lotus Notes mailboxes or calendars, other Lotus Notes databases
        - Enterprise Content Management System (CMS)
        - Local or shared computer drives (e.g., C:, F:, G:)
        - SharePoint sites
        - OneDrive
        - Mobile devices (e.g., text messages and photographs)
        - External drives and discs
        - Hard-copy files
        - And other locations reasonably likely to contain responsive records.

ii. Determine who should search.
    1. Once the Action Office identifies *which offices* potentially have responsive documents and where to search for those documents, the Action Office next needs to identify *who* would have potentially responsive documents. In identifying this list of individuals (referred to as custodians or individuals likely to have responsive records), include any custodians who are specifically named in a FOIA request or whose positions at the Agency suggest they are reasonably likely to possess responsive records. Also consult with subject-matter experts (SMEs) to determine which other custodians may have potentially responsive documents.
    2. Once the Action Office has coordinated with the Contributing Offices and has received the lists of potential custodians from Contributing Offices, the Action Office should compile the complete list of custodians and document that list in the search plan.

a. Before moving on to the next step in developing the search plan, take a moment and document in FOIAonline: (1) which offices beyond the Action Office may contain potentially responsive documents, (2) where to search for those documents, and (3) the list of custodians (including custodians from the Action Office and all Contributing Offices).

i. **Remember to consider former employees, employees who transferred to a different office, and contractors and assess whether any of these individuals would be potential custodians based on the information requested.**

iii. Determine how the search should be conducted.
Once you identify the locations of potentially responsive documents and their custodians, consider how you will conduct your search. See the section on Centralized Searching In EPA's Microsoft Office 365 System or How To Search For Items Not Located On EPA's Microsoft Office 365 System.

c. These three items represent the core elements of your search plan.

d. Consider the content of the request and where responsive documents would be located. If the request seeks only Outlook emails, then your search should be focused accordingly on Outlook emails. However, FOIA requests tend to be broad and seek, for example, documents regarding a particular topic during a particular timeframe.

TIPS ON DOCUMENTING SEARCH AND COMPLETING IMPLEMENTATION OF SEARCH

It is important to document the search that was conducted. It's recommended that the lead for the Action Office develop a memorandum or checklist to track the search. Specifically, the lead for the Action Office should note:

- The Contributing Offices searched
- The locations within those offices and the Action Office searched
- The list of custodians and whether the custodians have completed their search
- The number of responsive records

PERIODIC UPDATES TO THE REQUESTER

As a best practice, you should periodically contact the requester to provide updates on the status on the Agency's processing of the request, particularly if it will take longer than 20 working days to issue a final response. Communication with the requester is important so that they understand that the Agency is actively working to complete its response to the request. Consider providing interim or partial releases to demonstrate to requesters that you are actively processing the request. Such releases also give the requester insight into the types of records responsive to the request and may even result in the narrowing of the request.

Best Practice: Document your search plan and update it as you implement the search. This will enable you to track the process and build a strong administrative record, which is important if the requester appeals and/or later sues EPA challenging the adequacy of the Agency's search.

Centralized Searching in EPA's Microsoft Office 365 System

Searches for information in EPA's Microsoft Office 365 System are generally conducted by OEI's centralized search service. This service can locate records located in:

- Outlook email messages
- Outlook calendar entries
- Skype/Lync Chats.

Before contacting OEI, the Action Office should evaluate the request carefully and determine whether a centralized search is warranted. For example, if a FOIA request seeks a specific document, the document can be retrieved and produced without a centralized search. By contrast, if the request seeks all communications between two EPA individuals for a one-year period, the Action Office should pursue a centralized search request.

The Action Office is responsible for submitting the centralized search request to its Search Point of Contact (SPOC), who, in turn, will submit the request to OEI's Discovery Service Division for processing. Each organization has a SPOC, and that SPOC works directly with OEI's Discovery Services Division in processing search requests. Contributing Offices should not submit any search requests to OEI.

For each FOIA request, only one search request should be submitted to OEI, and it should be submitted by the Action Office.

If this does not occur, OEI is left in the untenable position of trying to consolidate search requests on a single FOIA. The Action Office should consult with the Discovery Services Division about the estimated timeframes for beginning and completing a requested search/collection, so other steps in the process can be planned accordingly.

Instructions for submitting a centralized search request through your SPOC are located here.

Before the Action Office Initiates the Centralized Search, ensure that information provided to the SPOC that will provide it to OEI's Discovery Services division includes:

- All custodians (by name and email address) from both the Action Office and all Contributing Offices
- Search terms reasonably likely to yield responsive records.

It's important for the Action Office to coordinate with the Contributing Office(s) to ensure that the search terms capture the scope of the records sought.

Searching for Documents in Repositories that are Not Captured by a Centralized Search

OEI runs the centralized search for Outlook records for EPA, including Outlook emails, calendar entries, and Skype for Business chat messages. For routine FOIA requests, the Discovery Services Division **will not** search:

- Lotus Notes mailboxes, calendars, or databases of any kind
- The Enterprise Content Management System (ECMS)
- The Correspondence Management System (CMS)
- Local or shared computer drives
- SharePoint sites
- OneDrive
- External drives
- Hard-copy files
- Any other non-Outlook locations where you may find responsive records.

It's important for custodians to evaluate all repositories that are reasonably likely to contain responsive records. This could include a personal email account if that account was used to conduct government business and if the email has not yet been forwarded into the Agency's system. Consistent with the Federal Records Act Amendments of 2014 and the Agency's Records Policy, any employee who uses a personal messaging system, such as email, to conduct government business has 20 days to forward that information into the Agency's Outlook system. Once forwarded into EPA's email system, the information can be captured via the centralized search.

OEI's centralized search also does not extend to data that are uniquely retained on mobile devices, such as text messages, photos, or notes that are unique to the mobile device. Custodians should be reminded of the Agency's guidance regarding forwarding text messages into the Agency's Outlook system, as such messages can be captured via the centralized search once the messages are in Outlook.

Instructions on how to forward text messages to EPA email accounts are located here.

Consistent with its search plan, the Action Office should email to all custodians providing specific search instructions to be followed regarding all non-Outlook document repositories. The instructions should read something like: "The agency has received a FOIA request for which you may have responsive documents. A centralized search for your Outlook emails is already being conducted. You should conduct a manual search for non-Outlook documents potentially responsive to the FOIA request.", etc. The instructions should also include:

- The FOIA request number;
- A clear description of the FOIA request (and any narrowing/clarification);
- A copy of the FOIA request and any relevant correspondence with the requester;
- Recommended search locations and instructions to search all non-Outlook repositories where responsive documents may be held;
- Recommended search terms;
- Recommended document collection method (i.e., where responsive documents should be provided); and

- Date by which documents collected are to be transferred to the Action Office.

To provide custodians ample time to search for non-Outlook documents, it is recommended that the Action Office provide custodians the search instructions for non-Outlook documents at or shortly after the Action Office submits the Outlook centralized search request. In the search instructions, ask custodians to document, with as much specificity as possible, how they conducted their search.

After distributing the search instructions, and before the collection period ends, the lead contact for the Action Office should touch base with the custodians to ensure that they understand their responsibilities and how to conduct the search.

Below are tips the Action Office may want to consider as it develops search instructions to custodians to search for non-Outlook responsive records.

Lotus Notes

If a FOIA request seeks emails or information located in Lotus Notes, the Action Office should:

- Contact EZ Tech to set up a collection database. EZ Tech will send the lead contact for the Action Office a link to the database that the lead can then circulate to custodians via email. Custodians will then use this database to upload responsive documents.
- As noted above, identify in the search instructions, keywords and search terms for the custodians' use during the search of Lotus Notes.
- Provide custodians the step-by-step instructions for searching Lotus Notes.

Electronic Content Management System (ECMS), or EZ Email Records

Even though emails saved through EZ Email Records are archived into ECMS as Agency records, they are not captured by OEI's centralized search. So, if a responsive outlook email message was saved to ECMS and then deleted from the user's Outlook account, a centralized search will not retrieve that record in Outlook. Thus, it is important to remind custodians to search manually ECMS for any non-duplicative emails that may be responsive to the request.

Detailed instructions for ECMS are available here.

Note: Depending on the office, the Records Liaison Officer (RLO) may be able to conduct a centralized ECMS search for the RLO's office. If there are multiple offices, you may need to coordinate with RLOs from each office. Contact your RLO or the RLO from the relevant office(s) for more information.

Correspondence Management System (CMS)

CMS is an electronic document management system that captures, stores, and tracks correspondence that is addressed to EPA or any of its employees in their official capacity. Some offices may use CMS, for example, to document correspondence received, including responses to such correspondence. If a custodian determines that CMS may contain records responsive to the request, CMS should be searched.

Custodians may not have used CMS previously and may not have access to the system. In this case, the custodian can identify the individual in the office responsible for maintaining CMS and work with that person to complete the search. All CMS records are full- text indexed and searchable by any data element.

Other Locations

For all other locations, including, for example, local or shared computer drives, OneDrive, SharePoint sites, external drives and discs, and hard-copy files, custodians should conduct a reasonable search of these locations based on the request for records, as described in the FOIA request and any subsequent communications with the requester.

Access to Separated Employee Records

The Action Office and Contributing Offices should work together to ensure that custodians' files are searched, **even** if those custodians are on-leave and not in the office when the request is received, or if they have separated from the Agency.

Searching Document Repositories when a Centralized Search is Not Conducted

If a centralized search is not conducted, the custodian would need to search manually the locations where potentially responsive documents may be located. The Action Office, consistent with its search plan, should email all custodians providing specific search instructions to be followed. See above for guidance in preparing and disseminating search instructions.

Tips on Documenting Search and Completing Implementation of Search

It is important to document the search that was conducted. The lead for the Action Office should develop a memorandum or checklist to track the search. Specifically, the lead for the Action Office would note:

- the Contributing Offices searched
- the locations within those offices and the Action Office searched
- the list of custodians and whether the custodians have completed their search; and

- the number of responsive records.

Once the search is complete, the team can develop and implement a review plan.

Periodic Updates to the Requester

You should periodically contact the requester to provide updates on the status of the Agency's processing of the request, *particularly* if it will take longer than 20 working days to issue a final response. Communication with the requester is important so that the requester understands that the Agency is actively working to complete its response to the request.

Consider providing interim or partial releases to demonstrate to requesters that you are actively processing the request. Such releases also give the requester insight into the types of records responsive to the request and may result in the requester narrowing the request.

Documenting and Updating your Search Plan

Document your search plan and update it as you implement the search. This will enable you to track the process and build a strong administrative record, which is important if the requester appeals and/or later sues the EPA challenging the adequacy of the Agency's search.

DEVELOP AND IMPLEMENT A REVIEW PLAN FOR POTENTIALLY RESPONSIVE DOCUMENTS

Develop your Review Plan

Identify Levels of Review

The Agency's FOIA procedures call for Division Director or equivalent approval of FOIA responses. The approval applies to both withholdings and releases. Before you begin to review the records, review your office's FOIA procedures here and think through who will likely need to review the records.

Depending on the size and complexity of the FOIA request, it may be just you doing first level review and your manager completing the second level review of the records, or it could involve multiple levels of review.

Practice Tip: If there are multiple offices involved or if you are working on a FEAT FOIA, individual office procedures may need to be adapted to accommodate overall processing of the request.

Regardless of the complexity of your FOIA, the review cycle of a FOIA should include consideration of all the steps below. Bear in mind that not every review will include documents that will require review at each of these steps; however, be mindful of these steps as you plan your review process.

It is imperative that you plan your review process early so reviewers at every step have adequate time to review the materials.

1. **First Level Review**. You (and your team, if you have one) take the first step to review the records. In doing so, evaluate the following:
    - Responsiveness: Responsive documents are those documents that match the description in the request. Be sure you clearly understand what the requester wants. Non-responsive records do not need to be produced.
    - Disposition: If the record is responsive, the first level reviewer then evaluates the documents to determine what, if any, FOIA exemptions apply and based on that analysis, whether a document should be released in full, withheld in full, or released with redactions.
    - Exemptions: If the record is responsive and should be withheld or redacted, identify the exemption(s) that applies(apply) and redact the document consistent with the claimed exemption(s).
    - Equities of other EPA offices: If the record is responsive and contains discussions or information from another EPA office, identify those records for internal equity review, as described below.
    - Equities of other federal agencies or the White House: If the record is responsive and contains discussions or information from another federal agency or involving the White

House, you will need to identify those records for external equity review, as described below.

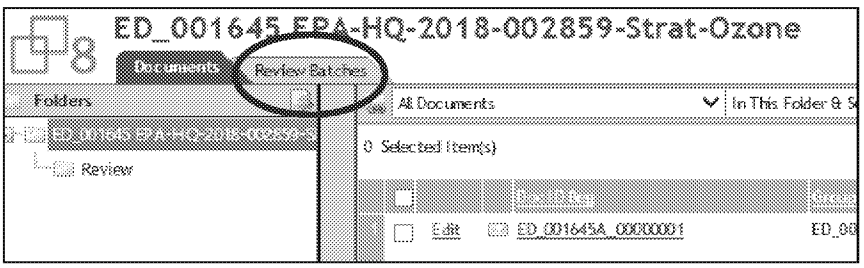
- Documents that upper management should be aware of prior to release: During first level review, you should mark for further review any documents you think management may have a specific interest of being aware of prior to release.

2. **Second Level Review**
    - Consistent with EPA's procedures, all FOIA responses in which documents are released or withheld must have approval of someone at least at the Division Director level or equivalent.
    - For many FOIAs, particularly those that are complex or voluminous, there may be other layers of review prior to the final management review. For example, your office may decide that a particular project warrants a second level review at the staff level prior to documents going through management review. Second level review can take many forms. This should be discussed with the FOIA team in conjunction with your management.
3. **Equity Review**
    - An office other than the office that conducted the first-level review may have an interest, or equity, in certain documents. Many factors go into determining when an office has "equity" in a document. In general, an office has equity in a document when the document includes information of substantive interest to that office. This includes documents that were created in that office, emails involving personnel from that office, and opinions or advice given by an attorney in a legal office. In general, any office with equity in the document should have the opportunity to review the document, and weigh in on whether they agree with the determinations made with respect to responsiveness and FOIA exemptions.

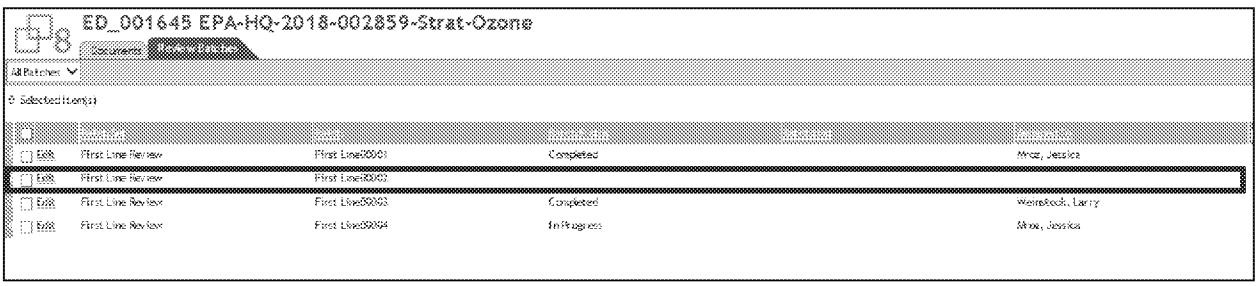
Practice Tip: If there is another agency or EPA office involved, notify that agency or office early and find out where to send the records for review. If the request involves only a few documents, you may consider discussing the records over the phone.

Assign Documents in Relativity

1. Go to https://webreview.epa.gov/ and log in.
2. Open up the appropriate workspace.
3. Go to the "Review Batches" tab at the top left of the page.

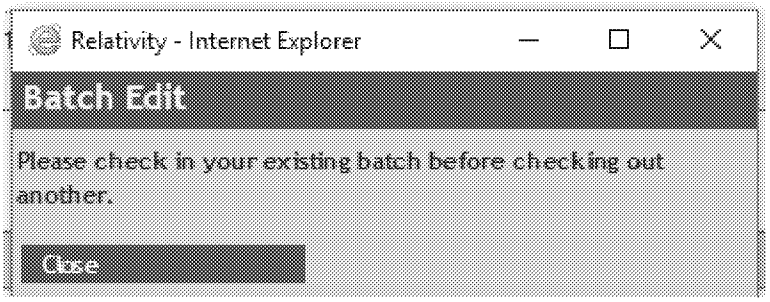


4. Look under the "Batch Status" column to and select a batch that is blank. This means it is not yet assigned to a reviewer.



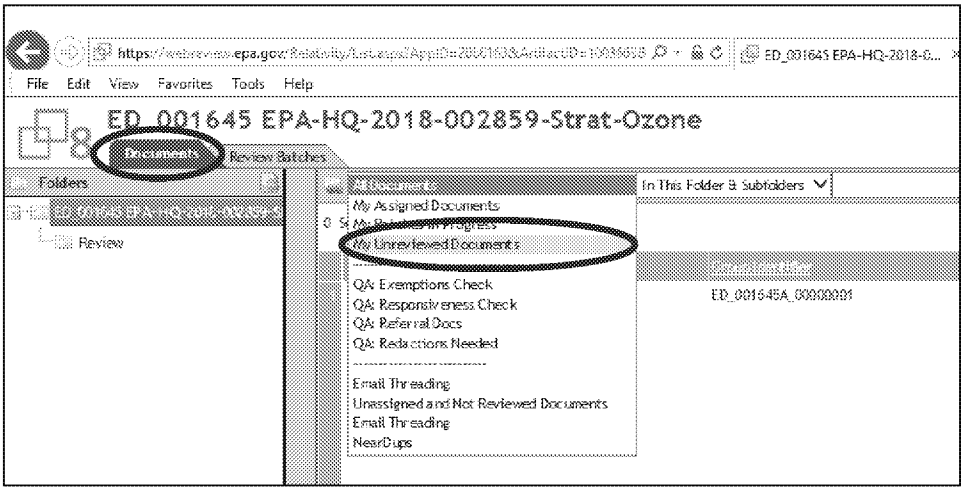
5. Click "Edit" on the row of documents you would like to assign.
6. A separate window will open. Click "Check Out."

If you see this window –



Click "Edit" next to the documents you were previously assigned and click either "Check In As Complete" or "Check In As Pending" as applicable.

7. Begin reviewing documents in the "Documents" pane by selecting "My unreviewed documents" from the dropdown menu.



Guidelines for Reviewer Instructions on How to Determine Which Offices May Have Equity in a Document

The following provides some general guidelines to follow when developing instructions for reviewers on how to determine which offices may have equity in a document; in other words, if the document includes information of substantive interest to that office. Any office with equity in a document should have the opportunity to review it and weigh in on its responsiveness/exemptions.

OEX - Office of the Executive Secretariat (Administrator's Office)

- Any document containing the Administrator's primary or secondary email address.
- Any document generated by a senior member of the Administrator's staff: Deputy Administrator, Chief of Staff, Deputy Chief of Staff, political appointees in the AO.
- Prior Administrators.

Public Affairs Office

- Any document to or from a member of the press, or discussing a media or press inquiry.
- Any document related to the drafting of press releases or other press materials.

Congressional Affairs Office

- Interactions between EPA employees and elected officials (or their staff). This includes mayors, governors, and members of Congress.
- Interactions between congressional affairs staff and other arms of the government, including internal communications related to these interactions.
- Congressional hearing preparation.
- Development of responses to formal correspondence from Congress.
- Development of responses to Questions for the Record.
- Substantive input from an OCIR employee.

OGC/ORC - Offices of General Counsel/ Regional Counsel

- Any document generated by OGC/ORC attorneys, except scheduling documents.
- Any document containing non-public information discussing litigation or legal strategy.
- Any communication between an attorney and program client containing legal advice.

Program Offices

- Documents created or originating from that office.
- Substantive emails involving personnel from that office.

When in doubt about another office's interest in conducting an internal equity review or reviewing a specific document, call and ask.

<u>Best Practice:</u> If your request has significant attention or you anticipate the release of records will generate media attention, reach out to your public affairs office and congressional affairs offices early in the review process to discuss what role they would like in the document review.

Other Federal Agencies

- If another federal agency has equities in a document in an EPA FOIA review, we need to give that agency the opportunity to consult on EPA's disposition of the document or refer the document to the other agency for processing. It is ultimately the Action Office's responsibility to ensure this coordination occurs; however, when document review is tasked to a Contributing Office, the offices may agree that the Contributing Office is the one to reach out to the other agency.
- For assistance in determining whom to contact at another agency, please reach out to the National FOIA Program Office or the General Law Office or FEAT in OGC. Staff in those offices often have established FOIA contacts with other agencies. Other options are to check with your fellow FOIA Officers/Coordinators or to check the agency's website.

Interagency Consult	Interagency Referral
Another agency has a significant interest in a record, like an email exchange between EPA and another agency. **EPA may ask for that agency's recommendation as to how to treat the record.**	**A record was created by another agency but is in EPA's possession.** **EPA may refer the record to the relevant agency for them to process.**
Communicate with other relevant agencies about your request. They may not want to review records, but they should be aware of them.	**The other agency will be responsible for responding directly to the requester. Notify the requester that the documents have been referred. Provide the point of contact for the other agency.**

Practice Tip: If you have a large volume of records to share with other agencies, consider using the free platform OMB Max, found here.

White House

The FEAT Office in OGC coordinates all White House equity reviews. If you have documents in which the White House has equities, you should contact the Director of the FEAT Office.

Awareness Review

Awareness review is one of the final steps before documents are released. Awareness review is a "heads up" to upper management, the press office and the congressional affairs office that documents are about to be released to the public. Whether and to what extent an awareness review may be necessary in a production should be discussed with your management.

Final Approval

Consistent with the Agency's FOIA Procedures, after all necessary review is complete, a Division Director (or equivalent) should approve and sign off on the release and/or withholding of any documents under FOIA.

Identify Technology Options for Review

The Agency has two primary tools for reviewing documents:

- Relativity
- Adobe Pro DC

Adobe Pro DC is generally used only in cases where there is a small number of responsive documents. Relativity is used in most other cases.

See Setting Up Your Relativity Workspace and The Use Of Boolean Logic For Relativity Searches for more tips on using Relativity for more complex requests.

SETTING UP YOUR REVIEW TEAM'S RELATIVITY WORKSPACE

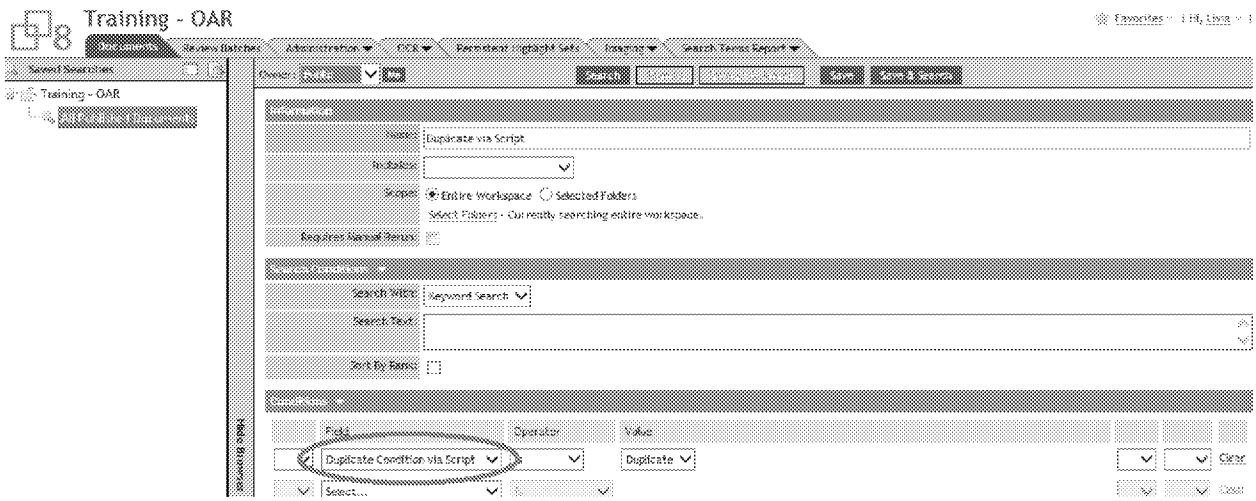
This document will show you how to get your Review Team's Relativity Workspace set up and organized. Before you actually start reviewing all the documents produced in a search, take the following steps. They will make Relativity much easier to navigate and should minimize the amount of review necessary for any request. Hit Ctrl and one of the links below to skip to that section.

Identify and Remove Duplicates
Identify and Remove Non-Responsive Documents
Create a Review Set of All Potentially Responsive Documents
Create Saved Searches and Batches for Different Stages of Document Review
Create Folders to Organize your Workspace

Log into your workspace, which can be identified using the last 4-5 digits of its ED number (e.g., ED_001333.)

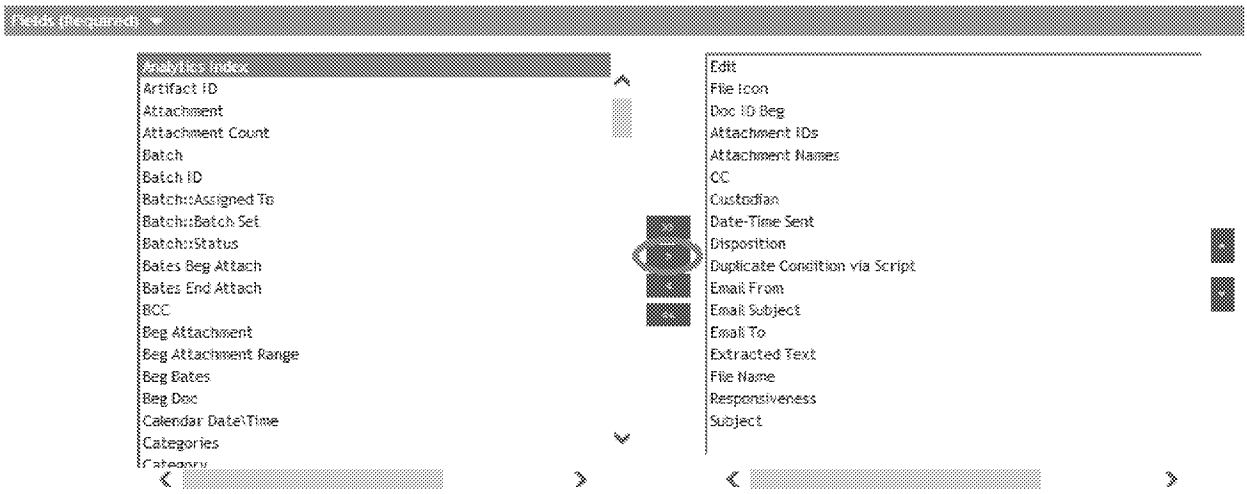
These instructions will get your review team's workspace and review pane set up.

1. **To reduce the number of files you have to filter through, first pull out all duplicate documents.** Some searches produce thousands, so this step can save you a lot of time.
    a. Create a new search using the icon at the bottom of the left pane. Click "New Search."
    b. Create a Save Search titled "Duplicate via Script".
        i. Under Conditions, set the field to Duplicate Condition via Script -> is-> Duplicate. *See below.*

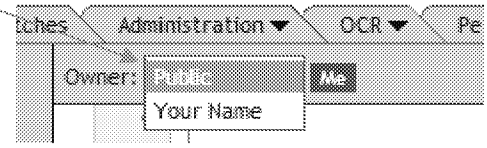


        ii. The **Field** section allows you to add which document elements will be visible for this search. These will vary depending on the kinds of documents you expect may be responsive (e.g., emails, spreadsheets, and/or text documents.) Select all fields that you think will contain useful information. Below, a number of options that are generally helpful have been selected and moved to the right

pane. You may not need all of these. Select each term so that it's highlighted in blue, then use the > arrow to add your selection(s) to the right pane. *See below.*

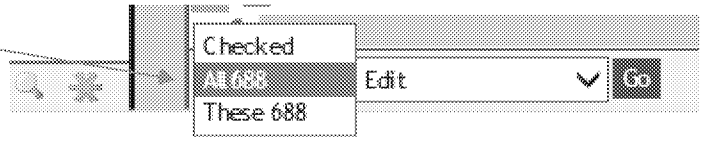


iii. *IMPORTANT: If you're creating a search that will be used by anyone other than yourself, be sure to set the Owner to "Public" using the pulldown arrow in the upper left corner so that the entire review team has access.*



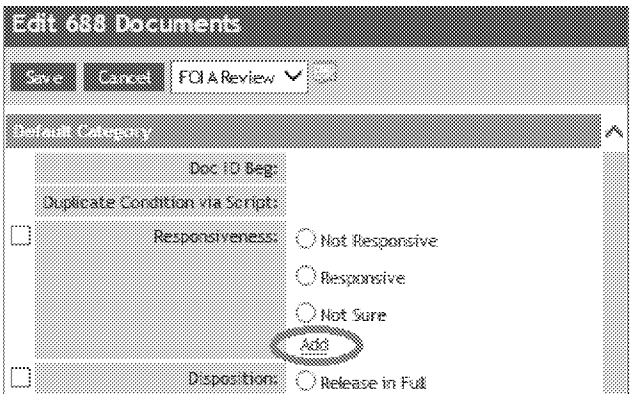
c. After following the above steps, click "Search."

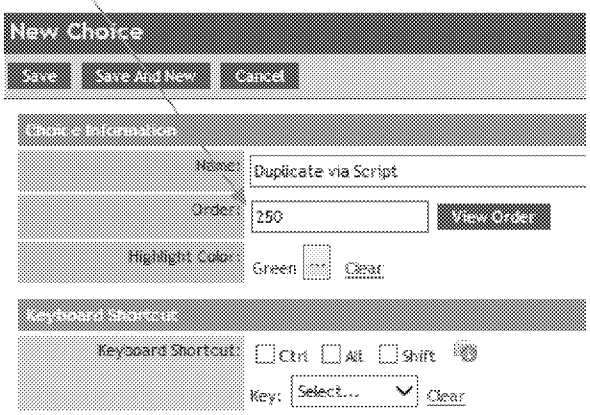
d. If your search brings up any duplicates, select them all by clicking **All [#]** in the pulldown tab on the bottom left of the screen.



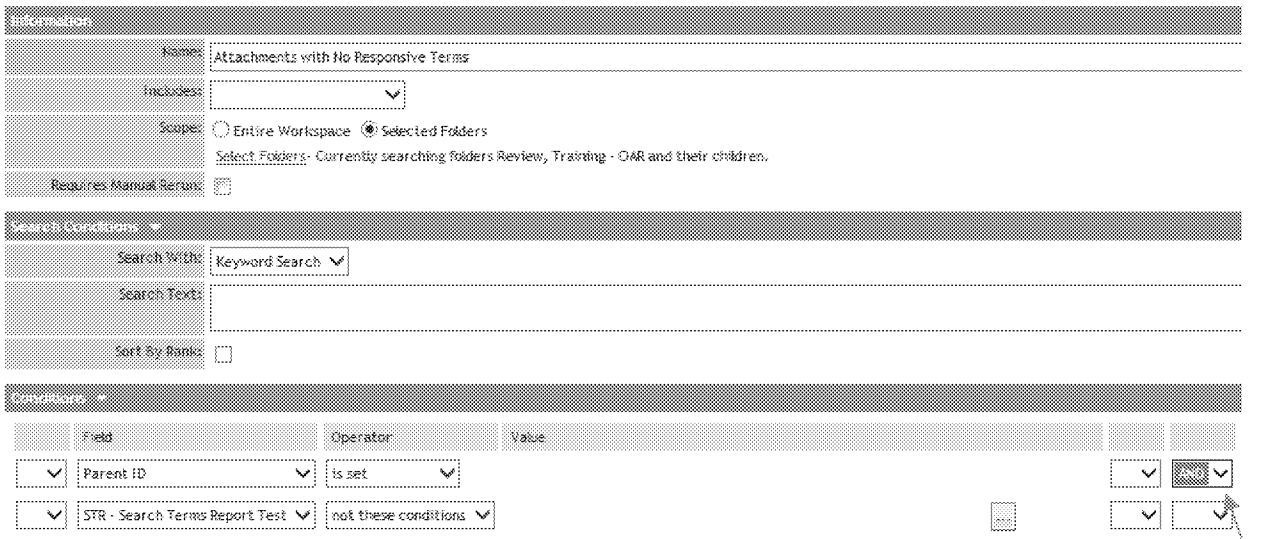
e. Click **Edit**, then click **Go**.

f. You should now see an **Edit [#] Documents screen**. Under **Responsiveness**, click Add to add a new check box for duplicates. On the New Choice screen, name this new choice "Duplicate via Script." [*Click View Order to determine what to enter for **Order**. In this case, the "Not Sure" button is 240. We want Duplicate via Script to appear underneath "Not Sure" as a choice, so the order should be 250.*]

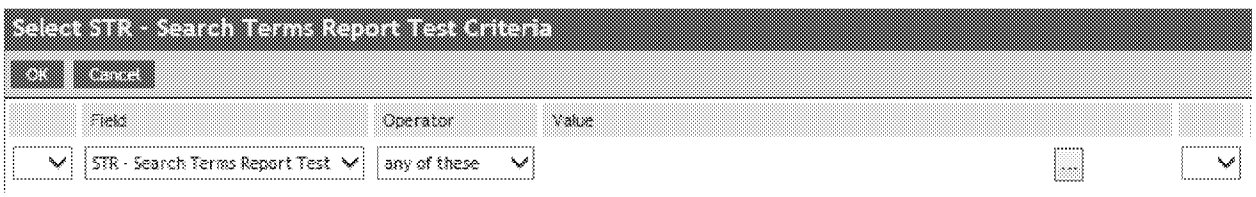


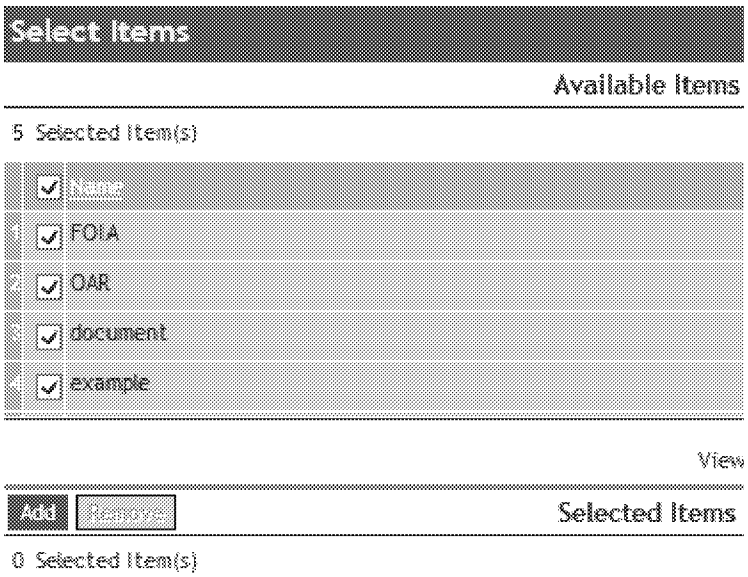


2. Remove unresponsive attachments to further narrow documents for review.



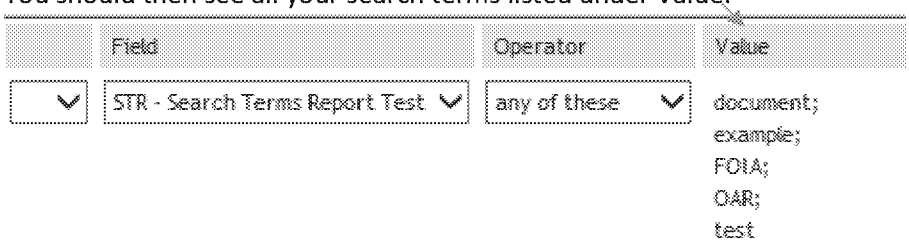
a. Create a new search titled "Attachments with No Responsive Terms".
b. Under Conditions, set Field to Parent ID and → is set. [*This is because we want families of documents, like email chains, to be pulled together so they're easier to read and understand.*]
c. Before setting the next condition, set the rightmost operator to AND so that the search accounts for *both* conditions. This is because we want the documents to be pulled only if they meet both conditions. See Boolean Logic for more tips on searches.
d. Also set Field to STR-Search Terms Report *Name*→not these conditions→then click the icon. *Note that the name that comes after "STR" may be different for your workspace.*
e. This will bring you to the "Select STR-Search Terms Report *Name* Criteria" screen (*below*.) Select STR once again→any of these→and then select the icon once again.





f. Select all necessary search terms on the "Select Items" screen *(above)*, then click Add, followed by Set.

g. You should then see all your search terms listed under Value.



h. Click OK.

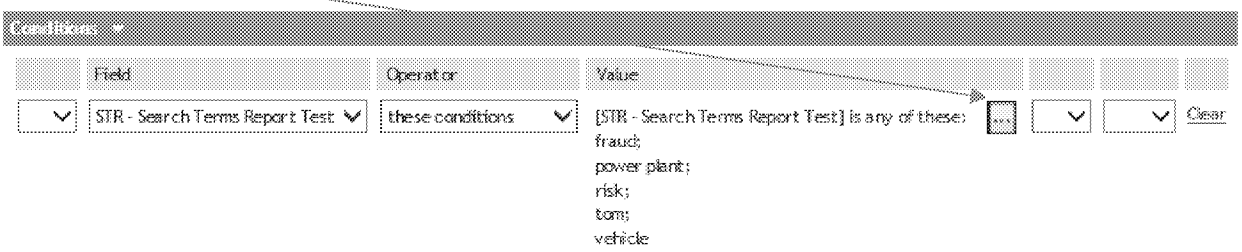
i. On the original Saved Search screen, click Save and Search.

   i. Depending on the nature of the FOIA request, you may decide to mark all of the documents pulled from this search as Not Responsive. To do so, simply mark them all as Not Responsive by selecting and editing all of them after saving your search, like above. (Note that you will simply have to select "Not Responsive"—you will not have to create a new choice for this step like you did above.) However, for many requests, it will be sufficient just to get these unresponsive documents in this folder and forget about them.

3. **Create a "review set" of all potentially responsive documents that need review.**

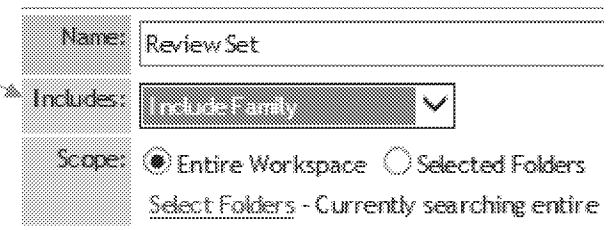
   a. Create a New Search titled "Review Set".

      i. Under **Conditions**, Set STR-Search Terms Report Name→these conditions→and, using this icon, select all search terms that would make a document responsive.



      ii. You could also add other elements to the search to filter through documents that are irrelevant. For example, if a requester specifically asked for documents from a certain year, you could add another condition that "Date-Time Sent" is a certain period of time.

      iii. Make sure to set **Includes: Include Family** to allow the search to produce all related documents, such as email attachments, together.



      iv. Just as you did for the Duplicates via Script search (*above*), select all **Fields** that you'd like to be visible for the search and use the > icon to pull them into the right pane.

   b. Click "Save and Search".

First Line Review

4. Create a New Search titled "First Line Review". This will pull out documents whose responsiveness has not yet been set, *i.e.*, they have not yet been reviewed by anyone.
    a. Under **Conditions**, set Responsiveness→ is not set.
    b. Set the rightmost operator to AND, and for the next **Conditions**, set (Saved Search)→document is in→ and use the icon to select Review Set.
    c. Like you did for all previous searches, use the icon to pull all relevant fields to the right pane.
    d. Save and Search.

TIP: It can save you a lot of time to create a new search by editing an existing one, particularly when using a lot of the same settings/fields. To do this, right-click on an existing search and select "Edit." You can then make changes to the existing settings, and clicking "Save As and Search" will save your changes as an entirely new search without changing or removing the original.

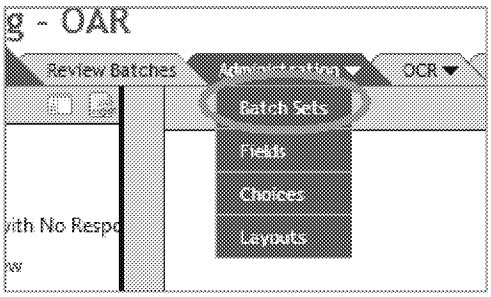
Equity Review

5. Create a New Search titled "Equity Review", for documents that have been marked responsive but require equity review from another office or agency. See the section on Equity Review for tips to determine which other offices may have equity over a document.
    a. Under Conditions, set Responsiveness→any of these→and use the icon to check "Responsive." Click Add, then Set.
    b. Set the rightmost operator to AND, then set Disposition→any of these→ and use the icon to check Release in Full and Release with Redactions. Click Add, then Set again.
    c. Pull all relevant fields to the right pane.
        i. For more complex requests, you can create multiple Second Line Review searches for use by any other offices/agencies that have equity in a set of documents. Simply name these searches so that they're easily distinguishable for the office responsible, *i.e.,* "Equity Review: OGC". See Setting Up a Relativity Review Pane to learn how to easily mark documents for equity review so they can automatically be placed in these folders.
6. Create a New Search titled "Withheld in Full", for documents that will not be released.
    a. Using the same method as the previous two searches, set Responsiveness→any of these→Responsive.
    b. Set the rightmost operator to AND, then set Disposition→any of these→Withhold in Entirety.

Production Set Review

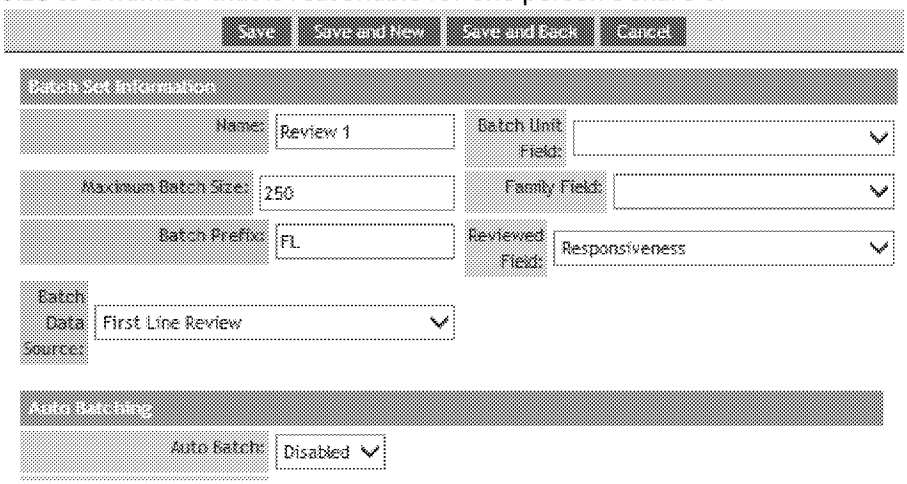
7. Create a New Search titled "Production Set Review", for documents that are ready for final review before being released either for agency awareness or directly to the requester.

Review Batches



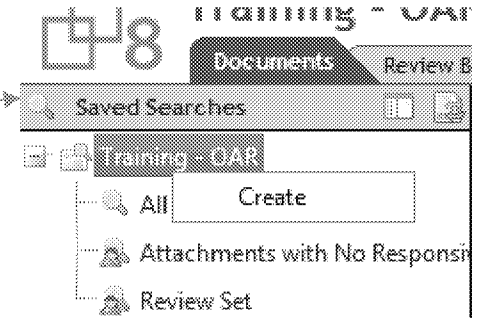
To create a document review batch for each person on your review team, click on the pulldown arrow on the Administration tab on the upper left, then click "Batch Sets."

a. Click New Batch Set on the upper left.
b. **Name** the batch so that the office/employee responsible for it can recognize it as their own.
c. Set the **Maximum Batch Size** to a number that is reasonable for one person's share of document review, e.g., 250 documents.
d. Set **Batch Prefix** to delineate it for the correct stage of review *(in this case, FL stands for First Line. The prefix is required but simply helps to organize sets of batches. Both the name and the prefix can be set to whatever is most helpful for your office.)*



e. Set the **Batch Data Source** to the "First Line Review" saved search.
f. Set the **Reviewed Field** to Responsiveness.
g. It is not likely that you'll need to enable **Auto Batch**.
h. Click "Save and Back".

8. **Create folders to organize your workspace and stages of review.**
   a. Right click on any existing search folder in the left pane to create a new one. *(Make sure you're still in the Saved Searches pane—this will not work if you click the icon.)*



   b. Right-click on the created folder to rename it. For example, you can name this one "Office Review" and put all searches your office will be conducting to accommodate this FOIA request inside it with subsequent organization.
   c. You can click and drag searches to different folders for different stages of review to keep them organized.

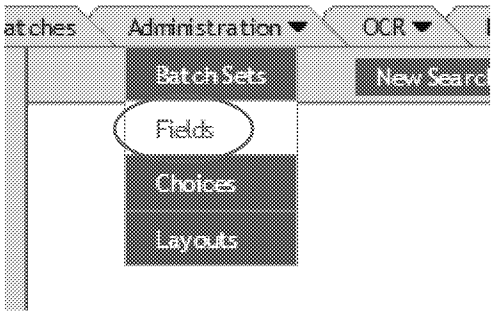
Your workspace will now be much easier to use. You can follow the same procedures to create folders and batches that require review from other offices. After the production set is created and reviewed, you can then create a Save Search from the remaining documents titled "Final Review" for the last review process.

Return to top of page.

SETTING UP A RELATIVITY REVIEW PANE

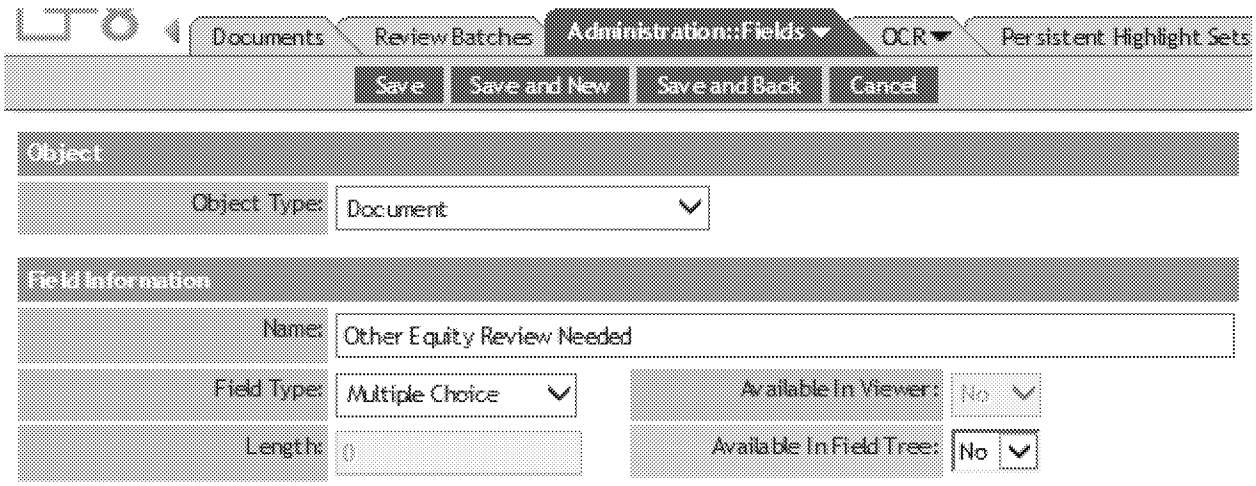
Create a New Field to Mark Documents that Need Review from Other Offices/Agencies

The below steps will show you how to create new fields in the review pane to categorize potentially responsive documents, such as multiple choice options to signify needed equity review.



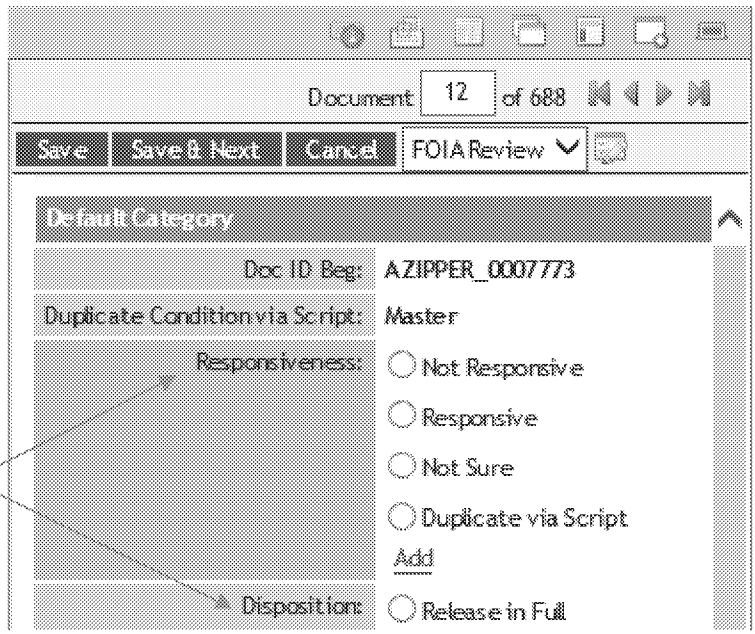
Click the arrow on the blue "Administration" tab on the upper right, then select Fields.

1. Click New Field.
2. For the new field, set **Object Type** to Document. **Name** it "Other Equity Review Needed", and set the Type to Multiple Choice *(like below)*.
3. Hit "Save and New" to create another field.

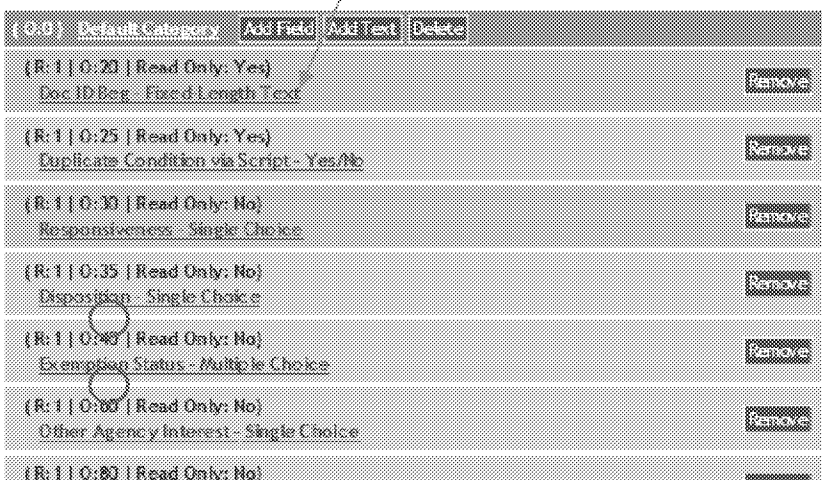


4. Use the same settings, but name this field "Other Equity Review Complete".
   a. These new fields will allow document reviewers to mark documents that either need further review or that have passed certain levels of review.

Add the New Field to the Review Pane



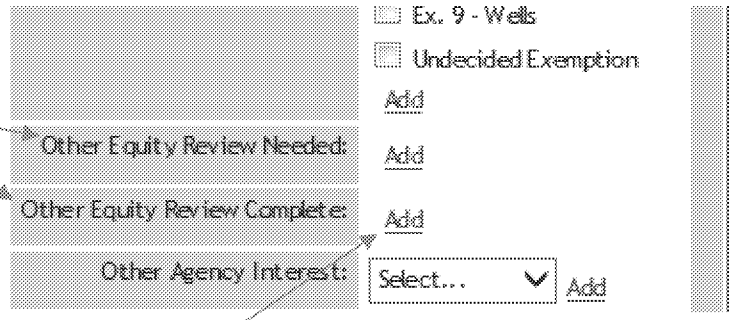
1. Click **Edit** on any document in the workspace. Any edits you make to the review pane will be for the entire workspace.
2. The screen you see on the right is the **Review Pane**. Click the icon to edit its layout.
3. The **Building Layout** screen will then pop up. You'll see a list of all the fields that are visible in the review pane. The field names that you saw on the review pane are blue and underlined on the Building Layout Screen (*below*), like so.



R: signifies row. There's no need for this to be any value other than 1. **O:** signifies the order of the fields (*circled on left*). These are spaced out by 5s/10s to allow reviewers to insert a new field between two others without having to update all other order values.

4. Click Add Field.
5. You'll then see the **Add Field to Layout** screen. Using the pulldown arrows, set **Field:** to the name of the field you just created (*e.g., Other Equity Review Needed*), set **Read Only:** to No (because we want to reviewers to be able to check the multiple choice options), and, using the order numbering on the previous screen, pick an order number that will allow you to drop the new field wherever is most appropriate.
    a. For example, on the Building Layout screen (*above*), "Exemption Status" is ordered O:40, and "Other Agency Interest" is ordered O:60. Therefore, if we set order to 45 for this field, it will be place right after Exemption Status.
6. Hit Save and New, then follow the same steps to add the "Other Equity Review Complete" field to the pane.
7. Hit Save. You should then see the two new fields in the Building Layout screen in the desired order. Hit Close on this screen to return to the document viewer/review pane.

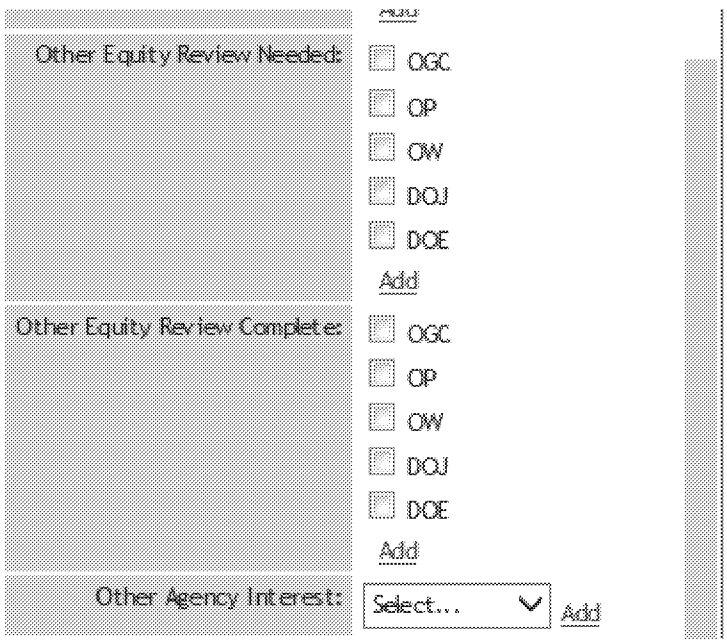
8. The two new fields should then be listed in the desired order on the review pane, like so.



Creating Choices for New Fields

Since these fields were created as multiple choice, you now need to create the choices. The choices we're creating below are the checkboxes that will allow reviewers to automatically place documents that require review from other offices/agencies in a search folder for that agency. There are a few ways to do this, but the easiest way is directly in the review pane.

1. While still in the viewer pane, click **Add** to add choices for the fields you just created. The **New Choice** screen will pop up.
    a. By now, you should have firmly established which offices or agencies may have equity in any of the documents being reviewed. If you have not, return to the EQUITY FOR DOCS page.
    b. Once you've developed a list of all offices/agencies that should be listed as needing additional outside review, create a choice for *each* of them.
    c. Under **Name:** list the office/agency that may need to review the document, i.e.:
        - OGC
        - OW
        - OP
        - DOJ
        - DOE
        - Etc.
    d. Use the same logic for Order as you did above. Each choice can simply be ordered 1,2,3,4, etc., but if you want to place a new choice in a specific location later, it may be wiser to number by 5s or 10s. Remember that Relativity simply interprets order as ascending.
    e. Hit Save and New and continue creating new choices as necessary. Then hit Save and repeat the process *identically* for the "Other Equity Review Complete" field (*see right*), so that documents needing external review can be marked and automatically moved to the Production Set folder once that review is complete.



BOOLEAN LOGIC IN RELATIVITY SEARCHES

Boolean logic defines logical relationships between terms in a search. You can use Boolean logic when creating Saved Searches to pull up potentially responsive documents in Relativity.

Boolean logic allows you to create a much narrower search and return the least possible number of potentially responsive documents to review, much like the Advanced Search function you'd find in most search engines. It does this using "operators", or commands that can be used to combine or filter search terms to return only the documents that meet very specific criteria.

The three main Boolean search operators are AND, OR, and NOT. For the sake of searching within Relativity, you only need to understand AND and OR.

AND

And combines search terms so that results **must contain all** of them.

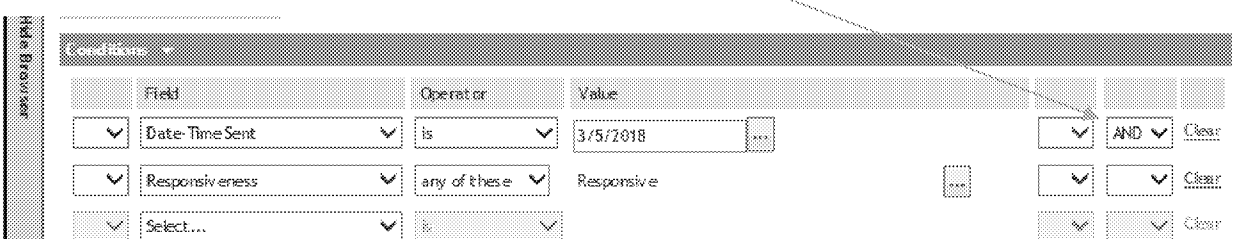
Simple Example

The search *diesel* AND *engine* returns only documents that contain **both** "diesel" and "engine". It does not return documents that return only one of these terms.

Relativity Example

The below search would **only** return documents that meet **both** conditions.

ONLY documents that were both sent on 3/5/2018 AND that have been marked as Responsive will be produced from this search.



OR

OR combines search terms so that results contain **at least one** of them.

Simple Example

The search *diesel* OR *engine* returns documents that only contain "diesel", as well as documents that only contain "engine". It also returns documents that contain both of these terms.

Relativity Example

The below search would return three kinds of documents:

1. emails in which crim.livia@epa.gov is CC'ed;
2. any documents (emails or not) that have been marked Responsive; and

3. emails that have been marked responsive AND in which crim.livia@epa.gov is CC'ed.

W/N

The W/N operator is used to return documents with two words or phrases that occur within a certain proximity of each other. W/N can be translated as "within N words". For example, a result only meets W/5 criteria if the two words are within 5 words of each other.

Simple Example
The search *diesel W/15 engines* would return:

- "diesel engines"
- "…State Clean Diesel Grant Program. Any engines that…."

However, it would NOT return:

- "The Diesel Emissions Reduction Act grants (DERA) program, first authorized by Congress in the Energy Policy Act of 2005, and reauthorized in 2010, supports state, Tribal, and local air quality management agency projects to reduce harmful emissions from engines."

Booleans and Parentheses (Search Order)

For even *more* efficient searches, you can use parentheses to "nest" search terms and operators within others. This will convey to Relativity *in which order* they should be interpreted.

If there are nested parentheses, Relativity will analyze the **innermost** expression first, then the one outside it, and so on.

Simple Example
(emissions OR diesel) AND standards would return all documents that contain the following combinations:

- emissions, standards
- diesel, standards
- emissions, diesel, standards

Since this search uses the AND operator for the term "standards", all results must contain that term. But since we placed parentheses around "emissions OR diesel", any combination of the three terms is possible.

Note that in Boolean search order logic, AND always takes precedence over other operators. For example, the above results differ from the results you would get if you searched *emissions OR diesel AND standards*. The only documents that meet these requirements contain **both** "diesel" and "standards", or neither. This search would return all documents that contain the following combinations:

- emissions, diesel
- emissions, diesel, standards
- standards

You can use parentheses to create a search that captures possible synonyms:

(children OR kids) AND health

Results:

- children, health
- kids, health
- children, kids, health

You can also use multiple sets of parentheses to make a more detailed search:

((children OR kids OR public) AND health) AND pollution)

Results would contain:

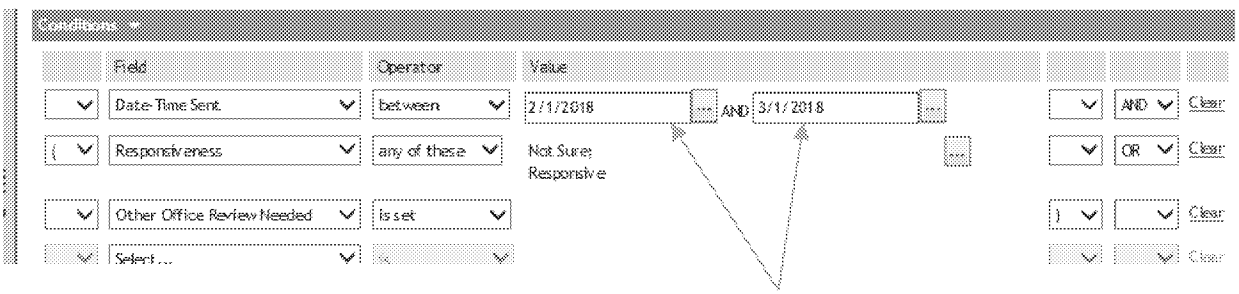
- children, health, pollution
- kids, health, pollution
- public, health, pollution
- children, kids, public, health, pollution
- children, public, health, pollution;
- etc.

Relativity Example

In a Relativity search, you can insert parentheses around commands in the Conditions section to use Boolean search order.

The search below puts parentheses around the statement with an OR operator, while leading with an AND operator statement. It can be interpreted like this:

> *Date-Time Sent=between 2/1/2018 and 3/1/2018* AND (*Responsiveness=Not Sure,Responsive* OR *Other Office Review=Is Set*)



This search will **only** return documents that fall within the timeframe described, and only if they meet at least one of the two other criteria (Responsiveness, Other Office Review Needed).

Documents that would result from this search:

- An email sent on 2/10/2018 with Responsiveness marked "Not Sure" but not marked for Other Office Review.
- An email sent on 2/24/2018 marked for Other Office Review but Responsiveness not marked.

Documents that would *not* result from this search:

- An email sent on 3/1/2018 that has been marked Responsive.
- An email sent on 2/15/2018 that has not been marked for Responsiveness or Other Office Review.

Other Boolean Syntax

There are other symbols you can use to make your Relativity searches more effective. Below are just two that are most likely to be helpful, particularly when creating Search Terms for a request. You can learn to do much more complex searches by viewing the Relativity Search Guide here.

Quotation Marks

Quotation marks can be used to return documents that contain the exact phrase enclosed within them.

For example, searching *"public health"* would **only** return documents that contain the exact phrase "public health". Documents that contain the words "public" and "health" separately scattered around the document would not be returned.

Asterisks

Searching with an asterisk returns results that include the root of the word that you type, but with any variation by where the asterisk is located.

For example, searching *child** would return:

- child
- children
- children's
- childhood
- etc.

Searching wom*n would return:

- woman
- women

Ensuring Consistency in Review Among your Review Team

For complex or even straightforward requests, a memorandum with review instructions (known as a "coding memo") can help your team achieve consistency in its document review. The coding memo serves as a protocol for how reviewers make determinations on documents, whether reviewing in Adobe Pro DC or Relativity. A coding memo can include, for example:

- **Responsiveness**
  - Describe the scope of the FOIA request.
  - Include a list of key words and acronyms that can help reviewers identify responsive material--use this list to help develop your persistent highlighting set for Relativity.
  - Include a list of key events and/or background on the issue that can help put the documents in context.
  - Include a list of key custodians and their roles in the issue.
  - Identify names of key attorneys (for attorney-client and attorney work product designations) -- consider including these names in your Relativity persistent highlighting set as a unique color.
  - Identify names of key people outside the Agency to assist with identifying records that are internal vs. external, and records that would need consultation from the White House or other agencies.
  - Explain whether non-responsive material may be redacted. Remember, you may only redact non-responsive material contained within a responsive FOIA record if you have an agreement with the requester.
- **FOIA Exemptions**
  - Describe the FOIA exemptions, and provide any key information specific to the FOIA request that will benefit reviewers in applying exemptions properly.
  - If a FOIA Exemption is not applicable to the FOIA request, do not include in the memo.
- **Equity Review**
  - Describe the EPA offices and/or other agencies for which review is needed.
- **Upper Management Review**
  - Documents may need to be flagged for upper management review. Providing this review enables management to be aware of documents that will be released and that may garner public or media attention.

REVIEWING POTENTIALLY RESPONSIVE RECORDS

Once you have collected potentially responsive records, you must review the records to determine whether they are actually responsive to the request and you must review the records to determine which, if any, FOIA exemptions apply.

For most FOIAs, responsiveness review and the FOIA exemption review are done concurrently during the first level review. During first level review, reviewers will determine if documents are responsive to the request (as narrowed or modified), if any FOIA exemptions apply, whether other EPA offices need to review the documents ("EPA Equity Review"), whether other Federal agencies or the White House need to review the documents ("Interagency Equity Review"), and whether any documents should be flagged for upper management awareness.

The levels of additional review beyond the first level of review will depend upon the scope of the FOIA and the need for equity reviews as set forth above. The review process should be set forth in the Review Plan, as explained above.

Don't Forget about the Requester!

Manage Expectations! Contact the requester right before you begin the Review Phase and discuss the results of your document collection. You can discuss the number of documents collected, your review process, and give candid time estimates for production. This gives the requester another opportunity to narrow their request or steer the review if they are unsatisfied with the time to complete review.

As you progress through the Review Phase, consider scheduling standing updates with the requester to discuss the status and progress of the request. For voluminous records requests, it can be very valuable to have the requester weigh in on how they would like the review of records to be prioritized. For example, perhaps the universe of documents to review includes 25,000 emails from 35 custodians. Ask the requester if there are custodians or timeframes the requester would like reviewed and released first; this is good customer service, and you know your review time is well spent.

As always, document these communications and upload any written communication with the requester into FOIAonline.

Are the Documents Responsive to the Request?

Once you have collected documents potentially responsive to a FOIA request, you must make sure that all reviewers have a single unified interpretation of the request. This ensures consistent responsiveness calls throughout the review process. If multiple people are reviewing documents to determine whether they are responsive to the request, consider having an initial meeting to discuss the FOIA request and what constitutes a responsive document.

- Occasionally, you may come across documents that are technically responsive (e.g., one of the search terms appears in an email) but that might have little to no informative value to the requester. Under the FOIA, agencies may not make value judgments on the utility of documents

to the requester. Accordingly, such documents should be considered responsive. However, you may ask the requester whether it wants certain categories of minimally-informative documents (e.g., newspaper clips) to be processed. If you come across large numbers of such documents, the requester may want to narrow its request to exclude those documents, which may enable the Agency to process the FOIA more quickly with fewer fees.

- You also may come across documents that discuss several different subjects in a single document, only some of which are responsive to the FOIA request. An example could include a staff meeting agenda addressing multiple topics. Under the FOIA and consistent with recent case law, if a FOIA record contains information responsive to the FOIA, the entire record is responsive, including the arguably non- responsive information. Information in the record can, however, be withheld based on one of the FOIA exemptions. If you identify large portions of material that are not responsive to the FOIA, consider meeting with the requester to determine if the requester is interested in narrowing the scope of the FOIA request to remove that material.

Do Any of the FOIA Exemptions Apply to Your Documents?

The FOIA provides for nine exemptions that agencies may use to protect specific types of information.

Exemption 1: Classified Information

Exemption 1 applies only to information that has been properly classified according to criteria established by an Executive Order. This exemption is rarely asserted by the EPA.

Exemption 2: Personnel Rules and Practices

Exemption 2 of FOIA exempts from mandatory disclosure records that are “related solely to the internal personnel rules and practices of an agency.” The Supreme Court has held that Exemption 2 covers only records “relating to issues of employee relations and human resources” and that such records must be internal and relate solely to those personnel rules and practices. Exemption 2 is narrow in scope and, thus, is rarely used.

Exemption 3: Federal Statute Prohibits Disclosure

Exemption 3 protects from disclosure information that is prohibited from disclosure by another federal statute, provided that the other federal statute explicitly requires matters to be withheld from the public. Statutes found to qualify under Exemption 3 include, for example, FIFRA, the Internal Revenue Code, and the Patent Act. Note that if you withhold information under Exemption 3, you must identify the statute under which you are withholding information in your response letter.

Exemption 4: Trade Secrets and Confidential Business Information (CBI) or Proprietary Business Information (PBI)

Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Based on this wording, the exemption covers two distinct categories

of information in federal agency records, (1) trade secrets, and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. For purposes of Exemption 4, "trade secret" is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end-product of either innovation or substantial effort." *See below for further information about reviewing documents that may contain CBI.*

Exemption 5: Privileged Communications

Exemption 5 protects "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." In simpler terms, Exemption 5 protects those documents that are normally privileged in the civil discovery context. This includes memoranda and letters but extends to many other types of documents as well. The three most common types of privilege asserted with Exemption 5 are the Deliberative Process Privilege, the Attorney-Client Privilege, and the Attorney Work Product Privilege.

- Deliberative Process Privilege (DPP)
    - Internal: communication must be internal to the executive branch (e.g., EPA, WH, DOT);
    - Pre-decisional - prepared to assist an Agency decision maker in arriving at his decision, rather than to support a decision already made;
    - Deliberative - Reflects the give-and-take discussion of the consultative process;
    - Privilege exists to: (1) encourage open, frank discussions; (2) protect against premature disclosure of proposed polices; and (3) protect against public confusion;
    - Apply DPP redaction "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption."
    - Some common examples include:
        - Draft documents, staff analysis, recommendations, advice, or opinions, internal e-mail discussions of potential courses of action, internal discussions about how to respond to a public inquiry, comments on draft rule-making documents, and e-mails or memos discussing Agency options.
- Attorney-Client Privilege (ACP)
    - Internal: communication must be internal to the executive branch (EPA, WH, DOT, etc.);
    - Legal advice is sought or relates to legal advice;
    - Communication between an attorney(s) and client(s);
    - Made in confidence; and
    - May have to show disclosure restricted to those who need to know within the Agency/Executive branch.
- Attorney-Client Work Product (AWP)
    - Internal to the Executive Branch (EPA, WH, DOT, etc.);
    - Prepared or obtained by or at the direction of an attorney;
    - In reasonable anticipation of litigation or active litigation; and
    - Extends to documents prepared by or for a representative of a party, including an agent

Exemption 6: Personal Privacy

Exemption 6 protects information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." When considering whether to assert Exemption 6, balance the privacy interest of the individual

against the public interest in disclosure. Common examples of content to withhold include private home addresses, personal phone numbers, personal email addresses, and medical information.

Exemption 7: Law Enforcement

Exemption 7 protects from disclosure certain types of "records or information compiled for law enforcement purposes." This exemption is comprised of six subsections, as described below. When asserting Exemption 7, remember to specify which subsection you are using.

- Exemption 7(A) protects records that "could reasonably be expected to interfere with enforcement proceedings." This includes information that would hinder the government's ability to control or shape the investigation, enable targets of the investigation to elude enforcement or suppress or fabricate evidence, or prematurely reveal the government's evidence or strategy. Note that this exemption is "temporary" because it is applicable only for the duration of the investigation.

- Exemption 7(B) is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding, protects "records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication."

- Exemption 7(C) protects information that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption is like Exemption 6 except that it requires EPA to meet a lower standard ("reasonably expected to" under exemption 7(C) vs "clearly unwarranted" for Exemption 6) and is applicable only in the law enforcement context. For example, Exemption 7(C) is sometimes used to protect identities of employees working on sensitive cases.

- Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes [which] 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 a 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."

- Exemption 7(E) affords protection to law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

- Exemption 7(F) protects law enforcement information that "could reasonably be expected to endanger the life or physical safety of any individual." Courts have routinely upheld the use of Exemption 7(F) to protect the identities of law enforcement agents. EPA has also used this exemption to protect the identities of members of security details and to withhold schematics detailing drinking water sources.

Exemption 8: Financial Institutions

Exemption 8 protects certain information related to financial institutions, but is only applicable for agencies responsible for regulating or supervising financial institutions. Accordingly, EPA does not assert Exemption 8.

Exemption 9: Wells

Exemption 9 exempts from disclosure "geological and geophysical information and data, including maps, concerning wells." This exemption can be applied to any type of well, including gas or water. An example of information withheld under Exemption 9 would be maps showing the exact locations of wells.

Do your Documents Contain Confidential Business Information or Trade Secrets?

FOIA Exemption 4 covers two categories of information, (1) trade secrets and (2) confidential Business information (CBI).

CBI is commercial or financial information obtained from a person that is privileged or confidential. (See 5 U.S.C § 552(b)(4)).
Trade secrets are a "secret, commercially valuable plan, formula, process, or device that is used in making, preparing, compounding or processing of a trade commodity, and that can be said to be the end product of either innovation, or substantial effort." (See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983)).

- Trade secret data may be found in contracts, manufacturing descriptions, schematics, product formulas, software, or quality control data/quality assurance procedures.

A business may explicitly assert a CBI claim, such as by marking or stamping a document with a confidential or proprietary business information label. Even if no explicit claim was made, the information can still be potential CBI.

If no claim was made, EPA regulations require the reviewer to apply the following standard to the business information:

> "[A]lthough [the business] has not asserted a claim, [it] might be expected to assert a claim if it knew EPA proposed to disclose the information." (*See 40 C.F.R. § 2.204(c)(2)(i)*).
>
> If you have identified potential CBI, you must ask the affected business if they claim the information as CBI, via telephone, email, or letter. The affected business has three working days to respond to your inquiry pursuant to EPA's regulations. (*See 40 C.F.R. § 2.204(c)(2)(ii)*).
>
> Please note that this standard does not apply in some circumstances. Specifically, if EPA follows the notice requirements of 40 C.F.R. § 2.203(b) when

it collects the information (such as including the required notice on a form), EPA may make the information available to the public without further notice to the business. (*See 40 C.F.R. §§ 2.203(b), 2.204(c)*).

Practice Tip: Look for labels on documents that indicate that a business intended for information to remain confidential, such as "trade secret," "proprietary," or "confidential." Also, a coversheet may contain a CBI claim for the attached material. Examples of information typically determined to be CBI include pricing information, information related to production, volume, and the manufacturing process, and customer lists.

Note that an affected business may waive its right to assert a CBI claim in which case you may release the information. You may always check with an affected business to see if the business will waive its claim.

If an affected business claims, or waives, confidentiality verbally, follow up in writing.

When potential CBI is identified, the Action Office must include the appropriate language in the initial denial letter and follow the proper procedures for tracking and processing a request for CBI as outlined in PBI Case Tracking Procedures. After the creation of the PBI case in FOIAonline, the Action Office works with OGC/ORC to send affected businesses substantiation requests, draft program recommendations, and revise the treatment of responsive records where necessary due to the final confidentiality determination.

More information about EPA's CBI Regulations are accessible here.

Separate Non-Exempt Information and Redact Exempt Information

The FOIA requires that "any reasonably segregable portion of a record" must be released "after deletion of the portions which are exempt" under the Act's nine exemptions. This requires you to redact the exempt information while producing the non-exempt information.

The FOIA states "[t]he amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made." Redaction marks should be visible and the exemption under which you are withholding information should be indicated. Note that judgment calls about what may be "helpful" to the requester are inappropriate when analyzing what, if any, information in a document can be segregated and released. If information does not fall within one of the nine exemptions, it should be released.

Once you have determined which FOIA exemptions apply to a document and what information needs to be redacted, use the redaction tools in Adobe Pro DC or Relativity to "black out" the content subject to a FOIA exemption, as discussed below.

Practice Tip: Redact the exempt information in the document and release the remainder.

Quality Assurance/Quality Control (QA/QC)

Throughout the review process, you will need to ensure that responsiveness determinations, FOIA exemption determinations, and redactions are made consistently. This is called quality assurance/quality control (QA/QC). Below are some Adobe and Relativity Practice Tips for smoother, more efficient QA/QC process.

Reviewing QA/QC in Adobe Pro DC

By using the "Create Comment Summary" option in the Comment tool, you can more easily spot redaction issues such as redactions with improper or missing exemption or overlay text.

You can also use the search tool to conduct searches using relevant search terms to locate pages in responsive documents that may require review by other EPA offices or other agencies. You can even export the results to PDF or CSV. Some examples of search terms are below:

- White House equities
  - "WH" or "POTUS" or "White House" or "EOP" or "CEQ" or "OMB"
- Congressional Relations Equities
  - "Senate" or "Senator" or "Congress" or "Representative" or "Congressional" or "Hill"
- Union Equities
  - "Union" or "NTEU" or "AFGE" or "280", or any union officials or topic words that may be relevant.
- OEX Equities
  - Include current administrator's name and email domains and any other relevant people in the Administrator's office.

Note that these search terms can also be used for "batch-tagging" in Relativity, as discussed above.

Reviewing QA/QC in Relativity

Saved Searches: In Relativity, saved searches can be set up to capture common coding inconsistencies and/or missed equities. The documents can be batched for review and errors corrected. See above for help with setting up saved searches.

When setting up a search to catch coding inconsistencies, the search should capture documents in the following categories:

- Release with redaction and no exemption selected
- Release with redaction and no redactions applied

- Release in full and exemption selected
- Release in full and redactions applied
- No disposition and exemption selected
- Withhold in full and no exemption selected
- Responsive and no disposition selected
- Not responsive and exemption selected
- Not responsive and has disposition selected
- Anything marked "additional review required" or similar

Batch Tagging: Additionally, you can "batch tag" items in Relativity for easy retrieval when handling equities. Batch tagging, or "mass coding," allows you to apply a specific coding choice to an entire set of documents that share a common term. Examples of terms that should be batch tagged are the same as those that should be searched for in Adobe, as mentioned above.

Awareness Reviews

For many FOIA requests, the last step in the document review process prior to final approval for production is an "awareness review" for upper Agency management. This final step is for upper management, including public affairs and congressional relations staff, to have a "heads up" as to what is being released to the public. This allows the public affairs staff to be prepared for any media inquiries that may be received following the release of documents. It also ensures coordination between productions of documents under FOIA and congressional oversight requests received by the Agency. You should always discuss with your management as to the appropriate awareness reviews for a particular FOIA request.

PRODUCTION OF RESPONSIVE RECORDS

Interim Release

Importance of Interim Releases

Requesters are less likely to seek litigation to get the records they want if they know you are actively working on their FOIA request. In addition to regular contact and a relationship with your requester, interim or partial releases demonstrate progress to the requesters because actions (disclosing records) speak louder than words ("We are actively working on your request.").

Interim responses can also be a valuable tool for narrowing requests. When requesters receive a partial release of records, they will have an opportunity to review them and identify the records or types of records in which they are not interested. You can then narrow the request to exclude those records going forward. In some cases, you may produce the record or records in an interim production, and the requester may determine, after review of the documents, that it needs nothing further from the Agency and that the request can be closed. It is sometimes helpful to ask the requester if there are particular records or custodians in which he/she is most interested to increase the possibility that the requester may be satisfied with an interim production as a conclusion to the request.

Required Elements of Interim Release Letter

When making an interim production, it is important to accompany the records you are producing with correspondence that clearly explains to the requester what is being delivered and the status of the request. Below are five key elements to include in an email or letter to the requester when making an interim production.

- ***Information about the Request***
  - Make sure to reference the request by number and provide a brief summary of what is sought. If the requester has clarified the request or you have had other significant communication, note it in the summary of the request.
- ***Description of the Records***
  - Provide information about the records themselves. This will vary depending on the records, it may make sense to provider the total number of documents, the total number of pages, the total file size, or some other description.
- ***Schedule Going Forward***

    - Include the anticipated date that the request will be closed out, and if you will be making additional interim productions, inform the requester as to when it can expect the next interim production(s).
- ***Appeal Information***
    - Make clear that the request is not being closed now. Inform the requester that when the request is closed, information will be provided about appeal rights for any part of EPA's response, including all interim productions. The goal is to make sure the requester understands that this is an initial release and that the clock does not start on the appeal period until after the request is closed.
- ***Contact Information***
    - In addition to the FOIA Public Liaison, make sure the requester has the direct contact information for someone who knows substantively about the request, such as the project lead or the FOIA Coordinator or FOIA Officer. The requester may be confused or have questions about the interim production or the status of the request going forward and should be provided with an Agency point of contact.

Final Release and Response to Requester

When all responsive records have been uploaded to FOIAonline, you will be ready to close out your request. It is important to follow your office's FOIA procedures which can be found on the intranet here.

Required Elements of Final Release Letter

The closeout letter for a request should clearly inform the requester of the Agency's response and the requester's appeal rights. There is no one way to write a closeout letter. The best letters should be tailored to the particular request. You can access an Agency letter template here. Each letter should contain the following elements:

- ***Information about the Request***
    - Make sure to reference the request by number and provide a brief summary of what is sought. If the requester has clarified the request or you have had other significant communication, describe it. It is particularly important to describe any agreed-upon modification or other narrowing of the FOIA request. The closeout letter memorializes the Agency's actions and serves as an important piece of the FOIA record if an administrative appeal or litigation is filed.
- ***Disposition***
    - There are four possible responses the Agency may provide. Inform the requester which applies to the request.
        - *Full Grant.* The records, in their entirety, are released to the requester.
        - *Partial Grant/Partial Denial.* Portions of the record are withheld from the requester if covered by one or more FOIA exemptions. The portions of the record that are not redacted are released to the requester.

- *Denial.* The records, in their entirety, are withheld from the requester if covered by one or more FOIA exemptions.
- *No Records.* If, after a reasonable search likely to uncover all responsive documents, no records are located that are responsive to the request, the requester must be informed in writing to that effect.

- ***Identification of Withheld Records***
  - If any records are being withheld in whole or in part, provide the requester with (1) an index or description of the records being withheld and (2) a summary of the FOIA exemptions that are being applied.
- ***Final Appeal Rights***
  - The following paragraph includes the information required to be conveyed to the requester regarding its appeal rights:

    This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90 calendar day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

- ***Contact Information***
  - The requester should be informed of a contact who can help if there are questions about the request. Additionally, consistent with the 2016 Amendments to FOIA, the requester should be provided contact information for the FOIA Public Liaison and the Office of Government Information Services. See the sample language below:

    Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or call (202) 566-1667. You may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information

Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

- ***Final Bill***
  - Inform the requester what fees are being assessed and how they should be paid.
- ***Signature***
  - Final closeout letters must be signed by the Action Office at the Division Director level or higher.

Disclosure through FOIAonline

FOIAonline is more than a convenient way to disclose records to a requester. Disclosure of records through FOIAonline is required under EPA policy and procedures. See EPA FOIA Policy, CIA 2157.1, and EPA FOIA Procedures, CIO 2157-P-01.1.

Recordkeeping Requirements for FOIA Requests

FOIAonline is used to maintain records related to a FOIA request in accordance with records management requirements and as a record of how a request was processed should it be appealed or litigated. Before closing a request, upload (1) all key correspondence and (2) all responsive records.

Uploading key correspondence is vital to preserving the record of how a FOIA request was processed. Any interactions with the requester that did not occur through FOIAonline should be documented and uploaded. For email correspondence, create a PDF of the email and upload it as "other" correspondence. Key internal correspondence such as communications requesting electronic searches or describing document collection should be uploaded as "other" correspondence as well.

It is important to upload all responsive records to FOIAonline, including those that are not releasable. Uploading records that will be withheld preserves the entire record so that it can be reviewed in full on appeal or during litigation. Be sure when uploading records to designate the proper release type for each record.

ADMINISTRATIVE APPEALS

What is an administrative appeal?

The FOIA and EPA's implementing regulations provide FOIA requesters the right to appeal any "adverse determination" that the Agency makes regarding a FOIA request. EPA's FOIA regulations, at 40 C.F.R. § 2.104(g), include the following list of "adverse determinations" that are subject to appeal:

- a determination to withhold any requested record in whole or in part;
- a determination that a requested record does not exist or cannot be located;
- a determination that what has been requested is not a record subject to the FOIA;
- a determination on any disputed fee matter, including a denial of a request for a fee waiver; and
- a denial of a request for expedited treatment.

Within 90 days of an adverse determination by the Agency, requesters may submit appeals, in writing, either through FOIAonline, by email to hq.foia@epa.gov, or by U.S. Mail to EPA Headquarters, National FOIA Program Office. An appeal should identify the Agency determinations being appealed and include the assigned FOIA request number.

What happens if the Agency's final FOIA response is appealed?

Administrative appeals are routed, via FOIAonline, to EPA's Information Law Practice Group, General Law Office, Office of General Counsel. Shortly after receipt, the requester is sent an acknowledgement letter and the appeal is assigned to an OGC attorney for processing. The OGC attorney will then contact the relevant program or regional staff to address any questions concerning the record.

EPA has 20 working days by statute to process an appeal, but this deadline can be extended for "unusual circumstances" pursuant to the same rules applicable to extension of FOIA request deadlines. Once the appeal determination is completed, the OGC attorney contacts the relevant office(s) that processed the request, notifies the office(s) of the decision, and issues the decision to the requester through FOIAonline.

What is your role in the administrative appeal process?

You may be notified by your FOIA Officer that an appeal relating to the FOIA request you handled has been received. As noted above, you will be contacted by the OGC attorney handling the appeal, as the attorney will likely have questions relating to the file and/or need additional information. Your FOIA Coordinator or Officer should also be able to review in FOIAonline who in OGC is assigned to an appeal so you can always reach out to the attorney to provide any context or other information that may be helpful for processing the appeal.

Please follow the instructions provided by the attorney concerning what action or information is needed. When contacted by OGC, please be sure to have the following information available:

- A complete set of the documents withheld in full, in unredacted form;
- A complete set of documents withheld in part (redacted documents) (ideally a markup copy of the redactions not yet applied, to review what material was redacted);
- The complete organized file relevant to the FOIA, including communications with the requester;
- Points of contact for staff in the Contributing Offices who worked on the request; and
- All communication regarding the processing of the FOIA, as well as all documents responsive to the FOIA (released, withheld in full and withheld in part), should be included in FOIAonline.

Pursuant to the 2016 Amendments to FOIA, the period to appeal an adverse determination is 90 days from the date of issuance of the adverse determination. As such, it is important to keep the above-noted information readily accessible in case an appeal is filed.

- For large volume responses, keep an organized electronic copy of the relevant materials to provide to OGC in the event of an appeal. FOIAonline currently does not permit bulk downloads of large volumes of documents, which complicates an expeditious review of a file.

Common issues on appeal relate to the adequacy of the Agency's search, the propriety of the Agency's withholdings, the propriety of denying a fee waiver, and the adequacy of the Agency's description of withholdings.

What are the potential outcomes in resolving an administrative appeal?

- **Appeal is Denied in Full:** OGC determines that all challenged actions were performed in compliance with statutory and regulatory requirements. No further action is needed.
- **Appeal is Granted in Full or In Part:** OGC determines that one or more challenged actions were not performed in full compliance with statutory and regulatory requirements in all aspects of the response.
    - *Without Remand:* OGC determination will complete the corrective action by attaching the releasable records or portions of records, or otherwise complete the corrective action for the Agency.
    - *With Remand:* Pursuant to 40 C.F.R. § 2.104(k), OGC determination will provide instructions for completing corrective action by remanding the request to the Action Office (the program office assigned to the request). That office should then address the instructions on remand.
        - Timing on remand: the instructions will either include a) a timeframe for completing the corrective action(s), or b) a timeframe for the program office to communicate a schedule for completion to the requester.
        - If you are instructed to release additional information to the requester, OGC advises that you re-open the FOIAonline case file for the request and upload the new responsive information to that case file.
        - In most cases, you should issue a new determination letter. OGC recommends that you do not include appeal rights if you were directed to

re-review withholdings or to conduct a new search and no additional material was withheld. Please contact OGC if you have questions about whether to include appeal rights after a remand. Be sure to upload any correspondence to the requester to FOIAonline before closing the request again.

LITIGATION

FOIA requesters can initiate litigation if the Agency denies their administrative appeal, or if the Agency fails to respond to their FOIA request within the statutory time frame. The attorneys in OGC's General Law Office handle all FOIA litigation filed against EPA. These attorneys work directly with Department of Justice (DOJ) attorneys to litigate the cases.

For a court to have jurisdiction to hear a case, the FOIA requester must allege that the agency has improperly withheld records. Allegations that an agency "improperly withheld records" may include:

- Failing to respond to a FOIA request within the statutory timeframe;
- Improperly withholding records, or portions of records, under a FOIA exemption;
- Not conducting a reasonable search for records;
- Denying a fee waiver or expedited processing; or
- Challenging a fee category designation.

General Overview of the Litigation Process

If the Agency is sued over a FOIA request, an attorney from OGC's General Law Office will reach out to the lead contact for the Action Office to discuss the administrative record supporting the FOIA action. If EPA has not provided a response to the FOIA requester, the OGC attorney will discuss with the lead contact for the Action Office where the Action Office is in the search and collection process and develop a production schedule.

The following provides a general overview of the primary steps in litigation:

1. **The Complaint:** A FOIA requester initiates litigation by filing a Complaint. In the Complaint, the plaintiff (FOIA requester) will identify the FOIA request(s) at issue and the bases for filing suit (e.g., agency's failure to respond to the FOIA, or a challenge to the agency's search and/or withholdings).
2. **The Answer:** EPA has 30 days (from the date the plaintiff serves the United States Attorney's Office) to respond to the Complaint in the form of an Answer. An Answer is generally EPA's first pleading and it responds, point by point, to the allegations in the Complaint. The Answer also includes any affirmative defenses or counterclaims EPA may have.
3. **Schedule for the Production of Documents (failure to respond cases):** If the case concerns EPA's failure to respond to a FOIA request, OGC and DOJ will initiate discussions with the plaintiff regarding a production schedule for any documents remaining to be produced. Once documents are produced, the plaintiff has an opportunity to review the documents to determine if the case can be resolved without further briefing. If the plaintiff reviews the documents and seeks to litigate any issue, such as the Agency's withholdings, the case proceeds to substantive briefing.
4. **Substantive Briefing:** If the plaintiff challenges the Agency's search or withholdings or raises any other issues, the case will proceed to briefing. Generally, FOIA cases are resolved when one or both parties file Motions for Summary Judgment. A Motion for Summary Judgment is a motion whereby the party filing the motion (the movant) asks the court to rule in its favor and dismiss all, or part, of the litigation. A Motion for Summary Judgment includes a motion asking the court

to rule in the moving party's favor and a brief called a Memorandum in Support of the Motion for Summary Judgment. The Memorandum in Support of the Motion for Summary Judgment is the Agency's opportunity to make its case and explain why the Agency met the relevant requirements in processing the FOIA request in dispute. In support of a Motion for Summary Judgment, EPA will file a declaration and *Vaughn* Index.

a. ***Declaration:*** The content of the declaration depends on the issues plaintiff has raised. A declaration contains factual statements and the declarant attests to the facts in the declaration under penalty of perjury. For example, in a case challenging the Agency's search, the declaration would address how the Agency searched for responsive records. The Agency's brief would, in turn, cite to the declaration and explain why the Agency's search was reasonable. In a case challenging the application of the FOIA exemptions to certain documents, the declaration would explain the nature of the documents at issue and the basis for the claimed exemption(s). The declaration assists the court in resolving the case without the need to review the documents in question in the underlying FOIA. (See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)).

    Who can be a declarant? The declarant must have "personal knowledge" of the facts presented. (See Fed. R. Civ. P. 56(e)(1)). Personal knowledge includes information provided to the declarant by co-workers or subordinates. Generally, the declarant is an individual in management who has personal knowledge of the processing of the FOIA request at issue.

    Briefing in a FOIA case may occur several months after the case is filed, especially in cases alleging a failure by EPA to respond to the FOIA request. It is important to maintain a well-documented case file, as that file will be useful in preparing the declaration.

b. ***Vaugh Index:*** Generally, the declaration references the Agency's *Vaughn* Index. A *Vaughn* Index is an index that describes the records withheld and the basis for the withholdings. There are different formats for a *Vaughn* Index, including, for example, an itemized description of each document, and a categorical approach, where similar documents are described together (as opposed to the itemized document-by-document approach).

Below is an example of an excerpt from a *Vaughn* Index.

545OneDrive2_00013175	ED_000454	Withheld in Entirety				Ex. 5 - Deliberative Process

Document 545OneDrive2_00013175 is a draft contract document for a statement of work between EPA and an unidentified contractor. This draft contract document was withheld in full under FOIA Exemption 5.

Exemption 5, Deliberative Process Privilege
The withheld information is protected under Exemption 5's deliberative process privilege because it is a draft of a statement of work between to SwRI and EPA. The document was circulated for review within OTAQ/ASD. The draft statement of work reflects pre-decisional deliberations between EPA employees about the work required under an EPA contract with SwRI who conducting testing for the EPAct Study/V2/E-89 Tier 2 Gasoline Fuel Effects Study. At the time the document was created, EPA had not finalized the statement of work, and EPA was still deliberating on the best approach to the contract. The withheld draft statement of work does not reflect an official Agency decision. The withheld information is deliberative because EPA employees and managers were still internally discussing issues related to contract requirements and testing parameters. This draft statement of work was circulated for review and comment, and it was not the final document. The document reflects recommendations and opinions that are considered as part of the EPA's decision-making process for finalizing contract documents. The draft statement of work does not represent a final agency action. Release of this information would discourage open and frank discussions among its staff and would also have a chilling effect on agency decision-making processes, and on the EPA's ability to have internal discussions and consultations concerning EPA's contracts. Furthermore, release would cause public confusion by disclosing rationales and reasons that were not in fact ultimately incorporated into the final statement of work and the final contract.

Segregability
There is no reasonably segregable information in this draft contract document, no meaningful portion could reasonably be released. To the extent there are facts in this document, the selection of those facts are an integral part of the deliberations in developing the final contract document and the facts selected may have varied between the draft and the final document, and the factual information contained therein is inextricably intertwined with the deliberative discussion concerning this document.

What is the role of the Action Office and Contributing Offices in Litigation?

The Action Office and Contributing Offices are responsible for:

- Ensuring that the OGC attorney assigned to the case has a copy of the entire FOIA file, including information about the search (*e.g.,* dates, terms, custodians, repositories, scope etc.); information related to the Agency's collection efforts; emails and other correspondence with the FOIA requester; and copies of the responsive records (both with and without redactions applied);
- Responding to any questions OGC has regarding the record;
- Completing the document production, which is relevant in cases involving a failure to produce records; and
- Reviewing all draft pleadings in the case and preparing the declaration in support of the Motion for Summary Judgment.

Litigation is time-consuming. EPA is also under court-ordered deadlines to submit briefs. As such, it is important that the FOIA team works together closely to ensure the deadlines are met.

Potential Outcomes

Courts generally dispose of FOIA cases based on Motions for Summary Judgment. If a court rules for EPA by granting the Agency's Motion for Summary Judgment, in full, the case will be dismissed. If the Court rules against EPA, in whole, or in part, there are different potential outcomes. For example, the court could ask EPA to submit the documents withheld under FOIA for *in camera* inspection so the court can assess the Agency's withholdings.

EPA would then submit the documents at issue for the court to review. *In camera* inspection is not common. During *in camera* inspection, plaintiff and plaintiff's counsel are not allowed to view the records; only the court views the records. If the court rules against EPA, another potential outcome is for the court to order the Agency to release some or all of the withheld records. If the court finds that the Agency failed to conduct a reasonable search, it could order the Agency to conduct a new search.

Attorney's Fees – What You Need to Know

A party seeking attorney's fees and costs in a FOIA action must show that it is both eligible for, and entitled to, such fees. The plaintiff also bears the burden of demonstrating the reasonableness of its fees. In assessing whether a plaintiff is eligible for attorney fees, the evaluates whether the plaintiff "substantially prevailed." If a plaintiff is eligible for attorney's fees, the court must then determine if the plaintiff is entitled to fees by evaluating four factors:

1. The public benefit derived from the case;
2. The commercial benefit to the plaintiff
3. The nature of the plaintiff's interest in the records sought; and
4. Whether the government's withholding had a reasonable basis in law.

Under FOIA, if payment of attorney's fees is required, those fees are paid by EPA. OCFO's Procedure 3 provides that payment of FOIA attorney's fees is made from funds appropriated to the Responsible Planning and Implementation Office (RPIO) involved in the FOIA judgment. The RPIO is generally the regional or program office designated by the FOIA Coordinator or FOIA Officer as the lead office (Action Office) for the FOIA request.

Message

From: White, Elizabeth [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F8AF641A6306479C9026142EF3B02BD7-WHITE, ELIZ]
Sent: 8/21/2018 8:19:37 PM
To: Farren, Victor [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b4e4ef4434e44bb488ab822e82780809-Farren, Vic]; Espinoza, Ana [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5e62ee5dcf1a473ab4c4875df22d90d2-Espinoza, Ana]; Newton, Jonathan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8a0f1a1699564041bd74c49a526c0fe5-Jnewton1]; Hope, Brian [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c27b55619fb248cc8776fc46cd3f8b0d-BHope]; No, Fredrick [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=422039a7a4804d38a105e25f983fd39a-No, Fredrick]
Subject: Fwd: Draft Improper Request Memo - NOT for circulation
Attachments: Memo Re. Improper Request Draft 7.3.docx; ATT00001.htm

FYI - please don't forward

Sent from my iPhone

Begin forwarded message:

> **From:** "Youngblood, Charlotte" <Youngblood.Charlotte@epa.gov>
> **Date:** August 13, 2018 at 12:16:52 PM EDT
> **To:** "White, Elizabeth" <white.elizabeth@epa.gov>
> **Subject: FW: Draft Improper Request Memo - NOT for circulation**
>
> Beth,
>
> FYI – our improper request memo. This is still in draft form and I would ask you not to circulate it outside of OEX, but I thought it might be helpful for your and your team as OGC's current view of the law.
>
> Charlotte Youngblood
> Deputy Associate General Counsel
> General Law Office
> Office of General Counsel
> U.S. Environmental Protection Agency
> (202) 564-0283
> youngblood.charlotte@epa.gov

Message

From: Hope, Brian [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C27B55619FB248CC8776FC46CD3F8B0D-BHOPE]
Sent: 3/5/2018 7:05:39 PM
To: White, Elizabeth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f8af641a6306479c9026142ef3b02bd7-White, Eliz]; Newton, Jonathan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8a0f1a1699564041bd74c49a526c0fe5-Jnewton1]; No, Fredrick [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=422039a7a4804d38a105e25f983fd39a-No, Fredrick]; Farren, Victor [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b4e4ef4434e44bb488ab822e82780809-Farren, Vic]
Subject: Deliberative Process / Ex. 5
Attachments: Deliberative Process / Ex. 5

Thanks again for your quick turnaround on this last week. Attached is a doc that consolidates your input.

Message

From: Newton, Jonathan [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8A0F1A1699564041BD74C49A526C0FE5-JNEWTON1]
Sent: 3/1/2018 4:16:12 PM
To: White, Elizabeth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f8af641a6306479c9026142ef3b02bd7-White, Eliz]; Hope, Brian [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c27b55619fb248cc8776fc46cd3f8b0d-BHope]; No, Fredrick [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=422039a7a4804d38a105e25f983fd39a-No, Fredrick]; Farren, Victor [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b4e4ef4434e44bb488ab822e82780809-Farren, Vic]
Subject: Reasonable Search Determination in HQ-2017-004942
Attachments: APPEAL EPA-HQ-2017-004360.pdf; DRAFT EPA-HQ-2017-004942 Townsend Appeal Determination2.docx; EPA-HQ-2017-004942 Townsend Appeal Determination.pdf

Deliberative Process / Attorney-Client Privilege / Attorney Work ProductEx. 5

Jonathan V. Newton, Attorney-Advisor
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 564-6164

From: Newton, Jonathan
Sent: Tuesday, April 25, 2017 9:59 AM
To: Kelly, Lynn <Kelly.Lynn@epa.gov>; Hope, Brian <Hope.Brian@epa.gov>; Farren, Victor <Farren.Victor@epa.gov>
Subject: RE: Draft of appeal determination for overbroad request

Hey Lynn,

Deliberative Process / Attorney-Client Privilege / Attorney Work ProductEx. 5

Deliberative Process / Attorney-Client Privilege / Attorney Work ProductEx. 5

Thank again.

Jonathan V. Newton, Attorney-Advisor
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 564-6164

From: Kelly, Lynn
Sent: Monday, April 24, 2017 4:52 PM
To: Hope, Brian <Hope.Brian@epa.gov>; Farren, Victor <Farren.Victor@epa.gov>
Cc: Newton, Jonathan <Newton.Jonathan@epa.gov>
Subject: RE: Draft of appeal determination for overbroad request

Deliberative Process / Attorney-Client Privilege / Attorney Work ProductEx. 5

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington, DC 20460 | phone: (202) 564-3266

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

From: Hope, Brian
Sent: Monday, April 24, 2017 4:37 PM
To: Farren, Victor <Farren.Victor@epa.gov>; Kelly, Lynn <Kelly.Lynn@epa.gov>
Cc: Newton, Jonathan <Newton.Jonathan@epa.gov>
Subject: Re: Draft of appeal determination for overbroad request

Deliberative Process / Attorney-Client Privilege / Attorney Work ProductEx. 5

- Brian
564-8212

From: Farren, Victor
Sent: Monday, April 24, 2017 4:14 PM
To: Kelly, Lynn; Hope, Brian
Cc: Newton, Jonathan
Subject: RE: Draft of appeal determination for overbroad request

Lynn,

Deliberative Process / Attorney-Client Privilege / Attorney Work ProductEx. 5

From: Kelly, Lynn
Sent: Monday, April 24, 2017 3:55 PM
To: Hope, Brian <Hope.Brian@epa.gov>
Cc: Farren, Victor <Farren.Victor@epa.gov>; Newton, Jonathan <Newton.Jonathan@epa.gov>
Subject: Draft of appeal determination for overbroad request

Hi Brian,

Deliberative Process / Attorney-Client Privilege / Attorney Work ProductEx. 5

Any questions, please let Kevin or I know. Thank you!

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington, DC 20460 | phone: (202) 564-3266
The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

April 26, 2017

Margaret Townsend
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374

Re: Freedom of Information Act Appeal EPA-HQ-2017-004942 (Request No. EPA-HQ-2017-004360)

Dear Ms. Townsend:

I am responding to your Freedom of Information Act (FOIA) appeal, dated March 13, 2017, which the Environmental Protection Agency (EPA or Agency) received on March 15, 2017. You appealed the March 2, 2017 decision of Victor Farren (decision), which denied as improper the FOIA request you submitted to EPA on February 28, 2017. Your February 28, 2017 FOIA request sought:

> all correspondence, including but not limited to, all letters, emails, text messages, instant messages, voicemails, and phone logs for any phones utilized by the new EPA Administrator Scott Pruitt ("Mr. Pruitt") from any and all agency and EPA servers, cloud portals, secure websites, computers, tablets, smart phones, etc., sent to or from Mr. Pruitt, with the exception of any records that are or will be publicly available (e.g., through regulations.gov). Please note, the Center is not requesting the actual email addresses utilized by Mr. Pruitt in the course of his official duties, but only the correspondence sent to and from his email addresses.

Request at 1. You also stated that, "[t]his request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request." Id. On March 1, 2017, an employee of the Office of the Executive Secretariat (OEX) contacted you regarding your request, and asked you to clarify your request. OEX notified you that your request does not reasonably define a set of records because it failed to provide necessary details such as key terms, subject matters or titles. As indicated in your appeal, you contacted OEX staff the same you declined to clarify your request. On March 2, 2017, OEX provided you with a final determination, closing your request because it failed to describe the records in a manner that would enable EPA to perform a search. In your appeal, you challenge the Agency's closure of your request, which was based on the fact that you did not reasonably describe the records sought.

I have carefully considered your request, EPA's decision, and your appeal. For the reasons set forth below, I have determined that your appeal should be, and is, denied.

Requirements for Making a Request

FOIA provides that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). Records are reasonably described if the description "enable[s] a professional employee of the agency who was familiar *with the subject area of the request* to locate the record with a reasonable amount of effort." Marks v. United States, 578 F.2d 261, 263 (9th Cir. 1978) (emphasis added) (internal quotations and citation omitted). Courts have explained that "[t]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters." Assassination Archives & Research Center, Inc. v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989). Courts have also held that agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records. See AFGE v. U.S. Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) (holding that "while [plaintiff's requests] might identify the documents requested with sufficient precision to enable the agency to identify them . . . it is clear that these requests are so broad as to impose an unreasonable burden upon the agency," because agency would have "to locate, review, redact, and arrange for [the] inspection [of] a vast quantity of material").

EPA's regulations also state that "[y]our request should reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them" and "[w]henever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter." 40 C.F.R. §2.102(c).

Based on my review of the description of the records you are seeking, I find that your request does not adequately describe the records you are seeking under the above standards. First, the explicit language of your request provides no defined limitations to the scope of your request. Your request seeks unknown records which "*although not specially requested*, are reasonably related to the subject matter of this request." Request at 1 (emphasis added). The very terms of your request would require EPA to go beyond the four corners of your request and attempt to identify what other documents are also "reasonably related to" the already broad descriptions in your request. Your request therefore lacks sufficient specificity to constitute a proper FOIA request. See Nurse v. Sec'y of the Air Force, 231 F. Supp. 2d 323, 329-330 (D.D.C. 2002) (explaining the requester's responsibility to frame requests with sufficient particularity and stating that an agency is not required to exercise "clairvoyant capabilities" to determine the nature of the plaintiff's request).

Second, your request also does not provide any subject matter for a subject matter expert to use to identify the responsive records with a reasonable amount of effort. EPA regulations state that "*[w]henever possible*, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter." 40 C.F.R. §2.102(c) (emphasis added). You state in your appeal that when you were contacted by OEX and asked to provide information on a subject matter, you stated that the subject matter was "Mr. Pruitt's conducting of official business." Appeal at 2. To accept this statement as an adequate definition of subject matter would render the relevant legal standard described above and in EPA regulations meaningless. Although requester's may not always be able to specify the date or author of an agency document, it is possible for a requester to provide even a basic subject matter of a request. Your appeal does not explain why you could not provide a general subject matter of your request beyond "official business."

Third, even assuming arguendo that such a description met the required standard, your request is unduly burdensome to the Agency due to the nature and volume of the requested records that EPA could identify. A request for all incoming and outgoing correspondence for the Agency Administrator "not limited to, all letters, emails, text messages, instant messages, voicemails, and phone logs for any phones" for even a minimum period of 11 days[1] is unduly burdensome to the Agency. A preliminary review of just one portion of the potentially responsive correspondence for the 11-day period results in approximately 30,000 records which require review and redaction prior to release. And in general, such an unbounded request requires high level staff to conduct a lengthy, burdensome, intra-agency review and coordination processes with multiple regional and headquarters offices for numerous documents relating to far-ranging, highly sensitive matters, including law enforcement matters, under distinct environmental statutes. You also indicated verbally to OEX staff that you plan to file a similar or identical request with EPA monthly, further indicating that your request is plainly beyond the scope of the Congressional intent of this statute. H.R. Rep. No. 93-876, at 6 (1974). See also Dale v. IRS, 238 F. Supp. 2d 99, 104-05 (D.D.C. 2002) (concluding that request seeking "'any and all documents . . . that refer or relate in any way'" to requester failed to reasonably describe records sought and "amounted to an all-encompassing fishing expedition of files at [agency's] offices across the country, at taxpayer expense").

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. § 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. Additionally, as part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 202-741-5770 or 1-877-684-6448; and facsimile, 202-741-5769.

Should you have any questions concerning this matter, please contact Lynn Kelly of my staff at (202) 564-3266 or at kelly.lynn@epa.gov.

Sincerely,

Kevin Miller
Assistant General Counsel
General Law Office

[1] Your February 28, 2017 request sought correspondence "since February 17, 2017." Request at 1. In your appeal, you state for the first time that you seek records between February 17, 2017 and the date of search. Appeal at 3. EPA regulations state that "[i]n determining which records are within the scope of a request, an office will ordinarily include only those records in its possession as of the date the request was received in the Headquarters or Regional FOI Office. If any other date is used, the office will inform you of that date." 40 C.F.R. § 2.103(a). Expanding the search cutoff date to the date of search as you now indicate further underscores the unreasonable breadth of your request, and EPA's determination that it is improper.

Message

From: Lubetsky, Jonathan [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E125D09A658E48119789CCAE5712B4A5-JLUBETSK]
Sent: 8/27/2018 3:45:49 PM
To: Farren, Victor [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b4e4ef4434e44bb488ab822e82780809-Farren, Vic]
Subject: RE: Relativity workspace instructions
Attachments: OAR FOIA Toolkit.Checklist.Edits.docx

Here it is. GO to the relativity section. You might find other parts helpful as well.

From: Farren, Victor
Sent: Monday, August 27, 2018 11:42 AM
To: Lubetsky, Jonathan <Lubetsky.Jonathan@epa.gov>
Subject: Relativity workspace instructions

Please email me, thanks.

Victor

OAR FOIA TOOLKIT

Steps to Efficiently Address both Simple and Complex Requests

Abstract

This document contains best step-by-step instructions, best practices, and guidelines to assist staff in complying with the Freedom of Information Act and EPA Policy without straining office resources. It draws almost in entirety from the Life Cycle of a FOIA – The Key Steps to Processing Any FOIA Request, which can be accessed at intranet.epa.gov/FOIA.

This document contains hyperlinks that allow you to navigate to the part of the document you're looking for. Click Ctrl and then click on one of the sections below be directed to its location.

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TRACKING THE FOIA PROCESS

The below checklist outlines the order of steps and action items to complete an individual FOIA request. Use this as a guideline to track the progress of your FOIA and to ensure you have completed all the necessary steps. Additional steps for 'complex' FOIA requests are colored in blue.

FOIA PROCESSING CHECKLIST- Simple and Complex FOIAs

Action Required	Target Deadline	Date Complete	Comments
Identify Action Office(s)			
Refine Scope of request			
Identify Custodians and Key Terms			
Submit Document Search to OEI			
Task appropriate EPA Offices in FOIA Online			
Organize Relativity Workspace			
Request a FOIA extension			
Obtain assurance of payment (applicable only for commercial requests without a fee waiver)			
Create and share a production schedule with action offices			
Identify Relativity Reviewers			

Obtain access for reviewers			
Assign batches to reviewers			
Submit document review instructions to reviewers.			
Determine additional review requirements. ☐ Triage ☐ Document Collection ☐ Review Setup ☐ 1st Line Review	Equity: Doc Collec: Review Setup: 1st Line:	Equity: Doc Collec: Review Setup: 1st Line:	
Produce and release documents ☐ OAR ☐ OGC ARLO ☐ Final Awareness ☐ FEAT ☐ Closeout	OAR: OGC: FA: FEAT: Closeout:	OAR: OGC: FA: FEAT: Closeout:	
Create reports of document review time.			
Enter admin costs into FOIA Online			
Load all relevant correspondence and supporting documentation to FOIA case file.			

Submit case for closure.			

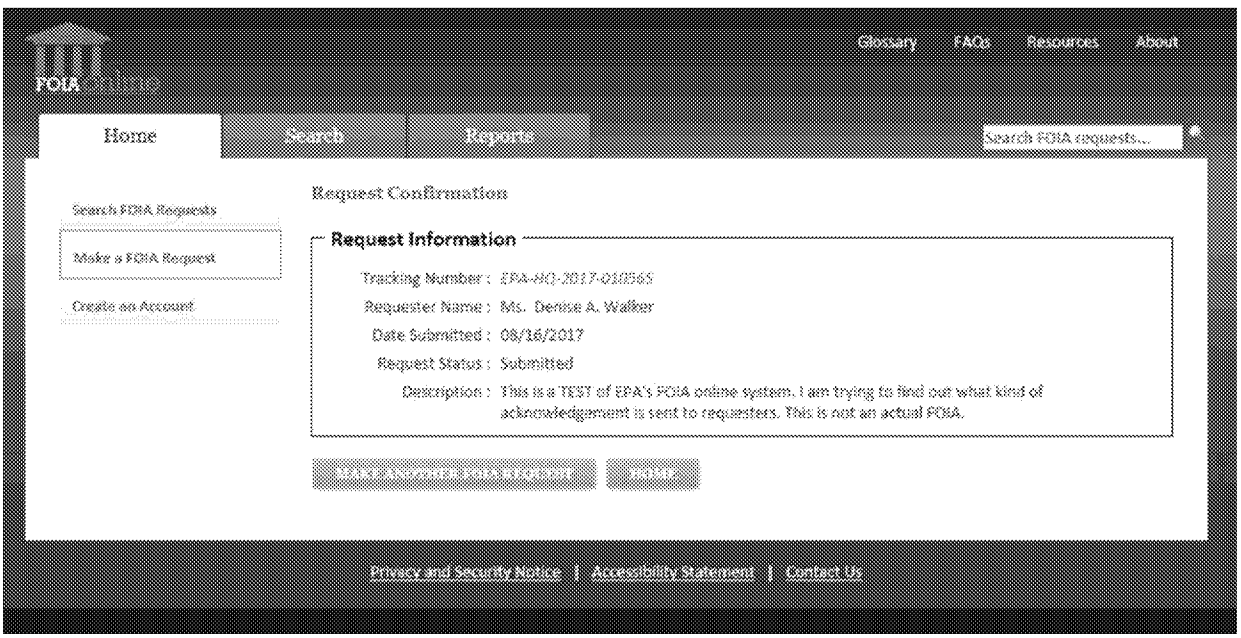
ACKNOWLEDGE RECEIPT OF THE REQUEST

How do I acknowledge receipt of a FOIA request?

FOIAonline

FOIA requesters can submit their written FOIA requests to EPA electronically via FOIAonline. FOIA requesters can also submit written requests to EPA's Headquarters or Regional FOIA Officers, in which case the National FOIA Program Office, or Regional Office, if applicable, will input the request into FOIAonline. All requests are processed through FOIAonline.

Once a request is submitted to FOIAonline, the requester receives notification immediately via the FOIAonline website confirming submission of a request. In this request confirmation, the requester is provided with a tracking number, the date submitted, and a brief description of the request as provided by the requester in the submission. An example of the response a FOIA requester receives upon submission of a request via FOIAonline is below:



FOIAonline then automatically generates an acknowledgement e-mail to the requester like the one below:

Reply Reply All Forward IM

Wed 8/16/2017 2:13 PM

foia_hq@epa.gov

FOIA Request EPA-HQ-2017-010565 Submitted

To Walker, Denise

Retention Policy Inbox (Never) Expires Never

This message is to confirm your request submission to the FOIAonline application: View Request. Request information is as follows:

- Tracking Number: EPA-HQ-2017-010565
- Requester Name: Denise A. Walker
- Date Submitted: 08/16/2017
- Request Status: Submitted
- Description: This is a TEST of EPA's FOIA online system. I am trying to find out what kind of acknowledgement is sent to requesters. This is not an actual FOIA.

The submission confirmation and the acknowledgment email are the first communication the requester receives from the Agency. The acknowledgment email also appears as the first correspondence entry as a system-generated email, which appears under the correspondence tab in FOIAonline.

Be sure to turn on the notification feature under the "My Account" tab in FOIAonline, as the system will then generate e-mails to your Outlook account notifying you to check FOIAonline for requests or tasks that have been assigned to you. Be sure also to check regularly the "My Cases" tab in FOIAonline, as you will find all pending requests and tasks listed here.

Initial Communication from Action Office

When you or your office is assigned as the lead (also known as the Action Office) on a FOIA request, you should immediately review the request and ensure that assignment to your office is appropriate. If you believe that your office should not be the Action Office for a particular FOIA request, immediately notify the FOIA Coordinator or FOIA Officer in the office that you believe should be the appropriate Action Office. If there is agreement, the FOIA request should immediately be reassigned via FOIAonline to the correct office. If you are unsure of the appropriate Action Office, you should immediately work with your office's FOIA Coordinator or FOIA Officer to resolve the issue in conjunction with the National FOIA Program Office. Be sure to communicate with the FOIA Coordinator or FOIA Officer in the other office before re-assigning the matter in FOIAonline.

After ensuring that the request is properly assigned to your office as the Action Office, as a best practice you should reach out to the requester by sending a short note through FOIAonline, letting the requester know your contact information, that you are reviewing the request and that you will be back in touch

promptly once you have had a chance to review the request fully. This can be accomplished by clicking the "Create Correspondence" in FOIAonline. The note might look like this:

Subject: [FOIA ID # XXX-XXXX]

Dear [FOIA Requester]:

My office has received your FOIA request. I will contact you again after we have had an opportunity to review the request fully. I will be your point of contact.

Please feel free to contact me directly with any questions or concerns. Additionally, at any point in time, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail at: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; by email at: ogis@nara.gov; by telephone at: (202) 741- 5770 or (877) 684-6448; or fax, (202) 741-5769

Sincerely, [Your Name]

[Your Phone Number]

Regular communication with the requester is fundamental to good FOIA processing. Start early!

OGIS, which is referenced in the sample noted above, is a FOIA resource for the public and the government. It can be found here. The FOIA Improvement Act of 2016 (hereinafter referred to as "the 2016 Amendments to FOIA") requires agencies to notify requesters of their right to pursue alternative dispute resolution through OGIS at certain points in the FOIA process, as explained below.

How much time do I have to respond to a FOIA request?

Statutory and Regulatory Time Limits

Under FOIA, you have 20 working days to process a request. 5 U.S.C. § 552(a)(6)(A)(i) (2006 & Supp. IV 2010). FOIAonline has a clock in the upper right hand corner that will help you keep track of how many days have passed since the National FOIA Program Office perfected the request. If you believe you can complete the request in 20 working days, let the requester know. If the request is not clear, you should seek clarification of the request.

Tolling Time Limits

You can stop the clock one time while you are waiting for clarification from a requester. 5 U.S.C. § 552(a)(6)(A)(ii). To do this, select "Stop the Clock" in FOIAonline and select the appropriate reason. Although you can only stop the clock once to clarify a request, you can stop the clock as many times as you need for fee-related reasons, including when the requester is required to provide an assurance of payment and has failed to do so. Fees are addressed more fully here.

Once the request is clarified or the fee issue is resolved, be sure to go back into FOIAonline and select "Start the Clock."

How do I get more time to respond to a FOIA request?

Unusual Circumstances and the 10-day extension, as provided in 5 U.S.C. § 552(a)(6)(B)(i). If you think you will need additional time beyond the 20 working days, you can provide the requester with a notice that you are invoking a 10-day extension for "unusual circumstances" per 5 U.S.C. § 552. This will give you a total of 30 days to respond to the request. This notice must: (1) be in writing; (2) include information on how to contact OGIS (as required by the 2016 Amendments to FOIA); (3) provide the requester with an opportunity to narrow the request (5 U.S.C. § 552(a)(6)(B)(ii)); and (4) be for one of the following reasons:

- the request requires EPA to collect responsive records from a field office or other entity separate from the office processing the request;
- the request involves a "voluminous" amount of records that must be located, compiled, and reviewed; or
- the request requires EPA to consult with another federal agency or other EPA components that have a substantial interest in the responsive information. 5 U.S.C. § 552(a)(6)(B)(iii).

As such, these circumstances are not all that unusual.

Extension of Time Beyond 30 days. If there are unusual circumstances and the request cannot be processed in 30 working days, you must provide the requester an opportunity to modify the request so that it can be processed within 30 working days or arrange for an alternative timeframe for completion of processing. 5 U.S.C. § 552(a)(6)(B)(ii). This notice must: (1) be in writing; (2) include information on how to contact OGIS (as required by the 2016 Amendments

to FOIA); (3) provide the requester with an opportunity to narrow the request; and (4) be for one of the unusual circumstances set forth in section 3.a. above. Requests that require the assistance of the Office of Environmental Information's (OEI) Discovery Services Division will likely exceed the 30-day limit. Please see Step 3 for additional information on how to submit search requests to the Discovery Services Division.

Consequences of not responding to a FOIA within time limits

While it's very common to take longer than 20 working days to complete a response, it is important to pay attention to statutory deadlines. Failing to respond to a FOIA within the statutory timeframe enables requesters to go directly to district court for relief, per 5 U.S.C.§ 552(a)(6)(C)(i). Failing to respond within statutory timeframes can also preclude the Agency from being able to charge fees, per 5 U.S.C. § 552(a)(4)(A)(viii).

Best Practice: Be sure to think about whether you will need additional time beyond the statutory 20 working days when you receive the request. Do not wait! Most complex FOIA requests cannot be processed in 30 working days (i.e., 20 working days plus 10 days for unusual circumstances), so take appropriate steps to notify the requester and arrange for additional time as soon as possible.

EVALUATE THE FOIA REQUEST AND DETERMINE FEES TO BE CHARGED, IF ANY

What is a proper FOIA request?

Before commencing a search for records pursuant to the FOIA, evaluate the FOIA request and confirm that it is proper. A proper FOIA request is one that sufficiently describes the records sought, i.e. it enables an Agency employee familiar with the subject area to locate the records with a reasonable amount of effort.

The FOIA was not intended to make government agencies full-time investigators on behalf of requesters or to allow requesters to conduct fishing expeditions through Agency files. The FOIA is about access to Agency records, but does not require the Agency to answer questions or create records to respond to a request. However, the breadth of the FOIA request or its burden on the Agency alone does not make a request improper – requests can be very large, yet still be proper. Instead, the key inquiry is whether the request sufficiently describes the records sought such that you have enough information to begin a search.

Applicable Legal Requirements

EPA's regulations at 40 C.F.R. § 2.102(c) state that the "request should reasonably describe the records you are seeking in such a way that will permit EPA employees to identify and locate them." Further, the regulations state "when possible, your request should include specific information about each record sought." Finally, the regulations state that this specific information should include (whenever possible):

- Date
- Title or name
- Author
- Recipient
- Subject

Requests do not need to have ALL of these elements to be proper requests; however, requests that contain none of these pieces of information (or only one) likely require clarification.

FOIA does not require EPA to do the following:

i. FOIA does not require EPA to create new records by compiling data or manipulating existing records, nor does it require the Agency to re-create records that were properly disposed of. Examples of this type of improper request include:
    a. "Make me a list of all Agency actions that …"
    b. "I want to know what the Agency is doing about …"
    c. "Provide me with information about who is working on …"

ii. EPA does not have to produce records over which it retains no control. An example of this type of improper request includes:
    a. "Provide me emails and communications between staff at XX Contractor" (if Agency employees are not included).

iii. EPA does not have to answer questions, interrogatories, or perform research to answer requests. Examples of this type of improper request include:
    a. "What files does EPA have on . . . ."
    b. "What did the EPA consider or rely on to ..."
    c. "How does EPA justify..."
    d. "Produce any documents that prove or disprove (statement or argument)."

iv. EPA does not have to produce purely personal records. Recall that the FOIA only requires the release of "agency records," *i.e.*, records that are created or obtained by an agency and under the agency's control at the time of the request. More information about what constitutes and "agency record" vs. a "personal record" is available here. An example of this type of improper request includes:
    a. "Please provide me EPA employee John Smith's recent home appraisal."

v. EPA does not have to explain or justify Agency decisions. Examples of this type of improper request:
    a. "Provide the basis for the Agency's decision to ..."
    b. "Provide any records supporting the statement that ..."

vi. EPA does not have to "hold" a request open for FOIA requests that seek records that EPA may create at some point in the future (i.e. records that do not exist at the time the request is received). Example of this type of improper request:
    a. "Provide the final XYZ Report when it is finished next month."

Tip: If, when reading the request, you think "I don't even know how we would begin to search for this", you probably have an improper request. Don't try to guess what the requester is searching for—contact them to clarify. Skip to the section on Communicating with Requesters for more best practices.

Requests that Only Seek Information Already Publicly Available on EPA Websites

These types of requests can be closed once you respond to the requester and direct the requester to the specific location where EPA has made the information publicly available. Locations may include the following:

- EPA's website
- EnviroFacts
- ECHO
- MyProperty
- FOIAonline
- ChemView

Perfecting Requests

Under current EPA procedures, the National FOIA Program Office documents the date on which the request is received as both the "submitted" date and "perfected" date in FOIAonline.

Because the request will be assigned to the Action Office as "perfected", it is that office's responsibility to determine if the request is proper and, if necessary, to seek clarification. Again, you can only stop the clock once to clarify the request during the first 20 working days.

If you determine a request is not proper, below are the steps to take:

1. Prepare the Improper Request/ Seeking Clarification Letter (you can access a template here).

2. Send the letter through FOIAonline or regular mail to the requester, as appropriate. If the letter is sent through regular mail, ensure that a copy is included in FOIAonline under the "correspondence" tab, so all communications can be kept as part of the FOIAonline case file.

3. In the FOIAonline case file, click the "Stop the Clock" button on the Left Navigation.

4. Select "Clarification" in the Reason drop down menu.

5. Explain the reason for stopping the clock in the Notes field. Also, to avoid confusion later, be sure to type in the Notes field the date by which you expect a response from the requester.

6. Click the "Stop the Clock" button on the left side of the page in FOIAonline.

7. Wait for the requester to respond or the due date to pass. When the requester responds and clarifies the request, click the "Start the Clock" button on the left side of the page in FOIAonline.

8. Once you are on the "Start the Clock" screen, press the "Start the Clock" button on the bottom of the page.

9. If the requester does not respond by the due date or fails to provide a clarification that sufficiently describes the records sought, begin the close-out process using the Closure for Failure to Modify Template, accessible here.

10. If the requester responded or you were able to clarify over the phone, confirm the modification or clarification in writing. (For template, see Confirmation of Clarification Template Appendix, Step 2).

11. Once confirmed, go to the "Submission Details" tab in FOIAonline and click the box saying "Has Description Been Modified?"

12. Type the modified description in the box.

13. Click "Save Changes" button at the bottom of the page.

14. Process the request according to the modified description.

If you determine that the FOIA request could be deemed "improper" per EPA's regulations, you **must** contact the requester and ask them to clarify or modify the request. Note that under the FOIA, you have one opportunity to "stop the clock" to clarify.

Evaluate the FOIA Request with Your Review Team and Clarify as Needed

This document will clarify who is on your office's review team for processing a request.

Building your Review Team

For simple FOIA requests:

Your team consists of:

- Your office's FOIA Coordinator or FOIA Officer
- Subject-matter experts (SMEs) of the requested records
- Custodians of the request, or office staff that may have created or handled responsive records
- Anyone else willing to help
  Note: you should coordinate with your SMEs early and often, even on simple requests. They will be able to identify whether, where, and what records exist that need to be reviewed.

For more complex requests:

Your team will consist of:

- The Action Office (who is receiving the request)
- Any contributing offices (including federal agencies other than the EPA, if necessary)
- Subject-matter experts (SMEs) of the requested records
- FOIA Coordinator(s)/Officer(s)
- FOIA Analyst(s), if needed

If your request requires you to work with other offices, coordinate with them every step of the way. Act as a group and regularly check in with each other to avoid redundant actions or unnecessary confusion. The Action Office is responsible for clarifying the FOIA request in such a way that all affected offices agree, so it's imperative to stay in communication with all parties involved.

The most important question you should keep asking as you identify the relevant Contributing Office(s): *Are there any other program office(s) or custodian(s) that are likely to have responsive records?*

With your team, discuss the request and ensure it meets all the requirements of a proper request:

- Does it sufficiently describe the records sought such that your subject matter expert(s) know where to search for records?
- Is the following provided: date range, program office(s), custodian(s), and search terms?
- Can you, as the Action Office, articulate a search plan of action for the records sought?

If the answer to any of these questions is "No", or "I'm not sure", ***reach out to the requester for clarification of the request.*** *Refer to the section on Communicating with Requesters for communication best practices.*

Other questions to consider with your team include:

- Has this information been requested through FOIA previously?
- What, if anything, could be a hurdle to efficient processing of this request?
    - Does it concern any sensitive issue(s)? (*e.g.,* litigation, ongoing rulemaking)
    - Potential resource concerns? (Is your team in the middle of another large project? Is the request unreasonable as is, given the timeframe, cost, etc.?)

From these discussions, your team should have:

- A common understanding of the request
- A plan of action if the team determines the request is improper or requires clarification
- A sense of any obstacles/hurdles going forward that may need to be addressed as a team
- An idea of what needs to be discussed with the requester

COMMUNICATING WITH REQUESTERS

If at any point in processing the request, the team is unsure or feels a sense of hesitation about how to resolve a question about the scope of the request, it is best to reach out to the requester for clarification and discussion. Such an approach will go far in establishing a positive relationship with the requester and is good customer service. Below are some tips for efficient and productive communication with requesters.

Prepare.

Upfront preparation is imperative to ensure efficient and positive communications with requesters.

- If you need clarification about the **type(s)** of records sought, gather information about the types of records the custodians create, the record systems, how the records are organized, and how the records are maintained.
- If you seek clarification on the **topic(s)** of records sought, gather information about the issue(s) on which the relevant office(s) is focused. Consider any relevant/timely issue(s) affecting the office(s), recent or upcoming projects, and similar issues.
    - *Sometimes requesters deliberately submit a very broad request without much direction about a topic because, while they have an idea, they're not quite sure of how to articulate exactly the information they seek. Having current topics on hand when contacting the requester can be useful, so you can ask questions like, "You mention X in your request, but X is a very broad topic. Our office is working on a rulemaking related to issues like X, are you interested in documents about the rulemaking?", etc.*
- If you seek clarification regarding **custodian(s)**, consider who are the individuals in your program office who are most likely to have relevant records. While the entire program office might have response emails, for example, helping the requester to nail down the custodian list to the primary individuals with relevant responsive documents increases the likelihood that the requester will receive the relevant information they seek.

Call.

Most requesters are glad to hear from the Agency about their FOIA requests, even if the discussion might require giving the requester "bad news", such as the length of time needed to process the request. **Calling the requester on the phone** is often a better technique than emailing them, since it is a more personal and, often, a more time-efficient way to clarify uncertainties and expectations.

- Communication with the requester is very important because the Agency can help manage the requester's expectations. Most requesters are not familiar with EPA records, organizational structure, or technical capabilities. Educating requesters about EPA is often productive for the requester and helps inform the public about the Agency.
- This technique can also be a way to reduce the burden of the request on the Agency. Open, verbal communication with the requester about the nature of the request can often reveal more specifically what they're looking for.
    - *Practice Tip: If managing multiple requests on a similar topic, and another requester submits a narrower request or you have worked with another requester to clarify/narrow a request, consider proffering those ideas to other requesters. The more*

similar you can make related requests, the more straightforward your management of the FOIA projects will be.

Engage.

Engage in an open, friendly discussion with the requester. An adversarial approach will not help anyone. Requesters are more likely to participate in some give and take if they trust that the Agency staff want to assist them in fulfilling their FOIA requests.

Document.

If communications occur via email, upload all email communications to FOIAonline. If via telephone, be sure to memorialize your discussion in an email to the requester, and upload the email to FOIAonline. You may also communicate with the requester directly through the correspondence tab in FOIAonline. If for some reason you are unable to document your communications via email with the requester, at the very least, create a comment in FOIAonline recording the details of your communication.

What if the requester does not want to clarify?

- The Office of Government Information Services (OGIS) provides mediation services to resolve disputes between FOIA requesters and Federal agencies. FOIA requesters and agencies may request OGIS's assistance in resolving a dispute at any point in the FOIA process. OGIS works with the parties to attempt to reach a mutually agreeable resolution.
- Remember, under the 2016 Amendments to FOIA, the Agency must notify requesters of their right to pursue alternative dispute resolution through OGIS at three points in the FOIA process in response to:
    - Initial determination letters;
    - Appeal response letters; and
    - Letters regarding requests in which unusual circumstances allow for 10 additional working days to respond.
- Below is the language regarding OGIS to include in letters to the requester:
    - *You may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.*

Remember: We still have an obligation to respond to parts of the request that are unambiguous! One imperfect part of a FOIA request does not permit the Agency to fail to respond to the entire request!

FOIA FEES

The FOIA allows agencies to charge certain fees to requesters to process their FOIA requests. Requesters are placed into one of three fee categories, which determine the types of fees an agency may charge. In some circumstances, the FOIA allows for a waiver or reduction of fees. Below includes an overview as well as certain restrictions that apply to an agency's ability to charge fees.

Types of Fees

- *Search fees* may be charged for the time spent looking for responsive documents, even if the Agency does not locate any responsive documents or if the documents are withheld under a FOIA exemption. Examples of actions that are chargeable as "search fees" include time spent for meetings to discuss search strings/how to conduct searches, time spent searching one's computer and hard copy files, and time spent looking at the records to see if they are responsive.
- *Review fees* may be charged for "direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed." This includes reviewing documents to determine which, if any, exemptions apply. Review fees may *not* be charged for subsequent levels of review.
- *Duplication fees* include the direct costs of making copies of the documents. They also include, if documents are scanned, the staff time spent scanning the documents. For paper copies, EPA currently charges 15 cents per page. For electronic copies, you may charge for a physical medium, such as a CD, but *not* for uploading documents into FOIAonline.
- Some FOIA requesters may also ask that the records be "certified." This is a service for which the OMB Fee Guidelines allows agencies to charge fees. EPA charges $25 to certify records. For certification requests, contact the Program Assistant in the General Law Office in the Office of General Counsel.

Categories of Requesters

Which types of fees an agency may charge for processing a FOIA request further depends on the category into which the requester falls. The FOIA provides three fee categories:

Category 1: Commercial Use Requesters

According to the OMB Fee Guidelines, "commercial use" requesters are those who ask for records for "a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made." The focus is how the requested information will be used, not the identity of the requester. Accordingly, the fact that a requester has been placed in a "commercial use" category in the past does not mean that the requester will be similarly placed in the future. When the intended use of the records is not clear from the wording of the request, an agency can seek additional information from the requester to make a fee category determination. Common uses of the requested records that result in a "commercial use" fee categorization include using the documents in litigation. ***Commercial use requesters are charged all three types of fees (search, review***

and duplication).

Category 2: Educational institutions, noncommercial scientific institutions, and representatives of the news media

Educational Institutions include schools such as universities and vocational institutions. The requirement is that the institution must operate a program of scholarly research. The OMB Fee Guidelines specify that to qualify for this fee category, the purpose of the request must relate to the goal of the educational institution, not the goal of the individual requester. For example, a requester asking for documents to write a term paper would not qualify for the "educational institution" fee category. However, a professor requesting records related to her field of study for use in instructing students might qualify.

Noncommercial scientific institutions are defined by the OMB Fee Guidelines as simply a noncommercial institution that is "operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry."

The FOIA defines a "representative of the news media" as "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." The FOIA also explains that this category includes news agencies as well as freelance journalists if they "can demonstrate a solid basis for expecting publication through [a news media] entity, whether or not the journalist is actually employed by the entity."

Requesters in the Category 2 fee category are only charged duplication fees, but receive the first 100 pages of paper copies for free.

Category 3: Other Requesters

The "other" category is simply a catchall category for any requester that does not fall into either of the other two categories. Requesters in this fee category are charged search fees and duplication fees; however, they receive the first two hours of search time and the first 100 pages of paper copies for free.

The table below summarizes which fees an agency can charge for the processing of a FOIA request based on the fee category of the requester.

Fee Waivers and Determination

The National FOIA Program Office processes initial fee waiver requests. The FOIA provides that agencies should waive or reduce fees "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."

Any FOIA requester may request that EPA waive all fees associated with the request, but the request for a waiver of fees must be submitted with the accompanying FOIA request. The initial fee waiver determination is made by the National FOIA Program Office and may be directly appealed by the requester to the Office of General Counsel by filing an administrative appeal.

Fee waiver determinations are made on a case-by-case basis using the information accompanying the FOIA request and are made based on six factors outlined by the Department of Justice in its January 1, 1987 Fee Waiver Policy Guidance. Those factors take into account the following considerations:

- *The subject of the request*: Whether the subject of the requested records concerns "the operations or activities of the government."
- *The informative value of the information to be disclosed:* Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records are meaningfully informative about government operations or activities and are "likely to contribute" to an increased public understanding of those operations or activities.
- *The contribution to an understanding of the subject by the public is likely to result from disclosure:* Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.
- *The significance of the contribution to public understanding:* Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.
- *The existence and magnitude of a commercial interest:* Whether the requester has a commercial interest that would be furthered by the requested disclosure.
- *The primary interest in disclosure:* Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

Advanced Payments and Assurances of Payment

EPA can ask for an advance payment of fees from the requester in two circumstances:

1. When the fees will exceed $250.
2. When the requester has previously failed to pay fees in a timely fashion.

If you are working with a requester who has a history of prompt payment, you may simply ask for an assurance of payment, discussed below. If you are working with a requester with no history of payment, you may either ask for an assurance of payment or an advance payment. For requesters who have failed to pay in a timely fashion in the past, you should ask for an advance payment.

Per EPA regulations, you must provide written notice to requesters of anticipated fees more than $25 if the requester did not agree to pay a higher amount in the initial FOIA request or subsequently. EPA then requires a written assurance of payment from the FOIA requester, unless an advance payment was received.

A requester can also designate a fee limit with a FOIA request. The main request page in FOIAonline indicates whether a fee limit has been set by the requester. An assurance of payment is required if the estimated costs of processing the request exceed the fee limit.

Changes to fees after the 2016 Amendments to FOIA

The 2016 Amendments to FOIA added a new limitation to the ability of agencies to charge search fees. Generally, agencies can no longer charge search fees if the response is beyond the 20-day deadline (or 30-day in the case of "unusual circumstances"), even with an agreement from the requester.

The exception to this rule is that agencies may charge search fees (or duplication fees for "news media" or "educational" requesters) if:

- "Unusual circumstances" apply; AND
- "More than 5,000* pages are necessary to respond to the request;" IF:
    - Timely written notice has been made to the requester; and
    - "The agency has discussed with the requester how the requester could effectively limit the scope of the request." The agency must make at least three good-faith attempts to discuss limiting the scope of the request with the requester and the communication must be by written mail, electronic mail, or telephone.

*Note: "5,000 pages" refers to the number of pages in the total universe of documents required for review, (i.e., "collected" documents), not the number of pages that will ultimately be released to the requester.

TIP: If you expect the final FOIA response to occur beyond the 10-day extension and more than 5,000 pages are necessary to respond, notify the requester before the 10 days expires and discuss how they can limit the scope of the request.

- If you know that unusual circumstances will apply when you receive the request, invoke the additional 10 days in your acknowledgement letter and invite the requester to narrow.
    - This will satisfy the "timely notice" requirement and will qualify as your first attempt to discuss with the requester how to limit the scope of the request.
- If a fee assurance letter is sent later, include another opportunity for the requester to discuss how to limit the scope.
    - This will qualify as your second attempt to discuss with the requester how to limit the scope of the request if the first request went unanswered. If the requester has not responded to either attempt, you will only need to make one additional attempt to contact them before satisfying the requirement that the Agency make three good-faith attempts.
    - If in response to any attempt to discuss how to limit the scope of the request, the requester refuses to limit the scope, it is not necessary to make any additional attempts.

For fee tips pertaining to more complex FOIAs, skip to the section on Complex FOIA Fees.

Fee Tips for Complex FOIAs

As with processing any FOIA request, when processing complex requests, you should be aware of the requester's fee category (or whether the requester has been granted a waiver) when evaluating the request. When you receive the request, consider whether the fee limit is reasonable considering what's requested. If the fee limit is not reasonable, consider preparing a fee estimate and reaching out to the requester to discuss the issue.

If you have unusual circumstances and followed the steps to extend the due date an additional 10 working days, but you are not confident you can process the request within 30 working days, give notice to the requester *before* the 30th working day of the unusual circumstances! Otherwise, you forfeit the ability to charge certain fees to the requester.

Consequences for failing to assert unusual circumstances:

- If a commercial requester, Agency cannot charge search fees.
- If a media/educational or noncommercial scientific institution, Agency cannot charge for duplication fees.
- If other requester, Agency, cannot charge search fees.

For more information, see the National FOIA Program Office's FOIA Fees Decision Tree here.

PLAN AND CONDUCT A SEARCH FOR RESPONSIVE RECORDS

*This document will identify the roles and responsibilities of each office in processing a FOIA request. The **Action Office**, which is the office that has been assigned the FOIA request, is responsible for taking the lead in developing and implementing the search plan. The Action Office needs to identify the other offices, if any, where responsive records may reasonably be located. If the Action Office determines that other offices may have potentially responsive documents, the Action Office needs to work with those Offices (called **Contributing Offices**), as discussed below, to develop and implement a search plan.*

Throughout this section, we will refer to the Action Office and Contributing Office(s) and discuss each office's role in the search process. To ensure efficient processing and avoid duplication, the Action Office should take the lead in developing a search plan and disseminating clear, consistent direction to Contributing Offices. Avoid situations that would allow Contributing Offices to have different interpretations of a FOIA request and thus use different search strategies or terms in processing the request. An effective search requires planning and, most importantly, coordination.

Legal Requirements for a Search under the FOIA

The FOIA requires federal agencies to make available to a requester any agency record that is responsive to a proper request. See 5 U.S.C.§ 552(a)(3)(A). To locate responsive records, agencies must conduct a reasonable search for records, i.e. a search that is reasonably calculated to uncover all relevant documents. A "reasonably calculated" search does not require a "perfect search," and failure to produce "one specific document" does not deem a search inadequate. See e.g., Defenders of Wildlife v. Dep't of Agric., 311 F. Supp. 2d 44, 54 (D.D.C. 2004); Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003).
Rather, the adequacy of the search is examined based on the reasonableness of the search given the totality of the circumstances. Weisberg v. U.S. Dep't. of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The Action Office needs to ensure that the Agency makes a good faith effort to conduct a search through methods that can be reasonably expected to produce the information requested. See Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 67-68 (D.C. Cir. 1990).

1. Develop a Search Plan.

   Before developing a search plan, you should have already confirmed that the FOIA request is a Proper Request and, if it is not, sought clarification from the requester. If not, return to the section on Communication With Requesters.

   a. Review the request again and consider what the request seeks.
   b. Regardless of whether your FOIA involves a request for records in a single office or multiple, you need to:
      i. Identify where to search.
         1. What offices might have documents?
         2. Are the records requested located solely in one office?
            a. If not, the Action Office should identify the offices (both HQ and Regional offices) where responsive records may reasonably be located. If responsive documents are located in more than one office, the Action Office needs to identify those offices

(Contributing Offices) and ensure that those offices understand the scope of the FOIA request.

3. Where are the documents?
    a. Once the Action Office has identified whether records are located in one or multiple offices, it next evaluates where to search for records within each office, e.g. repositories for paper files, emails electronic documents. In doing this, again refer back to the FOIA request. If it asks for documents in only one repository (e.g., Outlook emails) the search can be tailored accordingly. If the request is not limited to a repository but rather seeks topics on a topic in a timeframe, be sure to evaluate the locations where responsive records may be located.

    Potential locations include, for example:
        - Outlook email, calendars
        - Skype/Lync Chats
        - Lotus Notes mailboxes or calendars, other Lotus Notes databases
        - Enterprise Content Management System (CMS)
        - Local or shared computer drives (e.g., C:, F:, G:)
        - SharePoint sites
        - OneDrive
        - Mobile devices (e.g., text messages and photographs)
        - External drives and discs
        - Hard-copy files
        - And other locations reasonably likely to contain responsive records.

ii. Determine who should search.
    1. Once the Action Office identifies *which offices* potentially have responsive documents and where to search for those documents, the Action Office next needs to identify *who* would have potentially responsive documents. In identifying this list of individuals (referred to as custodians or individuals likely to have responsive records), include any custodians who are specifically named in a FOIA request or whose positions at the Agency suggest they are reasonably likely to possess responsive records. Also consult with subject-matter experts (SMEs) to determine which other custodians may have potentially responsive documents.
    2. Once the Action Office has coordinated with the Contributing Offices and has received the lists of potential custodians from Contributing Offices, the Action Office should compile the complete list of custodians and document that list in the search plan.

a. Before moving on to the next step in developing the search plan, take a moment and document in FOIAonline: (1) which offices beyond the Action Office may contain potentially responsive documents, (2) where to search for those documents, and (3) the list of custodians (including custodians from the Action Office and all Contributing Offices).

i. **Remember to consider former employees, employees who transferred to a different office, and contractors and assess whether any of these individuals would be potential custodians based on the information requested.**

iii. Determine how the search should be conducted.
Once you identify the locations of potentially responsive documents and their custodians, consider how you will conduct your search. See the section on Centralized Searching In EPA's Microsoft Office 365 System or How To Search For Items Not Located On EPA's Microsoft Office 365 System.

c. These three items represent the core elements of your search plan.

d. Consider the content of the request and where responsive documents would be located. If the request seeks only Outlook emails, then your search should be focused accordingly on Outlook emails. However, FOIA requests tend to be broad and seek, for example, documents regarding a particular topic during a particular timeframe.

TIPS ON DOCUMENTING SEARCH AND COMPLETING IMPLEMENTATION OF SEARCH

It is important to document the search that was conducted. It's recommended that the lead for the Action Office develop a memorandum or checklist to track the search. Specifically, the lead for the Action Office should note:

- The Contributing Offices searched
- The locations within those offices and the Action Office searched
- The list of custodians and whether the custodians have completed their search
- The number of responsive records

PERIODIC UPDATES TO THE REQUESTER

As a best practice, you should periodically contact the requester to provide updates on the status on the Agency's processing of the request, particularly if it will take longer than 20 working days to issue a final response. Communication with the requester is important so that they understand that the Agency is actively working to complete its response to the request. Consider providing interim or partial releases to demonstrate to requesters that you are actively processing the request. Such releases also give the requester insight into the types of records responsive to the request and may even result in the narrowing of the request.

Best Practice: Document your search plan and update it as you implement the search. This will enable you to track the process and build a strong administrative record, which is important if the requester appeals and/or later sues EPA challenging the adequacy of the Agency's search.

Centralized Searching in EPA's Microsoft Office 365 System

Searches for information in EPA's Microsoft Office 365 System are generally conducted by OEI's centralized search service. This service can locate records located in:

- Outlook email messages
- Outlook calendar entries
- Skype/Lync Chats.

Before contacting OEI, the Action Office should evaluate the request carefully and determine whether a centralized search is warranted. For example, if a FOIA request seeks a specific document, the document can be retrieved and produced without a centralized search. By contrast, if the request seeks all communications between two EPA individuals for a one-year period, the Action Office should pursue a centralized search request.

The Action Office is responsible for submitting the centralized search request to its Search Point of Contact (SPOC), who, in turn, will submit the request to OEI's Discovery Service Division for processing. Each organization has a SPOC, and that SPOC works directly with OEI's Discovery Services Division in processing search requests. Contributing Offices should not submit any search requests to OEI.

For each FOIA request, only one search request should be submitted to OEI, and it should be submitted by the Action Office.

If this does not occur, OEI is left in the untenable position of trying to consolidate search requests on a single FOIA. The Action Office should consult with the Discovery Services Division about the estimated timeframes for beginning and completing a requested search/collection, so other steps in the process can be planned accordingly.

Instructions for submitting a centralized search request through your SPOC are located here.

Before the Action Office Initiates the Centralized Search, ensure that information provided to the SPOC that will provide it to OEI's Discovery Services division includes:

- All custodians (by name and email address) from both the Action Office and all Contributing Offices
- Search terms reasonably likely to yield responsive records.

It's important for the Action Office to coordinate with the Contributing Office(s) to ensure that the search terms capture the scope of the records sought.

Searching for Documents in Repositories that are Not Captured by a Centralized Search

OEI runs the centralized search for Outlook records for EPA, including Outlook emails, calendar entries, and Skype for Business chat messages. For routine FOIA requests, the Discovery Services Division **will not** search:

- Lotus Notes mailboxes, calendars, or databases of any kind
- The Enterprise Content Management System (ECMS)
- The Correspondence Management System (CMS)
- Local or shared computer drives
- SharePoint sites
- OneDrive
- External drives
- Hard-copy files
- Any other non-Outlook locations where you may find responsive records.

It's important for custodians to evaluate all repositories that are reasonably likely to contain responsive records. This could include a personal email account if that account was used to conduct government business and if the email has not yet been forwarded into the Agency's system. Consistent with the Federal Records Act Amendments of 2014 and the Agency's Records Policy, any employee who uses a personal messaging system, such as email, to conduct government business has 20 days to forward that information into the Agency's Outlook system. Once forwarded into EPA's email system, the information can be captured via the centralized search.

OEI's centralized search also does not extend to data that are uniquely retained on mobile devices, such as text messages, photos, or notes that are unique to the mobile device. Custodians should be reminded of the Agency's guidance regarding forwarding text messages into the Agency's Outlook system, as such messages can be captured via the centralized search once the messages are in Outlook.

Instructions on how to forward text messages to EPA email accounts are located here.

Consistent with its search plan, the Action Office should email to all custodians providing specific search instructions to be followed regarding all non-Outlook document repositories. The instructions should read something like: "The agency has received a FOIA request for which you may have responsive documents. A centralized search for your Outlook emails is already being conducted. You should conduct a manual search for non-Outlook documents potentially responsive to the FOIA request.", etc. The instructions should also include:

- The FOIA request number;
- A clear description of the FOIA request (and any narrowing/clarification);
- A copy of the FOIA request and any relevant correspondence with the requester;
- Recommended search locations and instructions to search all non-Outlook repositories where responsive documents may be held;
- Recommended search terms;
- Recommended document collection method (i.e., where responsive documents should be provided); and

- Date by which documents collected are to be transferred to the Action Office.

To provide custodians ample time to search for non-Outlook documents, it is recommended that the Action Office provide custodians the search instructions for non-Outlook documents at or shortly after the Action Office submits the Outlook centralized search request. In the search instructions, ask custodians to document, with as much specificity as possible, how they conducted their search.

After distributing the search instructions, and before the collection period ends, the lead contact for the Action Office should touch base with the custodians to ensure that they understand their responsibilities and how to conduct the search.

Below are tips the Action Office may want to consider as it develops search instructions to custodians to search for non-Outlook responsive records.

Lotus Notes

If a FOIA request seeks emails or information located in Lotus Notes, the Action Office should:

- Contact EZ Tech to set up a collection database. EZ Tech will send the lead contact for the Action Office a link to the database that the lead can then circulate to custodians via email. Custodians will then use this database to upload responsive documents.
- As noted above, identify in the search instructions, keywords and search terms for the custodians' use during the search of Lotus Notes.
- Provide custodians the step-by-step instructions for searching Lotus Notes.

Electronic Content Management System (ECMS), or EZ Email Records

Even though emails saved through EZ Email Records are archived into ECMS as Agency records, they are not captured by OEI's centralized search. So, if a responsive outlook email message was saved to ECMS and then deleted from the user's Outlook account, a centralized search will not retrieve that record in Outlook. Thus, it is important to remind custodians to search manually ECMS for any non-duplicative emails that may be responsive to the request.

Detailed instructions for ECMS are available here.

Note: Depending on the office, the Records Liaison Officer (RLO) may be able to conduct a centralized ECMS search for the RLO's office. If there are multiple offices, you may need to coordinate with RLOs from each office. Contact your RLO or the RLO from the relevant office(s) for more information.

Correspondence Management System (CMS)

CMS is an electronic document management system that captures, stores, and tracks correspondence that is addressed to EPA or any of its employees in their official capacity. Some offices may use CMS, for example, to document correspondence received, including responses to such correspondence. If a custodian determines that CMS may contain records responsive to the request, CMS should be searched.

Custodians may not have used CMS previously and may not have access to the system. In this case, the custodian can identify the individual in the office responsible for maintaining CMS and work with that person to complete the search. All CMS records are full- text indexed and searchable by any data element.

Other Locations

For all other locations, including, for example, local or shared computer drives, OneDrive, SharePoint sites, external drives and discs, and hard-copy files, custodians should conduct a reasonable search of these locations based on the request for records, as described in the FOIA request and any subsequent communications with the requester.

Access to Separated Employee Records

The Action Office and Contributing Offices should work together to ensure that custodians' files are searched, **even** if those custodians are on-leave and not in the office when the request is received, or if they have separated from the Agency.

Searching Document Repositories when a Centralized Search is Not Conducted

If a centralized search is not conducted, the custodian would need to search manually the locations where potentially responsive documents may be located. The Action Office, consistent with its search plan, should email all custodians providing specific search instructions to be followed. See above for guidance in preparing and disseminating search instructions.

Tips on Documenting Search and Completing Implementation of Search

It is important to document the search that was conducted. The lead for the Action Office should develop a memorandum or checklist to track the search. Specifically, the lead for the Action Office would note:

- the Contributing Offices searched
- the locations within those offices and the Action Office searched
- the list of custodians and whether the custodians have completed their search; and

- the number of responsive records.

Once the search is complete, the team can develop and implement a review plan.

Periodic Updates to the Requester

You should periodically contact the requester to provide updates on the status of the Agency's processing of the request, *particularly* if it will take longer than 20 working days to issue a final response. Communication with the requester is important so that the requester understands that the Agency is actively working to complete its response to the request.

Consider providing interim or partial releases to demonstrate to requesters that you are actively processing the request. Such releases also give the requester insight into the types of records responsive to the request and may result in the requester narrowing the request.

Documenting and Updating your Search Plan

Document your search plan and update it as you implement the search. This will enable you to track the process and build a strong administrative record, which is important if the requester appeals and/or later sues the EPA challenging the adequacy of the Agency's search.

DEVELOP AND IMPLEMENT A REVIEW PLAN FOR POTENTIALLY RESPONSIVE DOCUMENTS

Develop your Review Plan

Identify Levels of Review

The Agency's FOIA procedures call for Division Director or equivalent approval of FOIA responses. The approval applies to both withholdings and releases. Before you begin to review the records, review your office's FOIA procedures here and think through who will likely need to review the records.

Depending on the size and complexity of the FOIA request, it may be just you doing first level review and your manager completing the second level review of the records, or it could involve multiple levels of review.

Practice Tip: If there are multiple offices involved or if you are working on a FEAT FOIA, individual office procedures may need to be adapted to accommodate overall processing of the request.

Regardless of the complexity of your FOIA, the review cycle of a FOIA should include consideration of all the steps below. Bear in mind that not every review will include documents that will require review at each of these steps; however, be mindful of these steps as you plan your review process.

It is imperative that you plan your review process early so reviewers at every step have adequate time to review the materials.

1. **First Level Review**. You (and your team, if you have one) take the first step to review the records. In doing so, evaluate the following:
    - Responsiveness: Responsive documents are those documents that match the description in the request. Be sure you clearly understand what the requester wants. Non-responsive records do not need to be produced.
    - Disposition: If the record is responsive, the first level reviewer then evaluates the documents to determine what, if any, FOIA exemptions apply and based on that analysis, whether a document should be released in full, withheld in full, or released with redactions.
    - Exemptions: If the record is responsive and should be withheld or redacted, identify the exemption(s) that applies(apply) and redact the document consistent with the claimed exemption(s).
    - Equities of other EPA offices: If the record is responsive and contains discussions or information from another EPA office, identify those records for internal equity review, as described below.
    - Equities of other federal agencies or the White House: If the record is responsive and contains discussions or information from another federal agency or involving the White

House, you will need to identify those records for external equity review, as described below.

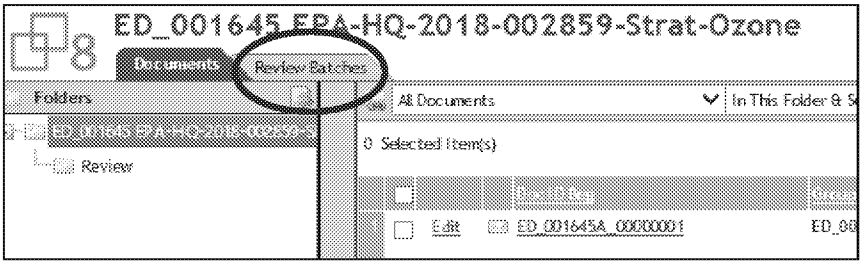
- Documents that upper management should be aware of prior to release: During first level review, you should mark for further review any documents you think management may have a specific interest of being aware of prior to release.

2. **Second Level Review**
    - Consistent with EPA's procedures, all FOIA responses in which documents are released or withheld must have approval of someone at least at the Division Director level or equivalent.
    - For many FOIAs, particularly those that are complex or voluminous, there may be other layers of review prior to the final management review. For example, your office may decide that a particular project warrants a second level review at the staff level prior to documents going through management review. Second level review can take many forms. This should be discussed with the FOIA team in conjunction with your management.
3. **Equity Review**
    - An office other than the office that conducted the first-level review may have an interest, or equity, in certain documents. Many factors go into determining when an office has "equity" in a document. In general, an office has equity in a document when the document includes information of substantive interest to that office. This includes documents that were created in that office, emails involving personnel from that office, and opinions or advice given by an attorney in a legal office. In general, any office with equity in the document should have the opportunity to review the document, and weigh in on whether they agree with the determinations made with respect to responsiveness and FOIA exemptions.

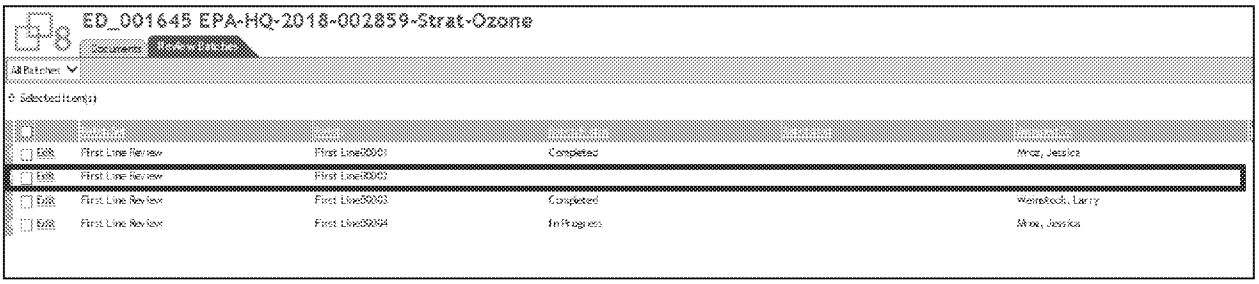
Practice Tip: If there is another agency or EPA office involved, notify that agency or office early and find out where to send the records for review. If the request involves only a few documents, you may consider discussing the records over the phone.

Assign Documents in Relativity

1. Go to https://webreview.epa.gov/ and log in.
2. Open up the appropriate workspace.
3. Go to the "Review Batches" tab at the top left of the page.

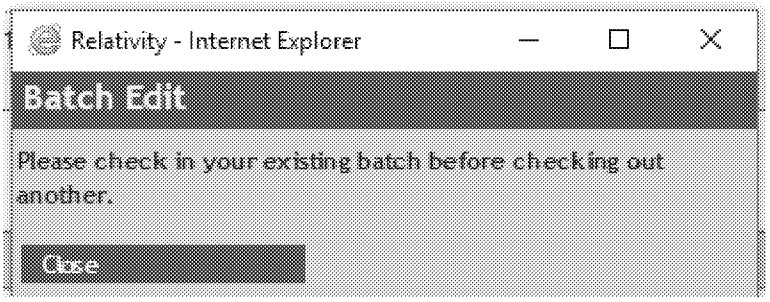


4. Look under the "Batch Status" column to and select a batch that is blank. This means it is not yet assigned to a reviewer.



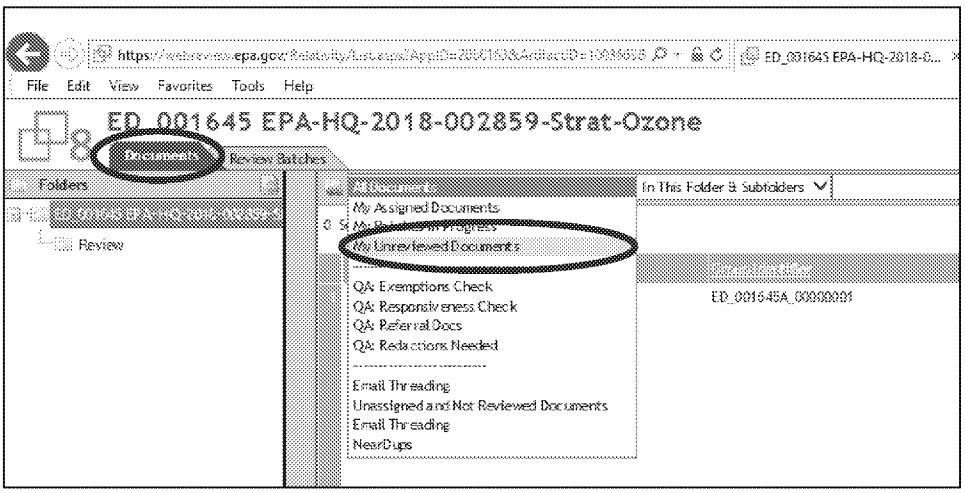
5. Click "Edit" on the row of documents you would like to assign.
6. A separate window will open. Click "Check Out."

If you see this window –



Click "Edit" next to the documents you were previously assigned and click either "Check In As Complete" or "Check In As Pending" as applicable.

7. Begin reviewing documents in the "Documents" pane by selecting "My unreviewed documents" from the dropdown menu.



Guidelines for Reviewer Instructions on How to Determine Which Offices May Have Equity in a Document

The following provides some general guidelines to follow when developing instructions for reviewers on how to determine which offices may have equity in a document; in other words, if the document includes information of substantive interest to that office. Any office with equity in a document should have the opportunity to review it and weigh in on its responsiveness/exemptions.

OEX - Office of the Executive Secretariat (Administrator's Office)

- Any document containing the Administrator's primary or secondary email address.
- Any document generated by a senior member of the Administrator's staff: Deputy Administrator, Chief of Staff, Deputy Chief of Staff, political appointees in the AO.
- Prior Administrators.

Public Affairs Office

- Any document to or from a member of the press, or discussing a media or press inquiry.
- Any document related to the drafting of press releases or other press materials.

Congressional Affairs Office

- Interactions between EPA employees and elected officials (or their staff). This includes mayors, governors, and members of Congress.
- Interactions between congressional affairs staff and other arms of the government, including internal communications related to these interactions.
- Congressional hearing preparation.
- Development of responses to formal correspondence from Congress.
- Development of responses to Questions for the Record.
- Substantive input from an OCIR employee.

OGC/ORC - Offices of General Counsel/ Regional Counsel

- Any document generated by OGC/ORC attorneys, except scheduling documents.
- Any document containing non-public information discussing litigation or legal strategy.
- Any communication between an attorney and program client containing legal advice.

Program Offices

- Documents created or originating from that office.
- Substantive emails involving personnel from that office.

When in doubt about another office's interest in conducting an internal equity review or reviewing a specific document, call and ask.

<u>Best Practice:</u> If your request has significant attention or you anticipate the release of records will generate media attention, reach out to your public affairs office and congressional affairs offices early in the review process to discuss what role they would like in the document review.

Other Federal Agencies

- If another federal agency has equities in a document in an EPA FOIA review, we need to give that agency the opportunity to consult on EPA's disposition of the document or refer the document to the other agency for processing. It is ultimately the Action Office's responsibility to ensure this coordination occurs; however, when document review is tasked to a Contributing Office, the offices may agree that the Contributing Office is the one to reach out to the other agency.
- For assistance in determining whom to contact at another agency, please reach out to the National FOIA Program Office or the General Law Office or FEAT in OGC. Staff in those offices often have established FOIA contacts with other agencies. Other options are to check with your fellow FOIA Officers/Coordinators or to check the agency's website.

Interagency Consult	Interagency Referral
Another agency has a significant interest in a record, like an email exchange between EPA and another agency. **EPA may ask for that agency's recommendation as to how to treat the record.**	**A record was created by another agency but is in EPA's possession.** **EPA may refer the record to the relevant agency for them to process.**
Communicate with other relevant agencies about your request. They may not want to review records, but they should be aware of them.	**The other agency will be responsible for responding directly to the requester. Notify the requester that the documents have been referred. Provide the point of contact for the other agency.**

Practice Tip: If you have a large volume of records to share with other agencies, consider using the free platform OMB Max, found here.

White House

The FEAT Office in OGC coordinates all White House equity reviews. If you have documents in which the White House has equities, you should contact the Director of the FEAT Office.

Awareness Review

Awareness review is one of the final steps before documents are released. Awareness review is a "heads up" to upper management, the press office and the congressional affairs office that documents are about to be released to the public. Whether and to what extent an awareness review may be necessary in a production should be discussed with your management.

Final Approval

Consistent with the Agency's FOIA Procedures, after all necessary review is complete, a Division Director (or equivalent) should approve and sign off on the release and/or withholding of any documents under FOIA.

Identify Technology Options for Review

The Agency has two primary tools for reviewing documents:

- Relativity
- Adobe Pro DC

Adobe Pro DC is generally used only in cases where there is a small number of responsive documents. Relativity is used in most other cases.

See Setting Up Your Relativity Workspace and The Use Of Boolean Logic For Relativity Searches for more tips on using Relativity for more complex requests.

SETTING UP YOUR REVIEW TEAM'S RELATIVITY WORKSPACE

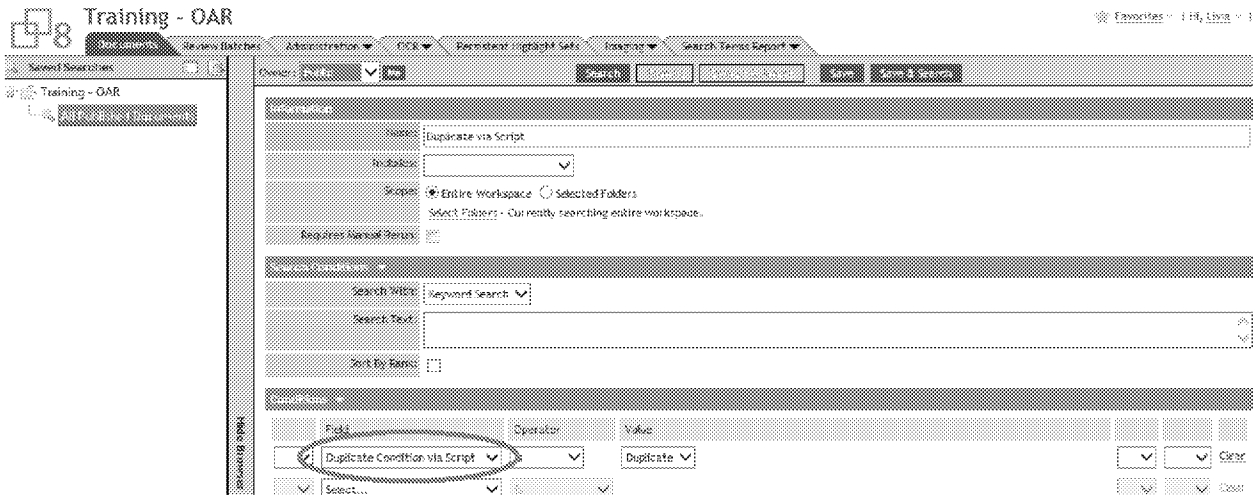
This document will show you how to get your Review Team's Relativity Workspace set up and organized. Before you actually start reviewing all the documents produced in a search, take the following steps. They will make Relativity much easier to navigate and should minimize the amount of review necessary for any request. Hit Ctrl and one of the links below to skip to that section.

Identify and Remove Duplicates
Identify and Remove Non-Responsive Documents
Create a Review Set of All Potentially Responsive Documents
Create Saved Searches and Batches for Different Stages of Document Review
Create Folders to Organize your Workspace

Log into your workspace, which can be identified using the last 4-5 digits of its ED number (e.g., ED_001333.)

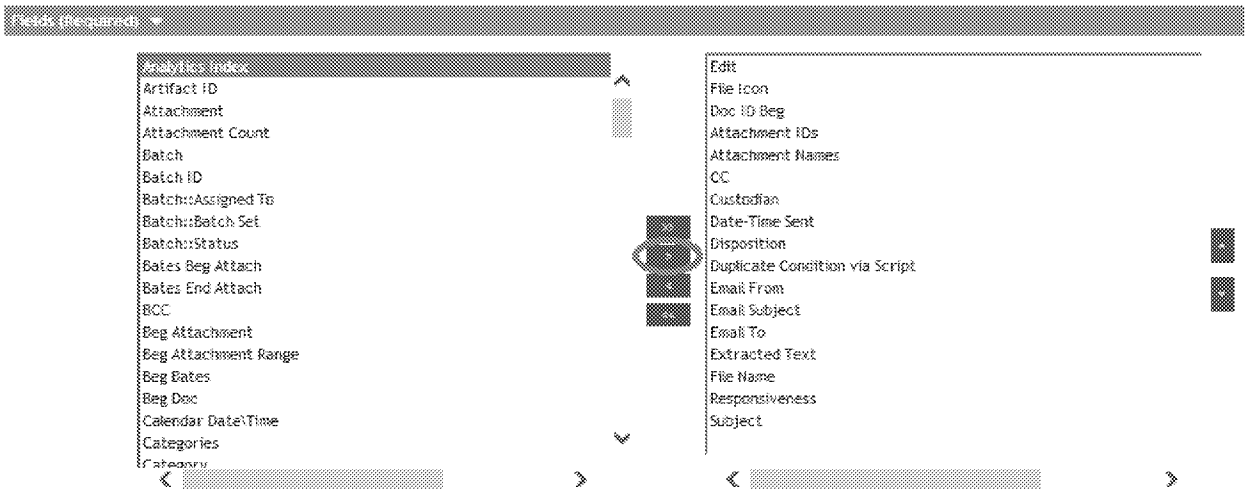
These instructions will get your review team's workspace and review pane set up.

1. **To reduce the number of files you have to filter through, first pull out all duplicate documents.** Some searches produce thousands, so this step can save you a lot of time.
    a. Create a new search using the icon at the bottom of the left pane. Click "New Search."
    b. Create a Save Search titled "Duplicate via Script".
        i. Under Conditions, set the field to Duplicate Condition via Script -> is-> Duplicate. *See below.*

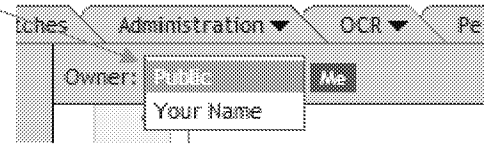


        ii. The **Field** section allows you to add which document elements will be visible for this search. These will vary depending on the kinds of documents you expect may be responsive (e.g., emails, spreadsheets, and/or text documents.) Select all fields that you think will contain useful information. Below, a number of options that are generally helpful have been selected and moved to the right

pane. You may not need all of these. Select each term so that it's highlighted in blue, then use the > arrow to add your selection(s) to the right pane. *See below.*

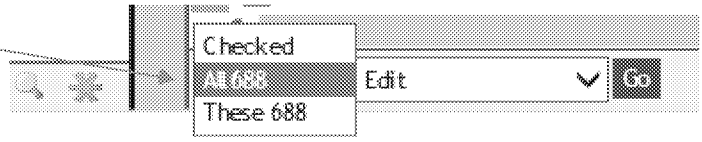


iii. *IMPORTANT: If you're creating a search that will be used by anyone other than yourself, be sure to set the Owner to "Public" using the pulldown arrow in the upper left corner so that the entire review team has access.*



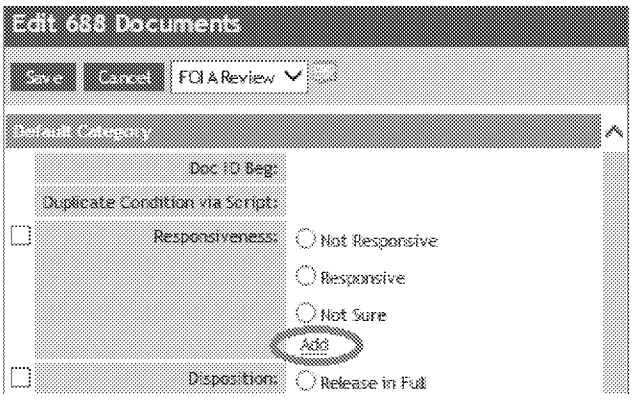
c. After following the above steps, click "Search."

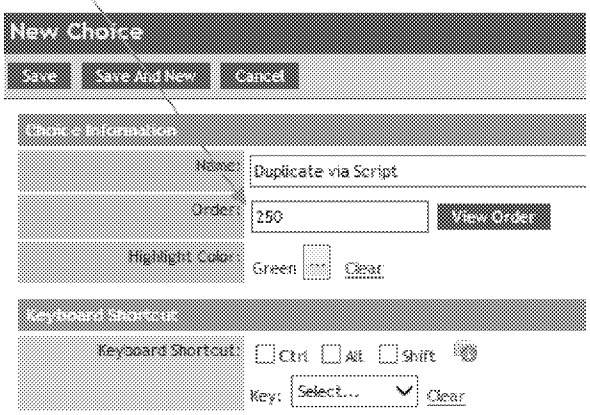
d. If your search brings up any duplicates, select them all by clicking **All [#]** in the pulldown tab on the bottom left of the screen.



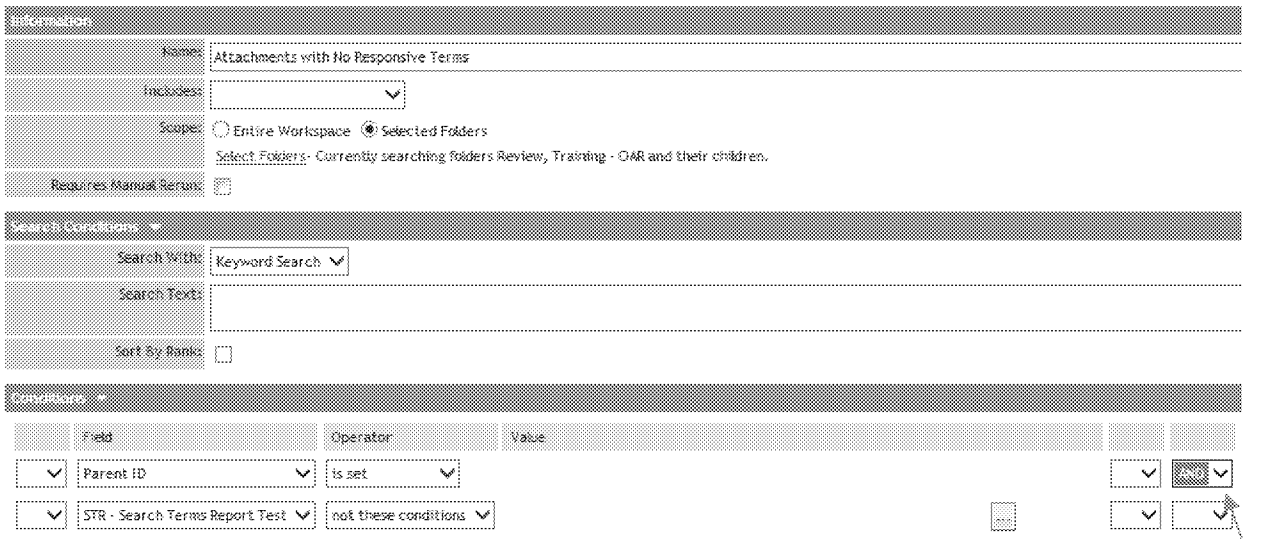
e. Click **Edit**, then click **Go**.

f. You should now see an **Edit [#] Documents screen**. Under **Responsiveness**, click Add to add a new check box for duplicates. On the New Choice screen, name this new choice "Duplicate via Script." [*Click View Order to determine what to enter for **Order**. In this case, the "Not Sure" button is 240. We want Duplicate via Script to appear underneath "Not Sure" as a choice, so the order should be 250.*]

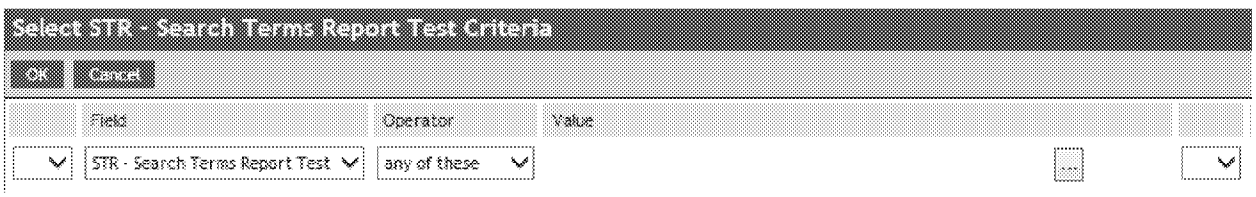


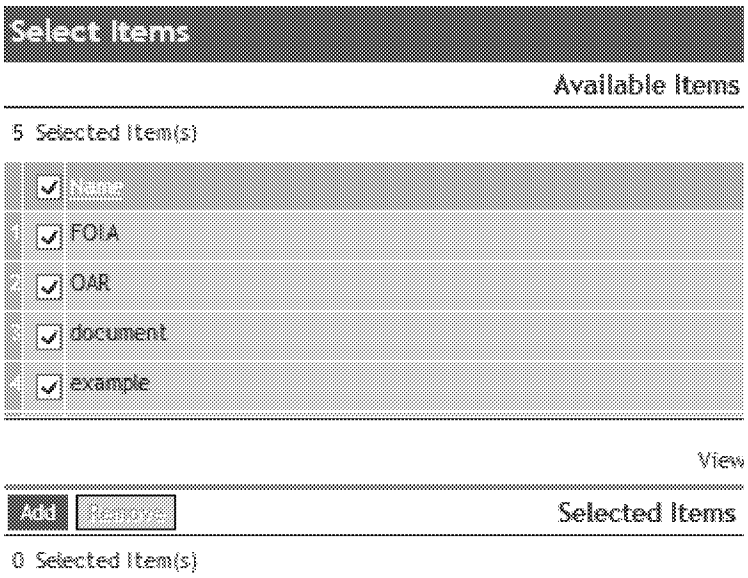


2. Remove unresponsive attachments to further narrow documents for review.



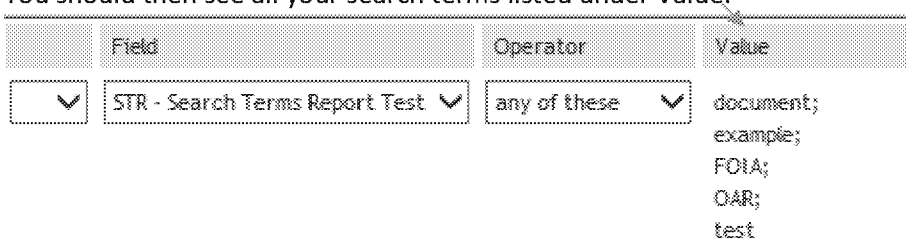
a. Create a new search titled "Attachments with No Responsive Terms".
b. Under Conditions, set Field to Parent ID and → <u>is set.</u> [*This is because we want families of documents, like email chains, to be pulled together so they're easier to read and understand.*]
c. Before setting the next condition, set the rightmost operator to AND so that the search accounts for *both* conditions. This is because we want the documents to be pulled only if they meet both conditions. See <u>Boolean Logic</u> for more tips on searches.
d. Also set Field to STR-Search Terms Report *Name*→<u>not these conditions</u>→then click the icon. *Note that the name that comes after "STR" may be different for your workspace.*
e. This will bring you to the "Select STR-Search Terms Report *Name* Criteria" screen (*below*.) Select STR once again→any of these→and then select the icon once again.





f. Select all necessary search terms on the "Select Items" screen *(above),* then click Add, followed by Set.

g. You should then see all your search terms listed under Value.



h. Click OK.

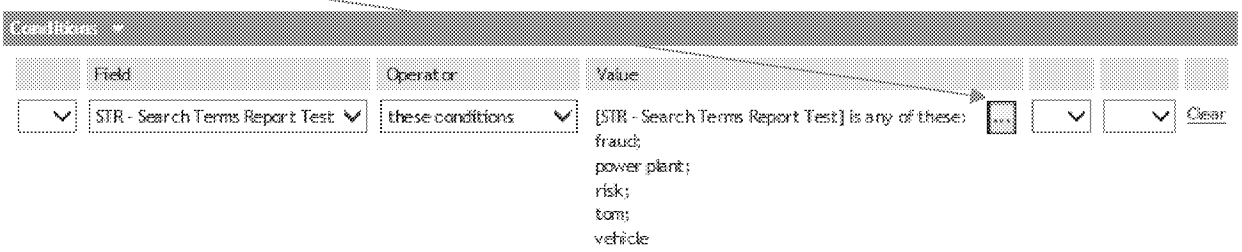
i. On the original Saved Search screen, click Save and Search.

   i. Depending on the nature of the FOIA request, you may decide to mark all of the documents pulled from this search as Not Responsive. To do so, simply mark them all as Not Responsive by selecting and editing all of them after saving your search, like above. (Note that you will simply have to select "Not Responsive"—you will not have to create a new choice for this step like you did above.) However, for many requests, it will be sufficient just to get these unresponsive documents in this folder and forget about them.

3. **Create a "review set" of all potentially responsive documents that need review.**

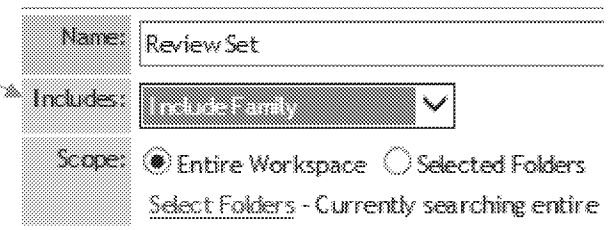
   a. Create a New Search titled "Review Set".

      i. Under **Conditions**, Set STR-Search Terms Report Name→these conditions→and, using this icon, select all search terms that would make a document responsive.



      ii. You could also add other elements to the search to filter through documents that are irrelevant. For example, if a requester specifically asked for documents from a certain year, you could add another condition that "Date-Time Sent" is a certain period of time.

      iii. Make sure to set **Includes: Include Family** to allow the search to produce all related documents, such as email attachments, together.



      iv. Just as you did for the Duplicates via Script search (*above*), select all **Fields** that you'd like to be visible for the search and use the > icon to pull them into the right pane.

   b. Click "Save and Search".

First Line Review

4. Create a New Search titled "First Line Review". This will pull out documents whose responsiveness has not yet been set, *i.e.*, they have not yet been reviewed by anyone.
    a. Under **Conditions**, set Responsiveness→ is not set.
    b. Set the rightmost operator to AND, and for the next **Conditions**, set (Saved Search)→document is in→ and use the icon to select Review Set.
    c. Like you did for all previous searches, use the icon to pull all relevant fields to the right pane.
    d. Save and Search.

TIP: It can save you a lot of time to create a new search by editing an existing one, particularly when using a lot of the same settings/fields. To do this, right-click on an existing search and select "Edit." You can then make changes to the existing settings, and clicking "Save As and Search" will save your changes as an entirely new search without changing or removing the original.

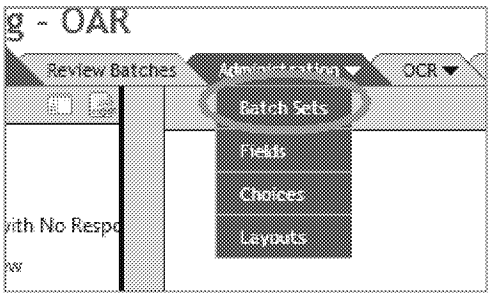
Equity Review

5. Create a New Search titled "Equity Review", for documents that have been marked responsive but require equity review from another office or agency. See the section on Equity Review for tips to determine which other offices may have equity over a document.
    a. Under Conditions, set Responsiveness→any of these→and use the icon to check "Responsive." Click Add, then Set.
    b. Set the rightmost operator to AND, then set Disposition→any of these→ and use the icon to check Release in Full and Release with Redactions. Click Add, then Set again.
    c. Pull all relevant fields to the right pane.
        i. For more complex requests, you can create multiple Second Line Review searches for use by any other offices/agencies that have equity in a set of documents. Simply name these searches so that they're easily distinguishable for the office responsible, *i.e.,* "Equity Review: OGC". See Setting Up a Relativity Review Pane to learn how to easily mark documents for equity review so they can automatically be placed in these folders.
6. Create a New Search titled "Withheld in Full", for documents that will not be released.
    a. Using the same method as the previous two searches, set Responsiveness→any of these→Responsive.
    b. Set the rightmost operator to AND, then set Disposition→any of these→Withhold in Entirety.

Production Set Review

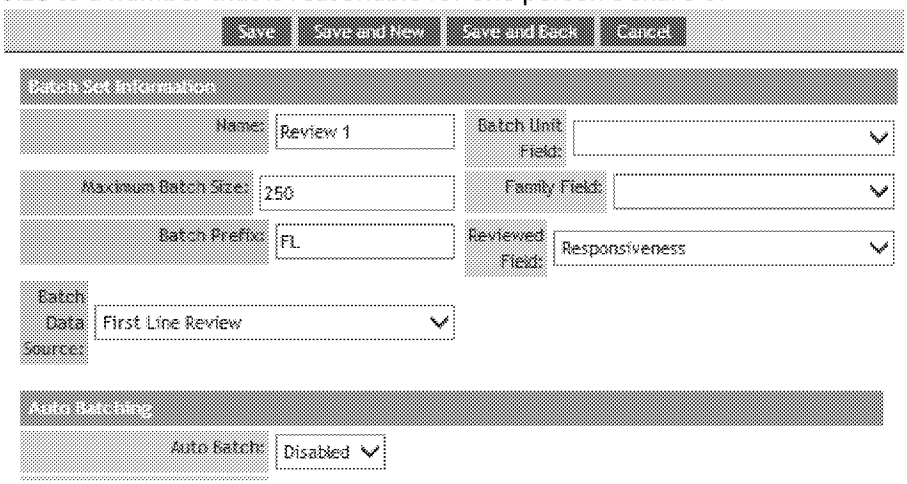
7. Create a New Search titled "Production Set Review", for documents that are ready for final review before being released either for agency awareness or directly to the requester.

Review Batches



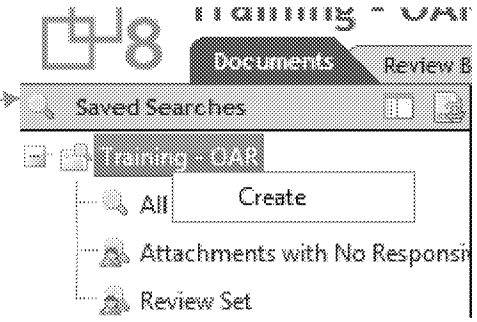
To create a document review batch for each person on your review team, click on the pulldown arrow on the Administration tab on the upper left, then click "Batch Sets."

a. Click New Batch Set on the upper left.
b. **Name** the batch so that the office/employee responsible for it can recognize it as their own.
c. Set the **Maximum Batch Size** to a number that is reasonable for one person's share of document review, e.g., 250 documents.
d. Set **Batch Prefix** to delineate it for the correct stage of review *(in this case, FL stands for First Line. The prefix is required but simply helps to organize sets of batches. Both the name and the prefix can be set to whatever is most helpful for your office.)*



e. Set the **Batch Data Source** to the "First Line Review" saved search.
f. Set the **Reviewed Field** to Responsiveness.
g. It is not likely that you'll need to enable **Auto Batch**.
h. Click "Save and Back".

8. **Create folders to organize your workspace and stages of review.**
   a. Right click on any existing search folder in the left pane to create a new one. *(Make sure you're still in the Saved Searches pane—this will not work if you click the icon.)*



   b. Right-click on the created folder to rename it. For example, you can name this one "Office Review" and put all searches your office will be conducting to accommodate this FOIA request inside it with subsequent organization.
   c. You can click and drag searches to different folders for different stages of review to keep them organized.

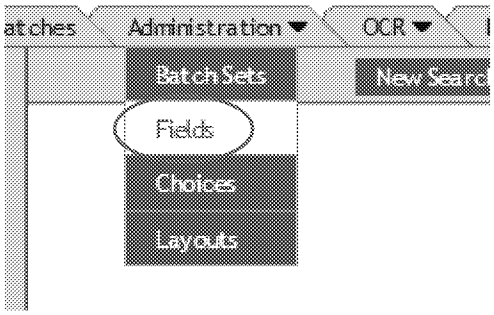
Your workspace will now be much easier to use. You can follow the same procedures to create folders and batches that require review from other offices. After the production set is created and reviewed, you can then create a Save Search from the remaining documents titled "Final Review" for the last review process.

Return to top of page.

SETTING UP A RELATIVITY REVIEW PANE

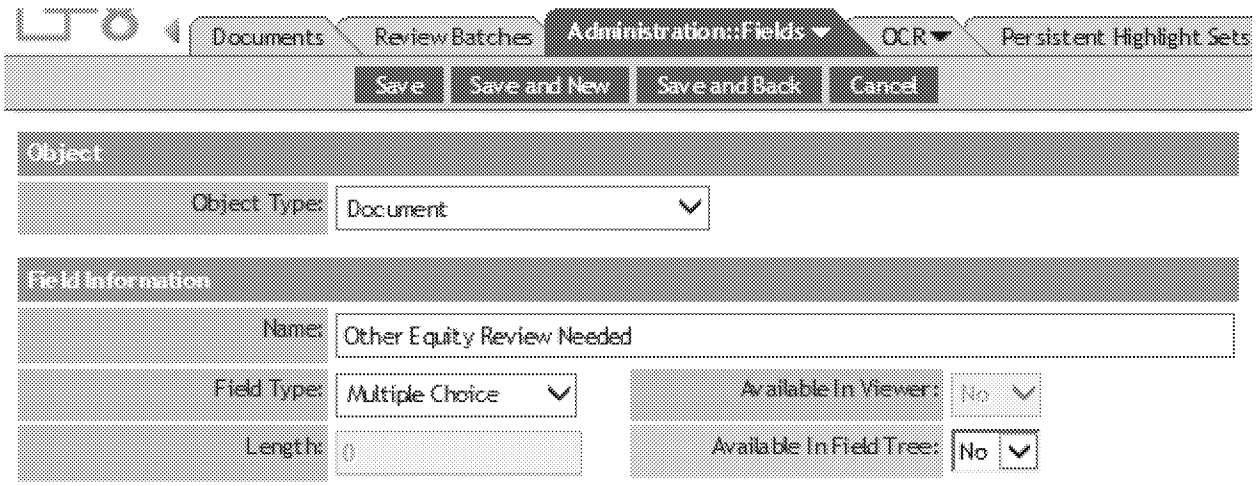
Create a New Field to Mark Documents that Need Review from Other Offices/Agencies

The below steps will show you how to create new fields in the review pane to categorize potentially responsive documents, such as multiple choice options to signify needed equity review.



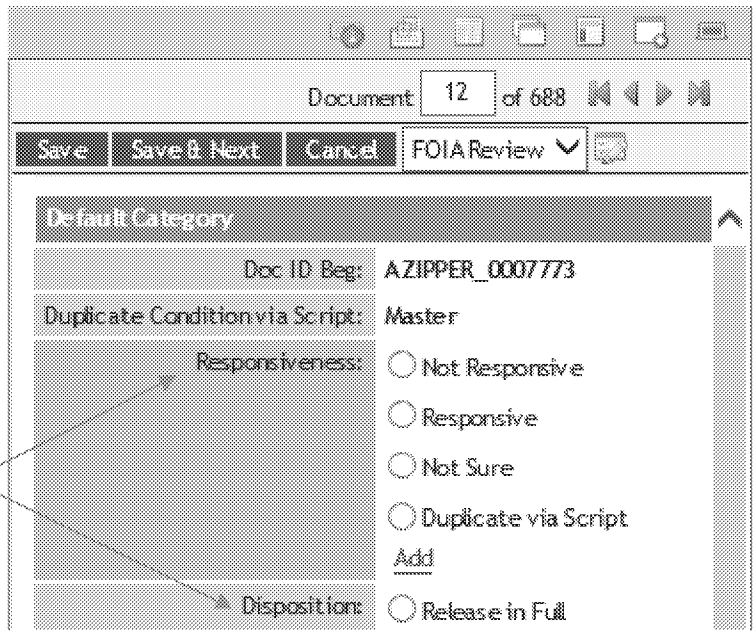
Click the arrow on the blue "Administration" tab on the upper right, then select Fields.

1. Click New Field.
2. For the new field, set **Object Type** to Document. **Name** it "Other Equity Review Needed", and set the Type to Multiple Choice *(like below)*.
3. Hit "Save and New" to create another field.

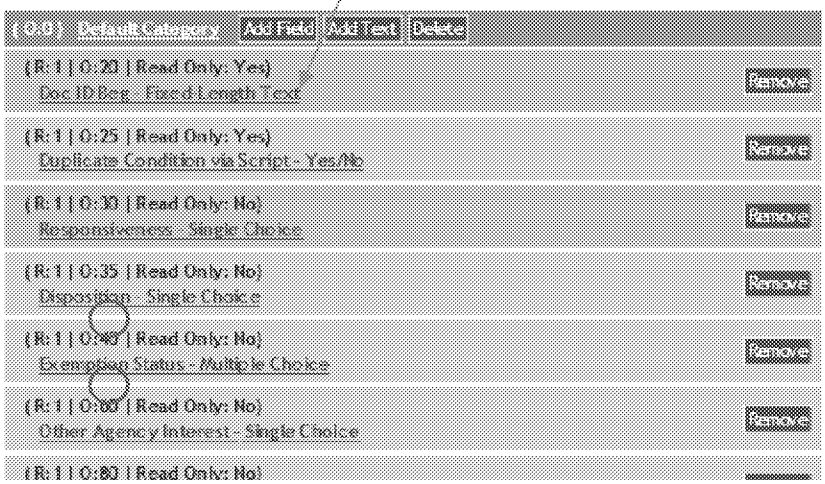


4. Use the same settings, but name this field "Other Equity Review Complete".
    a. These new fields will allow document reviewers to mark documents that either need further review or that have passed certain levels of review.

Add the New Field to the Review Pane



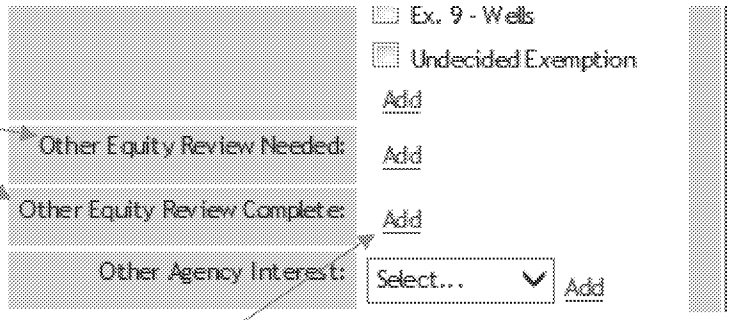
1. Click **Edit** on any document in the workspace. Any edits you make to the review pane will be for the entire workspace.
2. The screen you see on the right is the **Review Pane**. Click the icon to edit its layout.
3. The **Building Layout** screen will then pop up. You'll see a list of all the fields that are visible in the review pane. The field names that you saw on the review pane are blue and underlined on the Building Layout Screen (*below*), like so.



R: signifies row. There's no need for this to be any value other than 1. **O:** signifies the order of the fields (*circled on left*). These are spaced out by 5s/10s to allow reviewers to insert a new field between two others without having to update all other order values.

4. Click Add Field.
5. You'll then see the **Add Field to Layout** screen. Using the pulldown arrows, set **Field:** to the name of the field you just created (*e.g., Other Equity Review Needed*), set **Read Only:** to No (because we want to reviewers to be able to check the multiple choice options), and, using the order numbering on the previous screen, pick an order number that will allow you to drop the new field wherever is most appropriate.
    a. For example, on the Building Layout screen (*above*), "Exemption Status" is ordered O:40, and "Other Agency Interest" is ordered O:60. Therefore, if we set order to 45 for this field, it will be place right after Exemption Status.
6. Hit Save and New, then follow the same steps to add the "Other Equity Review Complete" field to the pane.
7. Hit Save. You should then see the two new fields in the Building Layout screen in the desired order. Hit Close on this screen to return to the document viewer/review pane.

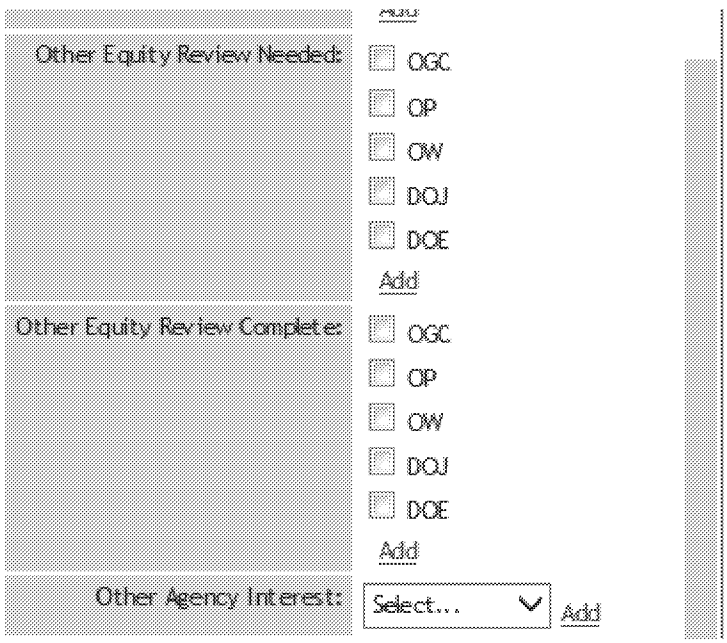
8. The two new fields should then be listed in the desired order on the review pane, like so.



Creating Choices for New Fields

Since these fields were created as multiple choice, you now need to create the choices. The choices we're creating below are the checkboxes that will allow reviewers to automatically place documents that require review from other offices/agencies in a search folder for that agency. There are a few ways to do this, but the easiest way is directly in the review pane.

1. While still in the viewer pane, click **Add** to add choices for the fields you just created. The **New Choice** screen will pop up.
    a. By now, you should have firmly established which offices or agencies may have equity in any of the documents being reviewed. If you have not, return to the EQUITY FOR DOCS page.
    b. Once you've developed a list of all offices/agencies that should be listed as needing additional outside review, create a choice for *each* of them.
    c. Under **Name:** list the office/agency that may need to review the document, i.e.:
        - OGC
        - OW
        - OP
        - DOJ
        - DOE
        - Etc.
    d. Use the same logic for Order as you did above. Each choice can simply be ordered 1,2,3,4, etc., but if you want to place a new choice in a specific location later, it may be wiser to number by 5s or 10s. Remember that Relativity simply interprets order as ascending.
    e. Hit Save and New and continue creating new choices as necessary. Then hit Save and repeat the process *identically* for the "Other Equity Review Complete" field (*see right*), so that documents needing external review can be marked and automatically moved to the Production Set folder once that review is complete.



BOOLEAN LOGIC IN RELATIVITY SEARCHES

Boolean logic defines logical relationships between terms in a search. You can use Boolean logic when creating Saved Searches to pull up potentially responsive documents in Relativity.

Boolean logic allows you to create a much narrower search and return the least possible number of potentially responsive documents to review, much like the Advanced Search function you'd find in most search engines. It does this using "operators", or commands that can be used to combine or filter search terms to return only the documents that meet very specific criteria.

The three main Boolean search operators are AND, OR, and NOT. For the sake of searching within Relativity, you only need to understand AND and OR.

AND

And combines search terms so that results **must contain all** of them.

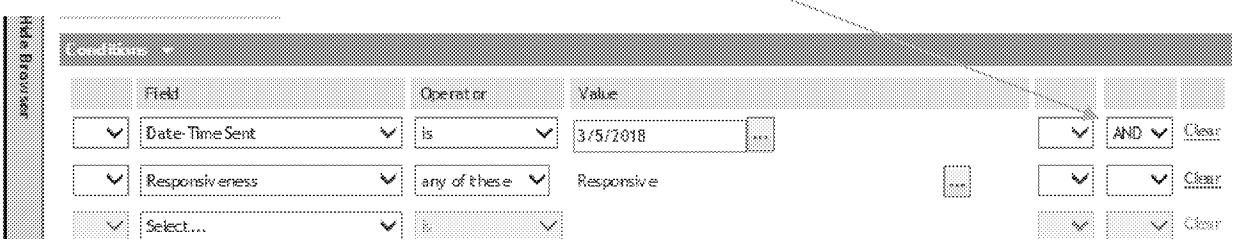
Simple Example

The search *diesel* AND *engine* returns only documents that contain **both** "diesel" and "engine". It does not return documents that return only one of these terms.

Relativity Example

The below search would **only** return documents that meet **both** conditions.

ONLY documents that were both sent on 3/5/2018 AND that have been marked as Responsive will be produced from this search.



OR

OR combines search terms so that results contain **at least one** of them.

Simple Example

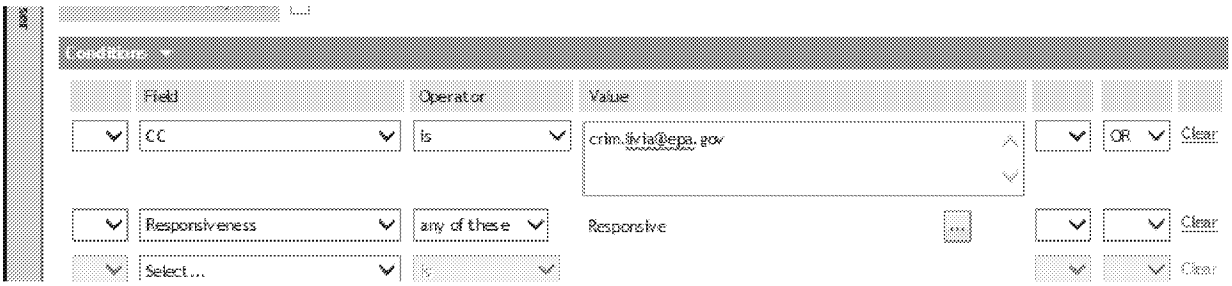
The search *diesel* OR *engine* returns documents that only contain "diesel", as well as documents that only contain "engine". It also returns documents that contain both of these terms.

Relativity Example

The below search would return three kinds of documents:

1. emails in which crim.livia@epa.gov is CC'ed;
2. any documents (emails or not) that have been marked Responsive; and

3. emails that have been marked responsive AND in which crim.livia@epa.gov is CC'ed.



W/N

The W/N operator is used to return documents with two words or phrases that occur within a certain proximity of each other. W/N can be translated as "within N words". For example, a result only meets W/5 criteria if the two words are within 5 words of each other.

Simple Example
The search *diesel W/15 engines* would return:

- "diesel engines"
- "…State Clean Diesel Grant Program. Any engines that…."

However, it would NOT return:

- "The Diesel Emissions Reduction Act grants (DERA) program, first authorized by Congress in the Energy Policy Act of 2005, and reauthorized in 2010, supports state, Tribal, and local air quality management agency projects to reduce harmful emissions from engines."

Booleans and Parentheses (Search Order)

For even *more* efficient searches, you can use parentheses to "nest" search terms and operators within others. This will convey to Relativity *in which order* they should be interpreted.

If there are nested parentheses, Relativity will analyze the **innermost** expression first, then the one outside it, and so on.

Simple Example
(emissions OR diesel) AND standards would return all documents that contain the following combinations:

- emissions, standards
- diesel, standards
- emissions, diesel, standards

Since this search uses the AND operator for the term "standards", all results must contain that term. But since we placed parentheses around "emissions OR diesel", any combination of the three terms is possible.

Note that in Boolean search order logic, AND always takes precedence over other operators. For example, the above results differ from the results you would get if you searched *emissions OR diesel AND standards*. The only documents that meet these requirements contain **both** "diesel" and "standards", or neither. This search would return all documents that contain the following combinations:

- emissions, diesel
- emissions, diesel, standards
- standards

You can use parentheses to create a search that captures possible synonyms:

(children OR kids) AND health

Results:

- children, health
- kids, health
- children, kids, health

You can also use multiple sets of parentheses to make a more detailed search:

((children OR kids OR public) AND health) AND pollution)

Results would contain:

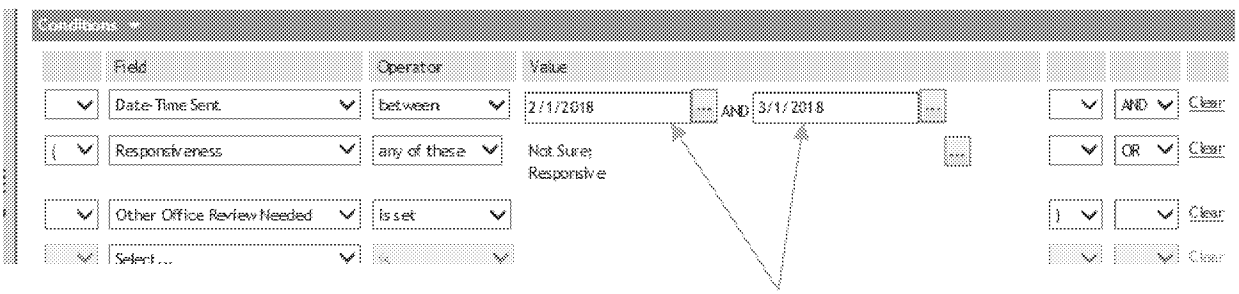
- children, health, pollution
- kids, health, pollution
- public, health, pollution
- children, kids, public, health, pollution
- children, public, health, pollution;
- etc.

Relativity Example

In a Relativity search, you can insert parentheses around commands in the Conditions section to use Boolean search order.

The search below puts parentheses around the statement with an OR operator, while leading with an AND operator statement. It can be interpreted like this:

> *Date-Time Sent=between 2/1/2018 and 3/1/2018* AND (*Responsiveness=Not Sure,Responsive* OR *Other Office Review=Is Set*)



This search will **only** return documents that fall within the timeframe described, and only if they meet at least one of the two other criteria (Responsiveness, Other Office Review Needed).

Documents that would result from this search:

- An email sent on 2/10/2018 with Responsiveness marked "Not Sure" but not marked for Other Office Review.
- An email sent on 2/24/2018 marked for Other Office Review but Responsiveness not marked.

Documents that would *not* result from this search:

- An email sent on 3/1/2018 that has been marked Responsive.
- An email sent on 2/15/2018 that has not been marked for Responsiveness or Other Office Review.

Other Boolean Syntax

There are other symbols you can use to make your Relativity searches more effective. Below are just two that are most likely to be helpful, particularly when creating Search Terms for a request. You can learn to do much more complex searches by viewing the Relativity Search Guide here.

Quotation Marks

Quotation marks can be used to return documents that contain the exact phrase enclosed within them.

For example, searching *"public health"* would **only** return documents that contain the exact phrase "public health". Documents that contain the words "public" and "health" separately scattered around the document would not be returned.

Asterisks

Searching with an asterisk returns results that include the root of the word that you type, but with any variation by where the asterisk is located.

For example, searching *child** would return:

- child
- children
- children's
- childhood
- etc.

Searching wom*n would return:

- woman
- women

Ensuring Consistency in Review Among your Review Team

For complex or even straightforward requests, a memorandum with review instructions (known as a "coding memo") can help your team achieve consistency in its document review. The coding memo serves as a protocol for how reviewers make determinations on documents, whether reviewing in Adobe Pro DC or Relativity. A coding memo can include, for example:

- **Responsiveness**
  - Describe the scope of the FOIA request.
  - Include a list of key words and acronyms that can help reviewers identify responsive material--use this list to help develop your persistent highlighting set for Relativity.
  - Include a list of key events and/or background on the issue that can help put the documents in context.
  - Include a list of key custodians and their roles in the issue.
  - Identify names of key attorneys (for attorney-client and attorney work product designations) -- consider including these names in your Relativity persistent highlighting set as a unique color.
  - Identify names of key people outside the Agency to assist with identifying records that are internal vs. external, and records that would need consultation from the White House or other agencies.
  - Explain whether non-responsive material may be redacted. Remember, you may only redact non-responsive material contained within a responsive FOIA record if you have an agreement with the requester.
- **FOIA Exemptions**
  - Describe the FOIA exemptions, and provide any key information specific to the FOIA request that will benefit reviewers in applying exemptions properly.
  - If a FOIA Exemption is not applicable to the FOIA request, do not include in the memo.
- **Equity Review**
  - Describe the EPA offices and/or other agencies for which review is needed.
- **Upper Management Review**
  - Documents may need to be flagged for upper management review. Providing this review enables management to be aware of documents that will be released and that may garner public or media attention.

REVIEWING POTENTIALLY RESPONSIVE RECORDS

Once you have collected potentially responsive records, you must review the records to determine whether they are actually responsive to the request and you must review the records to determine which, if any, FOIA exemptions apply.

For most FOIAs, responsiveness review and the FOIA exemption review are done concurrently during the first level review. During first level review, reviewers will determine if documents are responsive to the request (as narrowed or modified), if any FOIA exemptions apply, whether other EPA offices need to review the documents ("EPA Equity Review"), whether other Federal agencies or the White House need to review the documents ("Interagency Equity Review"), and whether any documents should be flagged for upper management awareness.

The levels of additional review beyond the first level of review will depend upon the scope of the FOIA and the need for equity reviews as set forth above. The review process should be set forth in the Review Plan, as explained above.

Don't Forget about the Requester!

Manage Expectations! Contact the requester right before you begin the Review Phase and discuss the results of your document collection. You can discuss the number of documents collected, your review process, and give candid time estimates for production. This gives the requester another opportunity to narrow their request or steer the review if they are unsatisfied with the time to complete review.

As you progress through the Review Phase, consider scheduling standing updates with the requester to discuss the status and progress of the request. For voluminous records requests, it can be very valuable to have the requester weigh in on how they would like the review of records to be prioritized. For example, perhaps the universe of documents to review includes 25,000 emails from 35 custodians. Ask the requester if there are custodians or timeframes the requester would like reviewed and released first; this is good customer service, and you know your review time is well spent.

As always, document these communications and upload any written communication with the requester into FOIAonline.

Are the Documents Responsive to the Request?

Once you have collected documents potentially responsive to a FOIA request, you must make sure that all reviewers have a single unified interpretation of the request. This ensures consistent responsiveness calls throughout the review process. If multiple people are reviewing documents to determine whether they are responsive to the request, consider having an initial meeting to discuss the FOIA request and what constitutes a responsive document.

- Occasionally, you may come across documents that are technically responsive (e.g., one of the search terms appears in an email) but that might have little to no informative value to the requester. Under the FOIA, agencies may not make value judgments on the utility of documents

to the requester. Accordingly, such documents should be considered responsive. However, you may ask the requester whether it wants certain categories of minimally-informative documents (e.g., newspaper clips) to be processed. If you come across large numbers of such documents, the requester may want to narrow its request to exclude those documents, which may enable the Agency to process the FOIA more quickly with fewer fees.

- You also may come across documents that discuss several different subjects in a single document, only some of which are responsive to the FOIA request. An example could include a staff meeting agenda addressing multiple topics. Under the FOIA and consistent with recent case law, if a FOIA record contains information responsive to the FOIA, the entire record is responsive, including the arguably non- responsive information. Information in the record can, however, be withheld based on one of the FOIA exemptions. If you identify large portions of material that are not responsive to the FOIA, consider meeting with the requester to determine if the requester is interested in narrowing the scope of the FOIA request to remove that material.

Do Any of the FOIA Exemptions Apply to Your Documents?

The FOIA provides for nine exemptions that agencies may use to protect specific types of information.

Exemption 1: Classified Information

Exemption 1 applies only to information that has been properly classified according to criteria established by an Executive Order. This exemption is rarely asserted by the EPA.

Exemption 2: Personnel Rules and Practices

Exemption 2 of FOIA exempts from mandatory disclosure records that are “related solely to the internal personnel rules and practices of an agency.” The Supreme Court has held that Exemption 2 covers only records “relating to issues of employee relations and human resources” and that such records must be internal and relate solely to those personnel rules and practices. Exemption 2 is narrow in scope and, thus, is rarely used.

Exemption 3: Federal Statute Prohibits Disclosure

Exemption 3 protects from disclosure information that is prohibited from disclosure by another federal statute, provided that the other federal statute explicitly requires matters to be withheld from the public. Statutes found to qualify under Exemption 3 include, for example, FIFRA, the Internal Revenue Code, and the Patent Act. Note that if you withhold information under Exemption 3, you must identify the statute under which you are withholding information in your response letter.

Exemption 4: Trade Secrets and Confidential Business Information (CBI) or Proprietary Business Information (PBI)

Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Based on this wording, the exemption covers two distinct categories

of information in federal agency records, (1) trade secrets, and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. For purposes of Exemption 4, "trade secret" is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end-product of either innovation or substantial effort." *See below for further information about reviewing documents that may contain CBI.*

Exemption 5: Privileged Communications

Exemption 5 protects "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." In simpler terms, Exemption 5 protects those documents that are normally privileged in the civil discovery context. This includes memoranda and letters but extends to many other types of documents as well. The three most common types of privilege asserted with Exemption 5 are the Deliberative Process Privilege, the Attorney-Client Privilege, and the Attorney Work Product Privilege.

- Deliberative Process Privilege (DPP)
    - Internal: communication must be internal to the executive branch (e.g., EPA, WH, DOT);
    - Pre-decisional - prepared to assist an Agency decision maker in arriving at his decision, rather than to support a decision already made;
    - Deliberative - Reflects the give-and-take discussion of the consultative process;
    - Privilege exists to: (1) encourage open, frank discussions; (2) protect against premature disclosure of proposed polices; and (3) protect against public confusion;
    - Apply DPP redaction "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption."
    - Some common examples include:
        - Draft documents, staff analysis, recommendations, advice, or opinions, internal e-mail discussions of potential courses of action, internal discussions about how to respond to a public inquiry, comments on draft rule-making documents, and e-mails or memos discussing Agency options.
- Attorney-Client Privilege (ACP)
    - Internal: communication must be internal to the executive branch (EPA, WH, DOT, etc.);
    - Legal advice is sought or relates to legal advice;
    - Communication between an attorney(s) and client(s);
    - Made in confidence; and
    - May have to show disclosure restricted to those who need to know within the Agency/Executive branch.
- Attorney-Client Work Product (AWP)
    - Internal to the Executive Branch (EPA, WH, DOT, etc.);
    - Prepared or obtained by or at the direction of an attorney;
    - In reasonable anticipation of litigation or active litigation; and
    - Extends to documents prepared by or for a representative of a party, including an agent

Exemption 6: Personal Privacy

Exemption 6 protects information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." When considering whether to assert Exemption 6, balance the privacy interest of the individual

against the public interest in disclosure. Common examples of content to withhold include private home addresses, personal phone numbers, personal email addresses, and medical information.

Exemption 7: Law Enforcement

Exemption 7 protects from disclosure certain types of "records or information compiled for law enforcement purposes." This exemption is comprised of six subsections, as described below. When asserting Exemption 7, remember to specify which subsection you are using.

- Exemption 7(A) protects records that "could reasonably be expected to interfere with enforcement proceedings." This includes information that would hinder the government's ability to control or shape the investigation, enable targets of the investigation to elude enforcement or suppress or fabricate evidence, or prematurely reveal the government's evidence or strategy. Note that this exemption is "temporary" because it is applicable only for the duration of the investigation.

- Exemption 7(B) is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding, protects "records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication."

- Exemption 7(C) protects information that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption is like Exemption 6 except that it requires EPA to meet a lower standard ("reasonably expected to" under exemption 7(C) vs "clearly unwarranted" for Exemption 6) and is applicable only in the law enforcement context. For example, Exemption 7(C) is sometimes used to protect identities of employees working on sensitive cases.

- Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes [which] 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 a 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."

- Exemption 7(E) affords protection to law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

- Exemption 7(F) protects law enforcement information that "could reasonably be expected to endanger the life or physical safety of any individual." Courts have routinely upheld the use of Exemption 7(F) to protect the identities of law enforcement agents. EPA has also used this exemption to protect the identities of members of security details and to withhold schematics detailing drinking water sources.

Exemption 8: Financial Institutions

Exemption 8 protects certain information related to financial institutions, but is only applicable for agencies responsible for regulating or supervising financial institutions. Accordingly, EPA does not assert Exemption 8.

Exemption 9: Wells

Exemption 9 exempts from disclosure "geological and geophysical information and data, including maps, concerning wells." This exemption can be applied to any type of well, including gas or water. An example of information withheld under Exemption 9 would be maps showing the exact locations of wells.

Do your Documents Contain Confidential Business Information or Trade Secrets?

FOIA Exemption 4 covers two categories of information, (1) trade secrets and (2) confidential Business information (CBI).

CBI is commercial or financial information obtained from a person that is privileged or confidential. (See 5 U.S.C § 552(b)(4)).
Trade secrets are a "secret, commercially valuable plan, formula, process, or device that is used in making, preparing, compounding or processing of a trade commodity, and that can be said to be the end product of either innovation, or substantial effort." (See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983)).

- Trade secret data may be found in contracts, manufacturing descriptions, schematics, product formulas, software, or quality control data/quality assurance procedures.

A business may explicitly assert a CBI claim, such as by marking or stamping a document with a confidential or proprietary business information label. Even if no explicit claim was made, the information can still be potential CBI.

If no claim was made, EPA regulations require the reviewer to apply the following standard to the business information:

> "[A]lthough [the business] has not asserted a claim, [it] might be expected to assert a claim if it knew EPA proposed to disclose the information." (*See 40 C.F.R. § 2.204(c)(2)(i)*).
>
> If you have identified potential CBI, you must ask the affected business if they claim the information as CBI, via telephone, email, or letter. The affected business has three working days to respond to your inquiry pursuant to EPA's regulations. (*See 40 C.F.R. § 2.204(c)(2)(ii)*).
>
> Please note that this standard does not apply in some circumstances. Specifically, if EPA follows the notice requirements of 40 C.F.R. § 2.203(b) when

it collects the information (such as including the required notice on a form), EPA may make the information available to the public without further notice to the business. (*See 40 C.F.R. §§ 2.203(b), 2.204(c)*).

Practice Tip: Look for labels on documents that indicate that a business intended for information to remain confidential, such as "trade secret," "proprietary," or "confidential." Also, a coversheet may contain a CBI claim for the attached material. Examples of information typically determined to be CBI include pricing information, information related to production, volume, and the manufacturing process, and customer lists.

Note that an affected business may waive its right to assert a CBI claim in which case you may release the information. You may always check with an affected business to see if the business will waive its claim.

If an affected business claims, or waives, confidentiality verbally, follow up in writing.

When potential CBI is identified, the Action Office must include the appropriate language in the initial denial letter and follow the proper procedures for tracking and processing a request for CBI as outlined in PBI Case Tracking Procedures. After the creation of the PBI case in FOIAonline, the Action Office works with OGC/ORC to send affected businesses substantiation requests, draft program recommendations, and revise the treatment of responsive records where necessary due to the final confidentiality determination.

More information about EPA's CBI Regulations are accessible here.

Separate Non-Exempt Information and Redact Exempt Information

The FOIA requires that "any reasonably segregable portion of a record" must be released "after deletion of the portions which are exempt" under the Act's nine exemptions. This requires you to redact the exempt information while producing the non-exempt information.

The FOIA states "[t]he amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made." Redaction marks should be visible and the exemption under which you are withholding information should be indicated. Note that judgment calls about what may be "helpful" to the requester are inappropriate when analyzing what, if any, information in a document can be segregated and released. If information does not fall within one of the nine exemptions, it should be released.

Once you have determined which FOIA exemptions apply to a document and what information needs to be redacted, use the redaction tools in Adobe Pro DC or Relativity to "black out" the content subject to a FOIA exemption, as discussed below.

Practice Tip: Redact the exempt information in the document and release the remainder.

Quality Assurance/Quality Control (QA/QC)

Throughout the review process, you will need to ensure that responsiveness determinations, FOIA exemption determinations, and redactions are made consistently. This is called quality assurance/quality control (QA/QC). Below are some Adobe and Relativity Practice Tips for smoother, more efficient QA/QC process.

Reviewing QA/QC in Adobe Pro DC

By using the "Create Comment Summary" option in the Comment tool, you can more easily spot redaction issues such as redactions with improper or missing exemption or overlay text.

You can also use the search tool to conduct searches using relevant search terms to locate pages in responsive documents that may require review by other EPA offices or other agencies. You can even export the results to PDF or CSV. Some examples of search terms are below:

- White House equities
  - "WH" or "POTUS" or "White House" or "EOP" or "CEQ" or "OMB"
- Congressional Relations Equities
  - "Senate" or "Senator" or "Congress" or "Representative" or "Congressional" or "Hill"
- Union Equities
  - "Union" or "NTEU" or "AFGE" or "280", or any union officials or topic words that may be relevant.
- OEX Equities
  - Include current administrator's name and email domains and any other relevant people in the Administrator's office.

Note that these search terms can also be used for "batch-tagging" in Relativity, as discussed above.

Reviewing QA/QC in Relativity

Saved Searches: In Relativity, saved searches can be set up to capture common coding inconsistencies and/or missed equities. The documents can be batched for review and errors corrected. See above for help with setting up saved searches.

When setting up a search to catch coding inconsistencies, the search should capture documents in the following categories:

- Release with redaction and no exemption selected
- Release with redaction and no redactions applied

- Release in full and exemption selected
- Release in full and redactions applied
- No disposition and exemption selected
- Withhold in full and no exemption selected
- Responsive and no disposition selected
- Not responsive and exemption selected
- Not responsive and has disposition selected
- Anything marked "additional review required" or similar

Batch Tagging: Additionally, you can "batch tag" items in Relativity for easy retrieval when handling equities. Batch tagging, or "mass coding," allows you to apply a specific coding choice to an entire set of documents that share a common term. Examples of terms that should be batch tagged are the same as those that should be searched for in Adobe, as mentioned above.

Awareness Reviews

For many FOIA requests, the last step in the document review process prior to final approval for production is an "awareness review" for upper Agency management. This final step is for upper management, including public affairs and congressional relations staff, to have a "heads up" as to what is being released to the public. This allows the public affairs staff to be prepared for any media inquiries that may be received following the release of documents. It also ensures coordination between productions of documents under FOIA and congressional oversight requests received by the Agency. You should always discuss with your management as to the appropriate awareness reviews for a particular FOIA request.

PRODUCTION OF RESPONSIVE RECORDS

Interim Release

Importance of Interim Releases

Requesters are less likely to seek litigation to get the records they want if they know you are actively working on their FOIA request. In addition to regular contact and a relationship with your requester, interim or partial releases demonstrate progress to the requesters because actions (disclosing records) speak louder than words ("We are actively working on your request.").

Interim responses can also be a valuable tool for narrowing requests. When requesters receive a partial release of records, they will have an opportunity to review them and identify the records or types of records in which they are not interested. You can then narrow the request to exclude those records going forward. In some cases, you may produce the record or records in an interim production, and the requester may determine, after review of the documents, that it needs nothing further from the Agency and that the request can be closed. It is sometimes helpful to ask the requester if there are particular records or custodians in which he/she is most interested to increase the possibility that the requester may be satisfied with an interim production as a conclusion to the request.

Required Elements of Interim Release Letter

When making an interim production, it is important to accompany the records you are producing with correspondence that clearly explains to the requester what is being delivered and the status of the request. Below are five key elements to include in an email or letter to the requester when making an interim production.

- ***Information about the Request***
  - Make sure to reference the request by number and provide a brief summary of what is sought. If the requester has clarified the request or you have had other significant communication, note it in the summary of the request.
- ***Description of the Records***
  - Provide information about the records themselves. This will vary depending on the records, it may make sense to provider the total number of documents, the total number of pages, the total file size, or some other description.
- ***Schedule Going Forward***

    - Include the anticipated date that the request will be closed out, and if you will be making additional interim productions, inform the requester as to when it can expect the next interim production(s).
- ***Appeal Information***
    - Make clear that the request is not being closed now. Inform the requester that when the request is closed, information will be provided about appeal rights for any part of EPA's response, including all interim productions. The goal is to make sure the requester understands that this is an initial release and that the clock does not start on the appeal period until after the request is closed.
- ***Contact Information***
    - In addition to the FOIA Public Liaison, make sure the requester has the direct contact information for someone who knows substantively about the request, such as the project lead or the FOIA Coordinator or FOIA Officer. The requester may be confused or have questions about the interim production or the status of the request going forward and should be provided with an Agency point of contact.

Final Release and Response to Requester

When all responsive records have been uploaded to FOIAonline, you will be ready to close out your request. It is important to follow your office's FOIA procedures which can be found on the intranet here.

Required Elements of Final Release Letter

The closeout letter for a request should clearly inform the requester of the Agency's response and the requester's appeal rights. There is no one way to write a closeout letter. The best letters should be tailored to the particular request. You can access an Agency letter template here. Each letter should contain the following elements:

- ***Information about the Request***
    - Make sure to reference the request by number and provide a brief summary of what is sought. If the requester has clarified the request or you have had other significant communication, describe it. It is particularly important to describe any agreed-upon modification or other narrowing of the FOIA request. The closeout letter memorializes the Agency's actions and serves as an important piece of the FOIA record if an administrative appeal or litigation is filed.
- ***Disposition***
    - There are four possible responses the Agency may provide. Inform the requester which applies to the request.
        - *Full Grant.* The records, in their entirety, are released to the requester.
        - *Partial Grant/Partial Denial.* Portions of the record are withheld from the requester if covered by one or more FOIA exemptions. The portions of the record that are not redacted are released to the requester.

- *Denial.* The records, in their entirety, are withheld from the requester if covered by one or more FOIA exemptions.
- *No Records.* If, after a reasonable search likely to uncover all responsive documents, no records are located that are responsive to the request, the requester must be informed in writing to that effect.

- ***Identification of Withheld Records***
  - If any records are being withheld in whole or in part, provide the requester with (1) an index or description of the records being withheld and (2) a summary of the FOIA exemptions that are being applied.
- ***Final Appeal Rights***
  - The following paragraph includes the information required to be conveyed to the requester regarding its appeal rights:

    This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90 calendar day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

- ***Contact Information***
  - The requester should be informed of a contact who can help if there are questions about the request. Additionally, consistent with the 2016 Amendments to FOIA, the requester should be provided contact information for the FOIA Public Liaison and the Office of Government Information Services. See the sample language below:

    Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or call (202) 566-1667. You may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information

Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

- ***Final Bill***
  - Inform the requester what fees are being assessed and how they should be paid.
- ***Signature***
  - Final closeout letters must be signed by the Action Office at the Division Director level or higher.

Disclosure through FOIAonline

FOIAonline is more than a convenient way to disclose records to a requester. Disclosure of records through FOIAonline is required under EPA policy and procedures. See EPA FOIA Policy, CIA 2157.1, and EPA FOIA Procedures, CIO 2157-P-01.1.

Recordkeeping Requirements for FOIA Requests

FOIAonline is used to maintain records related to a FOIA request in accordance with records management requirements and as a record of how a request was processed should it be appealed or litigated. Before closing a request, upload (1) all key correspondence and (2) all responsive records.

Uploading key correspondence is vital to preserving the record of how a FOIA request was processed. Any interactions with the requester that did not occur through FOIAonline should be documented and uploaded. For email correspondence, create a PDF of the email and upload it as "other" correspondence. Key internal correspondence such as communications requesting electronic searches or describing document collection should be uploaded as "other" correspondence as well.

It is important to upload all responsive records to FOIAonline, including those that are not releasable. Uploading records that will be withheld preserves the entire record so that it can be reviewed in full on appeal or during litigation. Be sure when uploading records to designate the proper release type for each record.

ADMINISTRATIVE APPEALS

What is an administrative appeal?

The FOIA and EPA's implementing regulations provide FOIA requesters the right to appeal any "adverse determination" that the Agency makes regarding a FOIA request. EPA's FOIA regulations, at 40 C.F.R. § 2.104(g), include the following list of "adverse determinations" that are subject to appeal:

- a determination to withhold any requested record in whole or in part;
- a determination that a requested record does not exist or cannot be located;
- a determination that what has been requested is not a record subject to the FOIA;
- a determination on any disputed fee matter, including a denial of a request for a fee waiver; and
- a denial of a request for expedited treatment.

Within 90 days of an adverse determination by the Agency, requesters may submit appeals, in writing, either through FOIAonline, by email to hq.foia@epa.gov, or by U.S. Mail to EPA Headquarters, National FOIA Program Office. An appeal should identify the Agency determinations being appealed and include the assigned FOIA request number.

What happens if the Agency's final FOIA response is appealed?

Administrative appeals are routed, via FOIAonline, to EPA's Information Law Practice Group, General Law Office, Office of General Counsel. Shortly after receipt, the requester is sent an acknowledgement letter and the appeal is assigned to an OGC attorney for processing. The OGC attorney will then contact the relevant program or regional staff to address any questions concerning the record.

EPA has 20 working days by statute to process an appeal, but this deadline can be extended for "unusual circumstances" pursuant to the same rules applicable to extension of FOIA request deadlines. Once the appeal determination is completed, the OGC attorney contacts the relevant office(s) that processed the request, notifies the office(s) of the decision, and issues the decision to the requester through FOIAonline.

What is your role in the administrative appeal process?

You may be notified by your FOIA Officer that an appeal relating to the FOIA request you handled has been received. As noted above, you will be contacted by the OGC attorney handling the appeal, as the attorney will likely have questions relating to the file and/or need additional information. Your FOIA Coordinator or Officer should also be able to review in FOIAonline who in OGC is assigned to an appeal so you can always reach out to the attorney to provide any context or other information that may be helpful for processing the appeal.

Please follow the instructions provided by the attorney concerning what action or information is needed. When contacted by OGC, please be sure to have the following information available:

- A complete set of the documents withheld in full, in unredacted form;
- A complete set of documents withheld in part (redacted documents) (ideally a markup copy of the redactions not yet applied, to review what material was redacted);
- The complete organized file relevant to the FOIA, including communications with the requester;
- Points of contact for staff in the Contributing Offices who worked on the request; and
- All communication regarding the processing of the FOIA, as well as all documents responsive to the FOIA (released, withheld in full and withheld in part), should be included in FOIAonline.

Pursuant to the 2016 Amendments to FOIA, the period to appeal an adverse determination is 90 days from the date of issuance of the adverse determination. As such, it is important to keep the above-noted information readily accessible in case an appeal is filed.

- For large volume responses, keep an organized electronic copy of the relevant materials to provide to OGC in the event of an appeal. FOIAonline currently does not permit bulk downloads of large volumes of documents, which complicates an expeditious review of a file.

Common issues on appeal relate to the adequacy of the Agency's search, the propriety of the Agency's withholdings, the propriety of denying a fee waiver, and the adequacy of the Agency's description of withholdings.

What are the potential outcomes in resolving an administrative appeal?

- **Appeal is Denied in Full:** OGC determines that all challenged actions were performed in compliance with statutory and regulatory requirements. No further action is needed.
- **Appeal is Granted in Full or In Part:** OGC determines that one or more challenged actions were not performed in full compliance with statutory and regulatory requirements in all aspects of the response.
    - *Without Remand:* OGC determination will complete the corrective action by attaching the releasable records or portions of records, or otherwise complete the corrective action for the Agency.
    - *With Remand:* Pursuant to 40 C.F.R. § 2.104(k), OGC determination will provide instructions for completing corrective action by remanding the request to the Action Office (the program office assigned to the request). That office should then address the instructions on remand.
        - Timing on remand: the instructions will either include a) a timeframe for completing the corrective action(s), or b) a timeframe for the program office to communicate a schedule for completion to the requester.
        - If you are instructed to release additional information to the requester, OGC advises that you re-open the FOIAonline case file for the request and upload the new responsive information to that case file.
        - In most cases, you should issue a new determination letter. OGC recommends that you do not include appeal rights if you were directed to

re-review withholdings or to conduct a new search and no additional material was withheld. Please contact OGC if you have questions about whether to include appeal rights after a remand. Be sure to upload any correspondence to the requester to FOIAonline before closing the request again.

LITIGATION

FOIA requesters can initiate litigation if the Agency denies their administrative appeal, or if the Agency fails to respond to their FOIA request within the statutory time frame. The attorneys in OGC's General Law Office handle all FOIA litigation filed against EPA. These attorneys work directly with Department of Justice (DOJ) attorneys to litigate the cases.

For a court to have jurisdiction to hear a case, the FOIA requester must allege that the agency has improperly withheld records. Allegations that an agency "improperly withheld records" may include:

- Failing to respond to a FOIA request within the statutory timeframe;
- Improperly withholding records, or portions of records, under a FOIA exemption;
- Not conducting a reasonable search for records;
- Denying a fee waiver or expedited processing; or
- Challenging a fee category designation.

General Overview of the Litigation Process

If the Agency is sued over a FOIA request, an attorney from OGC's General Law Office will reach out to the lead contact for the Action Office to discuss the administrative record supporting the FOIA action. If EPA has not provided a response to the FOIA requester, the OGC attorney will discuss with the lead contact for the Action Office where the Action Office is in the search and collection process and develop a production schedule.

The following provides a general overview of the primary steps in litigation:

1. **The Complaint:** A FOIA requester initiates litigation by filing a Complaint. In the Complaint, the plaintiff (FOIA requester) will identify the FOIA request(s) at issue and the bases for filing suit (e.g., agency's failure to respond to the FOIA, or a challenge to the agency's search and/or withholdings).
2. **The Answer:** EPA has 30 days (from the date the plaintiff serves the United States Attorney's Office) to respond to the Complaint in the form of an Answer. An Answer is generally EPA's first pleading and it responds, point by point, to the allegations in the Complaint. The Answer also includes any affirmative defenses or counterclaims EPA may have.
3. **Schedule for the Production of Documents (failure to respond cases):** If the case concerns EPA's failure to respond to a FOIA request, OGC and DOJ will initiate discussions with the plaintiff regarding a production schedule for any documents remaining to be produced. Once documents are produced, the plaintiff has an opportunity to review the documents to determine if the case can be resolved without further briefing. If the plaintiff reviews the documents and seeks to litigate any issue, such as the Agency's withholdings, the case proceeds to substantive briefing.
4. **Substantive Briefing:** If the plaintiff challenges the Agency's search or withholdings or raises any other issues, the case will proceed to briefing. Generally, FOIA cases are resolved when one or both parties file Motions for Summary Judgment. A Motion for Summary Judgment is a motion whereby the party filing the motion (the movant) asks the court to rule in its favor and dismiss all, or part, of the litigation. A Motion for Summary Judgment includes a motion asking the court

to rule in the moving party's favor and a brief called a Memorandum in Support of the Motion for Summary Judgment. The Memorandum in Support of the Motion for Summary Judgment is the Agency's opportunity to make its case and explain why the Agency met the relevant requirements in processing the FOIA request in dispute. In support of a Motion for Summary Judgment, EPA will file a declaration and *Vaughn* Index.

a. ***Declaration:*** The content of the declaration depends on the issues plaintiff has raised. A declaration contains factual statements and the declarant attests to the facts in the declaration under penalty of perjury. For example, in a case challenging the Agency's search, the declaration would address how the Agency searched for responsive records. The Agency's brief would, in turn, cite to the declaration and explain why the Agency's search was reasonable. In a case challenging the application of the FOIA exemptions to certain documents, the declaration would explain the nature of the documents at issue and the basis for the claimed exemption(s). The declaration assists the court in resolving the case without the need to review the documents in question in the underlying FOIA. (See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)).

    Who can be a declarant? The declarant must have "personal knowledge" of the facts presented. (See Fed. R. Civ. P. 56(e)(1)). Personal knowledge includes information provided to the declarant by co-workers or subordinates. Generally, the declarant is an individual in management who has personal knowledge of the processing of the FOIA request at issue.

    Briefing in a FOIA case may occur several months after the case is filed, especially in cases alleging a failure by EPA to respond to the FOIA request. It is important to maintain a well-documented case file, as that file will be useful in preparing the declaration.

b. ***Vaugh Index:*** Generally, the declaration references the Agency's *Vaughn* Index. A *Vaughn* Index is an index that describes the records withheld and the basis for the withholdings. There are different formats for a *Vaughn* Index, including, for example, an itemized description of each document, and a categorical approach, where similar documents are described together (as opposed to the itemized document-by-document approach).

Below is an example of an excerpt from a *Vaughn* Index.

545OneDrive2_00013175	ED_000454	Withheld in Entirety				Ex. 5 - Deliberative Process

Document 545OneDrive2_00013175 is a draft contract document for a statement of work between EPA and an unidentified contractor. This draft contract document was withheld in full under FOIA Exemption 5.

Exemption 5, Deliberative Process Privilege
The withheld information is protected under Exemption 5's deliberative process privilege because it is a draft of a statement of work between to SwRI and EPA. The document was circulated for review within OTAQ/ASD. The draft statement of work reflects pre-decisional deliberations between EPA employees about the work required under an EPA contract with SwRI who conducting testing for the EPAct Study/V2/E-89 Tier 2 Gasoline Fuel Effects Study. At the time the document was created, EPA had not finalized the statement of work, and EPA was still deliberating on the best approach to the contract. The withheld draft statement of work does not reflect an official Agency decision. The withheld information is deliberative because EPA employees and managers were still internally discussing issues related to contract requirements and testing parameters. This draft statement of work was circulated for review and comment, and it was not the final document. The document reflects recommendations and opinions that are considered as part of the EPA's decision-making process for finalizing contract documents. The draft statement of work does not represent a final agency action. Release of this information would discourage open and frank discussions among its staff and would also have a chilling effect on agency decision-making processes, and on the EPA's ability to have internal discussions and consultations concerning EPA's contracts. Furthermore, release would cause public confusion by disclosing rationales and reasons that were not in fact ultimately incorporated into the final statement of work and the final contract.

Segregability
There is no reasonably segregable information in this draft contract document, no meaningful portion could reasonably be released. To the extent there are facts in this document, the selection of those facts are an integral part of the deliberations in developing the final contract document and the facts selected may have varied between the draft and the final document, and the factual information contained therein is inextricably intertwined with the deliberative discussion concerning this document.

What is the role of the Action Office and Contributing Offices in Litigation?

The Action Office and Contributing Offices are responsible for:

- Ensuring that the OGC attorney assigned to the case has a copy of the entire FOIA file, including information about the search (*e.g.,* dates, terms, custodians, repositories, scope etc.); information related to the Agency's collection efforts; emails and other correspondence with the FOIA requester; and copies of the responsive records (both with and without redactions applied);
- Responding to any questions OGC has regarding the record;
- Completing the document production, which is relevant in cases involving a failure to produce records; and
- Reviewing all draft pleadings in the case and preparing the declaration in support of the Motion for Summary Judgment.

Litigation is time-consuming. EPA is also under court-ordered deadlines to submit briefs. As such, it is important that the FOIA team works together closely to ensure the deadlines are met.

Potential Outcomes

Courts generally dispose of FOIA cases based on Motions for Summary Judgment. If a court rules for EPA by granting the Agency's Motion for Summary Judgment, in full, the case will be dismissed. If the Court rules against EPA, in whole, or in part, there are different potential outcomes. For example, the court could ask EPA to submit the documents withheld under FOIA for *in camera* inspection so the court can assess the Agency's withholdings.

EPA would then submit the documents at issue for the court to review. *In camera* inspection is not common. During *in camera* inspection, plaintiff and plaintiff's counsel are not allowed to view the records; only the court views the records. If the court rules against EPA, another potential outcome is for the court to order the Agency to release some or all of the withheld records. If the court finds that the Agency failed to conduct a reasonable search, it could order the Agency to conduct a new search.

Attorney's Fees – What You Need to Know

A party seeking attorney's fees and costs in a FOIA action must show that it is both eligible for, and entitled to, such fees. The plaintiff also bears the burden of demonstrating the reasonableness of its fees. In assessing whether a plaintiff is eligible for attorney fees, the evaluates whether the plaintiff "substantially prevailed." If a plaintiff is eligible for attorney's fees, the court must then determine if the plaintiff is entitled to fees by evaluating four factors:

1. The public benefit derived from the case;
2. The commercial benefit to the plaintiff
3. The nature of the plaintiff's interest in the records sought; and
4. Whether the government's withholding had a reasonable basis in law.

Under FOIA, if payment of attorney's fees is required, those fees are paid by EPA. OCFO's Procedure 3 provides that payment of FOIA attorney's fees is made from funds appropriated to the Responsible Planning and Implementation Office (RPIO) involved in the FOIA judgment. The RPIO is generally the regional or program office designated by the FOIA Coordinator or FOIA Officer as the lead office (Action Office) for the FOIA request.

Message

From: Farren, Victor [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B4E4EF4434E44BB488AB822E82780809-FARREN, VIC]
Sent: 3/5/2018 9:44:23 PM
To: Fredrick No (No.Fredrick@epa.gov) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=422039a7a4804d38a105e25f983fd39a-No, Fredrick]
Subject: FW:
Attachments: image2018-03-05-163657.pdf

FYI

From: DC-WJCN-2407B-M@epa.gov [mailto:DC-WJCN-2407B-M@epa.gov]
Sent: Monday, March 05, 2018 4:37 PM
To: Farren, Victor <Farren.Victor@epa.gov>
Subject:

Message

From: Schumacher, Wendy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7AE5042E53E943728333B23CA294294F-SCHUMACHER,]
Sent: 9/27/2018 8:48:29 PM
To: Epp, Timothy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=46b70972e0c7421a9a922eeab6280211-TEpp]
CC: Gottesman, Larry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7b3dbf872f954fbeb950e98c56bdc431-LGottesm]
Subject: FOIA Training 2019 mandatory.pptx
Attachments: FOIA Training 2019 mandatory.pptx

Tim,

Please let me know if you have any edits or the slides are ready to share with Elise and Joe.

FYI - this is the required font size.

Thanks, Wendy

Wendy Schumacher, Ph.D., PMP
National FOIA Office
Government Information Specialist
(202) 566-2513
email: schumacher.wendy@epa.gov

Message

From: Schumacher, Wendy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7AE5042E53E943728333B23CA294294F-SCHUMACHER,]
Sent: 9/4/2018 2:35:37 PM
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Subject: FOIA Training 2019 mandatory.pptx
Attachments: FOIA Training 2019 mandatory.pptx

Larry,

Please let me know if you have any edits or this is ready to go back to Quoc.

Thanks, Wendy

Message

From: Schumacher, Wendy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7AE5042E53E943728333B23CA294294F-SCHUMACHER,]
Sent: 6/20/2018 5:09:29 PM
To: Miller, Kevin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2191d964c6bf4e2fb52817bee20213be-Miller, Kevin]; Nguyen, Quoc [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=dd07feb4da3343a885b9ed60ee5a8bd2-Nguyen, Quoc]
CC: Gottesman, Larry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7b3dbf872f954fbeb950e98c56bdc431-LGottesm]
Subject: FOIA Training 2019 - for your review
Attachments: FOIA Requests - FOIA Training 2019 mandatory.pptx

Kevin and Quoc,

Here is the slide deck for the proposed FY19 Mandatory FOIA Training for your review and comments. The PBI training is already in your office for review.

Please let me know what changes, if any, you have.

Thanks, Wendy

Wendy Schumacher, Ph.D., PMP
National FOIA Office
Government Information Specialist
(202) 566-2513
email: schumacher.wendy@epa.gov

Message

From: Schumacher, Wendy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7AE5042E53E943728333B23CA294294F-SCHUMACHER,]
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Subject: FOIA Requests - FOIA Training 2019 mandatory.pptx
Attachments: FOIA Requests - FOIA Training 2019 mandatory.pptx

Resending.

Thanks for reviewing this week.

Wendy

Message

From: Schumacher, Wendy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7AE5042E53E943728333B23CA294294F-SCHUMACHER,]
Sent: 2/7/2018 4:33:51 PM
To: Green, LindaE [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8c0ece4b80fb45f79814d2f0fc598e36-Green, LindaE]; Lewis, Judith [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7f755fc9e1104e3fb4f70db9980ea395-Lewis, Judith]; Lewis, Monica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e30c5be0e73b47359ad703d4e6fde807-MLEWIS02]; Person, Linda [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9b4a67f036b34e5885721c2763a129e4-LPerson]
CC: Byrd, Jonda [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f7b4a274987843219b4df98cdb01891a-Byrd, Jonda]; Gottesman, Larry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7b3dbf872f954fbeb950e98c56bdc431-LGottesm]
Subject: National FOIA Office Operations Manual_2018 02 07 JB comments.docx REPLY BY 2/12/18
Attachments: National FOIA Office Operations Manual_2018 02 07 JB comments.docx

Linda, Judith, Linda, and Monica,

Here is the draft FOIA Office Operations Manual. Please send your comments to me with a cc to Jonda and Larry by COB, Monday, February 12, 2018.

This version includes Jonda's edits.

Please let Jonda, Larry or me know if you have any questions.

Thanks, Wendy

Wendy Schumacher, Ph.D., PMP
Government Information Specialist
Office of Environmental Information
FOIA, Libraries & Accessibility Division
(202) 566-2513
email: schumacher.wendy@epa.gov

Message

From: Schumacher, Wendy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7AE5042E53E943728333B23CA294294F-SCHUMACHER,]
Sent: 8/6/2018 5:26:31 PM
To: Nguyen, Quoc [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=dd07feb4da3343a885b9ed60ee5a8bd2-Nguyen, Quoc]
CC: Miller, Kevin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2191d964c6bf4e2fb52817bee20213be-Miller, Kevin]; Gottesman, Larry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7b3dbf872f954fbeb950e98c56bdc431-LGottesm]
Subject: FOIA Requests - FOIA Training 2019 mandatory.pptx
Attachments: FOIA Requests - FOIA Training 2019 mandatory.pptx

Quoc,

Here is another copy of the draft training slides. I look forward to getting your feedback.

Thanks, Wendy

Wendy Schumacher, Ph.D., PMP
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Government Information Specialist
(202) 566-2513
email: schumacher.wendy@epa.gov

Message

From: Schumacher, Wendy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7AE5042E53E943728333B23CA294294F-SCHUMACHER,]
Sent: 8/6/2018 11:22:40 AM
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Subject: National FOIA Office Operations Manual_2018 08 06.docx
Attachments: National FOIA Office Operations Manual_2018 08 06.docx

Larry,

A hard copy is in your in box.

Please let us know when you'd like to implement.

Wendy

Wendy Schumacher, Ph.D., PMP
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Government Information Specialist
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email: schumacher.wendy@epa.gov

National FOIA Operations and Resource Team (FORT) Manual

August 6, 2018

U. S. Environmental Protection Agency

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INTRODUCTION

Purpose

This manual covers functions performed under the National FOIA Operations and Resources Team (FORT) and the National FOIA Program. FORT staff, and grantees/contractors may perform both sets of functions concurrently. FORT activities will be in accordance with Federal regulations and EPA policy and procedures. Providing excellent customer support to FOIA requesters requires flexibility and continuous learning. Users of this manual are encouraged to use a variety of other FOIA references and resources as appropriate. These are located on or may be accessed through the EPA FOIA Internet and Intranet sites.

National FOIA Operation Office Functions

This manual describes internal FORT processes for receiving and handling Headquarters FOIA requests. Agency-wide processes are detailed in the EPA Information Procedure entitled "Procedures for Responding to FOIA Requests." Both documents must be used together and can be found at: http://intranet.epa.gov/foia/FOIA-Procedures.html.

Use of FOIAonline has allowed EPA to implement best practices and streamline its FOIA processes. Out of necessity, some processes and decision making remain outside the system. This manual (in conjunction with the EPA FOIA procedures mentioned above) explains how those activities are to be performed and when and where the activities should be documented. It is assumed that FORT staff and grantee/contractor have taken FOIAonline training and are knowledgeable users of the system.

This manual also documents activities associated with managing the National FOIA program for both EPA headquarters and regions. The FORT supports the EPA FOIA community by providing guidance, training, and decision making for fee waiver and expedited processing requests. It also maintains the FOIA Requester Service Center as a contact point for the public. Finally, it supports other federal agencies by managing FOIAonline and its interagency governing board.

Supervision and Management

The FORT and the EPA National FOIA Program is managed by the Director of the National FOIA Office. The General Counsel is the Chief FOIA Officer.

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FORT FUNCTIONS

Receiving and acknowledging requests

All FOIA requests and appeals must be in writing. Although FOIAonline is the primary way that FOIA requests are received in EPA, some requests are submitted in other ways. These must be manually entered into FOIAonline within 1 day of receipt. Staff, usually grantees/contractors, perform the data entry for requests and appeals received as:

- emails to FOIA group email box – FOIA_HQ@epa.gov
- hard copies/emails routed to the FORT with FOIA requests that are forwarded from other federal organizations (e.g., referral or consultation) or congressional offices on behalf of constituents
- hard copy documents sent to EPA

If the request **does not have a mailing address**, then staff in charge of the FOIA group email box will attempt to contact the submitter by email or telephone to get the address. Requests without mailing addresses cannot be entered into FOIAonline.

FOIAonline will automatically send a receipt to the requester that includes the tracking number and submission date for all requests entered in the system. If an email address was not provided by the requester, the support staff will prepare an acknowledgement with the tracking number and submission date which will be signed by the Agency FOIA Officer and sent out by regular mail. A PDF copy of the acknowledgement letter sent by regular mail must be placed into the FOIAonline case file.

National FOIA Operations Program Group Email Box

Staff in charge of the FOIA group email box will either respond to or forward all emails to the appropriate staff person at least twice each day: before noon and before 5pm. A PDF copy of all emails must be placed into the FOIAonline case file within one day.

Reviewing requests

National FOIA Specialists will review the requests, verify the following criteria, and respond as follows:

	Criteria to Be Verified	Response if Criteria Not Met
1.	**Request reasonably describes the records that are sought.** • A description is considered sufficient if it enables a typical Agency employee familiar with the subject to locate the records with a reasonable amount of effort.	If description is missing, inadequate, or phrased as a question the specialist will call requester or send the clarification letter. If the requester does not respond or does not wish to change

	Criteria to Be Verified	Response if Criteria Not Met
	• Request must seek records rather than posing a question or questions. However, if the question or questions can easily be interpreted as constituting a request for Agency records, the request should be processed under FOIA.	the description, prepare the follow-up letter for failure to clarify for Agency FOIA Officer signature.
2.	**Records requested are expected to be within Agency control.** Records not expected to be in Agency control are: • Records that do not exist or will not be created until a future date (such as an upcoming report). • Records that exist (in their entirety) in another federal agency.	If records are not within Agency control, specialist will contact requester and suggest alternatives. If requester does not change the request, specialist will prepare a final action letter for Agency FOIA Officer signature.
3.	**Records are not purely personal**.	If purely personal, specialist will close request and prepare the proper final action letter for Agency FOIA Officer signature.

All communications with the requester (whether by email, telephone, or letter) must be documented in FOIAonline in the comments field or uploaded as a PDF file in Correspondence - Other. Whenever possible, emails to requesters should be initiated through FOIAonline. If not, then a copy of all email correspondence must be uploaded or attached to the system, preferably as a PDF file. Records of telephone calls initiated or received must be documented in FOIAonline in the Comment field or by follow up via email or regular mail. Documentation must include the date and content of the discussion.

Routing misdirected requests

If the responsive records are not expected to be located at EPA headquarters, but rather in an EPA region or anther federal agency, the National FOIA Specialist will reroute the request to the appropriate FOIA office. **This must be done within 10 working days of when the request was received at EPA via FOIAonline, email, fax or hard copy.**

To Headquarters Program Offices: Requests for records held at Headquarters will be routed to the appropriate EPA regional FOIA office in FOIAonline within 10 working days of when the request was received at EPA.

To Regions: Requests for regional records will be routed to the appropriate EPA regional FOIA office in FOIAonline. They will remain open for the region to process.

To Other Agencies: If requests are transferred (in full) to another agency, the National FOIA Specialist will prepare a letter to the requester explaining the reason for the transfer and providing the contact information for the other agency within two days. The letter will be signed by the Agency FOIA Officer, scanned into FOIAonline, and mailed to the requester via FOIAonline or regular mail. Once that is completed, the National FOIA Specialist will close the request in FOIAonline.

Perfecting requests and starting the clock

Perfecting a request includes the process of: reviewing the request, working with the requesters to clarify criteria, routing misdirected requests, and doing any other work needed to prepare the request for assignment and processing. Once this is complete, the FORT staff changes the status of the request in FOIAonline to "perfected." In most cases the program office or region will contact the requester for clarification. This initiates the statutory 20 day working period for EPA's response.

At the same time FORT staff should assign the fee category and change the description to "yes" to release to the public unless it contains personal information. Modify the description so that there is a version that may be released to the public or if the description is something like "see attached."

Consultations and Referrals

The grantee/contractor who receives the mail makes a copy of the cover letter of every referral and consultation before assigning to one of the National FOIA Specialists. The cover letter is held in a file by the grantee/contractor. The grantee/contractor hand carriers or forwards the email containing the entire file to one of the National FOIA Specialists on a rotating basis who will enter into FOIAonline within one day of receipt. There are separate work forms for referrals and consultations.

Routing requests to Headquarters FOIA coordinators and assigning tasks

The National FOIA Specialist routes the perfected request to the FOIA Coordinator in the headquarters program or staff office where they believe the majority of responsive records are held. (OGC has its own coordinator.) The coordinator in each office may process the request themselves (in other words, they may act as an Action Office) or they may further route it to the specific Action Office where most of the records are held. If any additional records are needed outside the jurisdiction of the FOIA Coordinator, then the FOIA Coordinator may create additional tasks in FOIAonline and assign those to other FOIA coordinators.

Note: Action Offices have responsibility for processing requests. Staff in Action Offices may also create tasks for other offices if, 1) the receiving office for the assignment is under the same FOIA coordinator as they are and, 2) is not of a higher organizational level.

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Approving due date extensions for Headquarters Action Offices

If a Headquarters Action Office needs additional time beyond the 20 day working period to process a request due to "unusual circumstances" or because the due date for a request has already been extended once before in accordance with FOIA regulations, the Action Office follows the sequence of activities outlined in the EPA "Procedures for Responding to FOIA Requests." These include contacting the requester, negotiating additional time, and documenting the outcome. Once that is done, the Action Office enters the new requested due date and the justification for the extension into FOIAonline (using the Extend Due Date button). The system generates a notice to the FORT for approval.

Support grantees/contractors for FORT assign the task to the National FOIA Specialist who originally perfected the request. **The National FOIA Specialist makes a decision within two working days**, documents his or her decision (with comments, if necessary) in FOIAonline. The Action Office will communicate the new due date to the requester if necessary.

Managing records and documentation

From October 1, 2012, forward, all FOIA correspondence, documentation, and responses (with the exception of very large data files) are maintained in FOIAonline. Large data files are handled on a case by case basis, in accordance with direction from the Agency FOIA Officer.

Prior to October 1, 2012, Office staff maintained hard copies of the material associated with Headquarters FOIA requests. Unless the case is open or there is litigation, this material is being destroyed in accordance with FOIA record schedules. Per the schedules, this is usually six years from date of closure for requests granted in full and six years from closure for requests that have been denied, partially granted, or where no records were found. By October 1, 2018, most hard copy FOIA files in the FORT will be destroyed.

NATIONAL FOIA PROGRAM FUNCTIONS

Serving customers: Role of FOIA Requester Service Center and Public Liaison

EPA maintains the FOIA Requester Service Center as a national FOIA hotline for customers. The telephone number is the same as the FORT (202-566-1667) and the email is FOIA_HQ@epa.gov. The center is staffed by Headquarters FOIA specialists and support grantees/contractors who perform this work in addition to other duties. Requesters may call or send an email to receive guidance on the types of information available on EPA's Websites or obtain general information on FOIA. Usually Service Center staff are able to help, but if not they refer the inquiries to FOIA coordinators in the program offices or Regional FOIA Officers. If individuals are ready to submit a FOIA request or wish to check

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on the status of a prior request, the staff person answering the call or email will refer them to the FOIA Officer or Coordinator of the organization processing the request. After forwarding the call add a Comment or add a PDF of the email to FOIAonline.

EPA's Public Liaison function is filled by the Agency FOIA Officer. The Public Liaison assists with resolving requester's disputes. He/she facilitates timely FOIA responses, provides information on the status of requests and fosters greater openness and transparency in the Agency's FOIA administration activities.

Serving FOIA professionals: Role of Agency FOIA Officer and National FOIA Specialists

The Agency FOIA Officer is the primary agency subject matter expert on all aspects of FOIA. Following legal determinations and guidance provided by the Office of General Counsel, the Agency FOIA Officer works collaboratively across EPA to implement the program. He/she leads EPA FOIA training; supports development and dissemination of policy; procedures, and guidance; provides leadership for development and enhancement of automated systems, tools, and websites; and responds to questions from senior management, the FOIA community of interest (e.g., FOIA coordinators, FOIA officers, FOIA specialists) and EPA staff. He/she plans and facilitates regular conference calls and meetings with the FOIA community. He/she reports to the Associate Director.

Any National FOIA Specialist may receive inquiries from EPA employees and grantees/contractors regarding how to process FOIAs. If they know the answer, they may respond at that time. If not, they seek guidance from the Agency FOIA Officer and respond as quickly as possible. An example of a common question is what to do with misdirected requests. Requests sent by the public to an office other than a FOIA Office are always considered "misdirected."

Measuring the success of the program

It is the goal of the EPA FOIA Program to continually reduce the backlog of open FOIA requests even if the total number of requests increases from year to year. Results of the Lean Kaizan event will help refine the measures.

FOIAonline includes reporting capability that allows FOIA coordinators and officers to pull reports for their organizations that reflect pending and completed FOIA requests and other information.

Performance reports for senior EPA management and the Department of Justice (DOJ) are prepared in OGC by the Agency FOIA Officer and Associate Director. They include information from FOIAonline, but may also require additional information which varies by year. Two reports are mandatory: Annual FOIA Report which contains fiscal year statistics; and the Chief FOIA Officer's Report which is qualitative.

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Handling fee waiver (FW) requests

Requesters seeking a fee waiver must submit their desire for a waiver with their initial FOIA request. **EPA has a goal of making all fee waiver determinations within 10 working days of receipt.**

Once initiated, FOIAonline will automatically set up a task to track the status of the fee waiver. For requests initially received at the FORT, the support grantee/contractor for the FORT will assign the fee waiver task to the same National FOIA Specialist who was assigned to distribute the request. For requests received in a region, the Regional FOIA Officer will route the fee waiver task to the FORT where it will be assigned by the support grantee/contractor to the National FOIA Specialist who covers that region.

The individual in the EPA program, staff, or regional office who has been assigned responsibility for the FOIA request is still required to determine if the request is billable (over $14.00) or unbillable. They must be contacted **within five working days of receiving the FOIA request.** They notify the National FOIA Specialist of their opinion by calling, email or comment in FOIAonline. If they do not respond within two days, the National FOIA Specialist will make the determination. The National FOIA Specialist may request input on whether or not the request is billable through a task in FOIAonline or through email messages which are converted into PDF files and uploaded into FOIAonline.

The National FOIA Specialist may fill out a Fee Waiver Processing Sheet. They note the billable/non-billable status on the sheet based on the input received above. If there are no billable fees associated with processing the request, they may skip to the bottom of the form and check "Non-Billable." If billable, they make a recommendation whether to grant or deny the fee waiver based on the following factors outlined in 40 C.F.R. § 2.107(I)(5):

1. *Does request involve government operation or activities;* ***Y or N***
2. *Would the release of the information "likely to contribute" to understanding of government operations or actions;* ***Y or N***
3. *Would the disclosure contribute to public understanding (media presumed to satisfy this criteria). How does the requester plan on dissemination this information;* ***Y or N***
4. *Will the release "significantly" contribute to public understanding (all justifications for a fee waiver request must be specific and not generic):* ***Y or N or N/A***
5. *If commercial requester has an interest that would be furthered by disclosure; and* ***Y or N***
6. *If criteria 5 is met, does commercial interest outweigh public interest?* ***Y or N***

The National FOIA Specialist prints the Fee Waiver Processing Sheet and prepares a draft determination letter that is addressed to the FOIA requester. The specialist hand carries the document(s) to the Agency FOIA Officer for approval and signature.

The Agency FOIA Officer is responsible for making the fee waiver decision and signing the Fee Waiver Processing Sheet, if provided, and determination letter. Letter templates are available at: http://intranet.epa.gov/foia/FOIA-letters.html. Once this has been done, the National FOIA Specialist scans the letter and uploads it to FOIAonline as the document of record. *(Note: The specialist should double check and make sure the document loaded*

ED_002194_00002266-00009

correctly.) The specialist then creates an email within the system, attaches a copy of the signed determination letter, and sends it to the requester. If no email address was provided by the requester, the letter is mailed via regular mail after uploading a copy of the letter into FOIAonline. The National FOIA Specialist closes out the fee waiver task in FOIAonline by checking the appropriate box to reflect the Agency FOIA Officer's decision. When the task is closed, the EPA employee that was assigned the FOIA request will be automatically notified of the determination by FOIAonline.

The requester may appeal the determination to OGC and, if they are still not satisfied, to district court.

Handling expedited processing (EP) requests

All requests for expedited processing must be submitted with the initial FOIA request. Determinations on EP requests will be made by the Agency FOIA Officer based on the factors outlined in 40 C.F.R. 2.104(e) (see below). **The Agency must document in FOIAonline whether or not to grant an EP request within 10 calendar days of receipt.** The National FOIA Specialist gives the draft letter to the Agency FOIA Officer for signature. Letter templates are available at: http://intranet.epa.gov/foia/FOIA-letters.html. The Agency FOIA Officer may consult others prior to granting EP. If the request is granted, it must be given priority by the Action Office and be the next request in line for processing. However, the request itself is not required to be processed with the 10 calendar days.

Once initiated, FOIAonline will automatically set up a task to track the status of the EP request. For requests initially received at the FORT, the support grantee/contractor for the FORT will assign the EP task to the same National FOIA Specialist who was assigned to distribute the request. For requests received in a region, the Regional FOIA Officer will route the EP task to the FORT where it will be assigned to the National FOIA Specialist who covers that region.

There are two conditions under which an EP may be approved:

1) Request is from an individual **in the media** who has "an urgency to inform the public about an actual or alleged Federal government activity." This factor is restricted to media applicants because the information must be "requested by a person primarily engaged in disseminating information to the public."

2) Request is from an individual who is applying because of "circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual."

The National FOIA Specialist prepares a draft determination letter that is addressed to the FOIA requester (template available on Intranet site). The specialist hand carries the letter(s) to the Agency FOIA Officer for approval.

The Agency FOIA Officer is responsible for making the EP determination and signing the letter. Once this has been done, the National FOIA Specialist scans the letter and uploads it to FOIAonline. The specialist then creates an email within the system, attaches a copy of the signed determination letter, and sends it to the requester. If no email address was provided by the requester, the letter is mailed via regular mail. The National Headquarters Specialist closes out the EP task in FOIAonline by checking the appropriate box to reflect the Agency FOIA Officer's determination. When the task is closed, the EPA employee that was assigned the FOIA request will be automatically notified of the determination by FOIAonline.

The requester may appeal the determination to OGC and, if still not satisfied, to district court.

Developing and disseminating Agency FOIA policy, procedures, guidance and other information

The FORT is responsible for:

- Maintaining FOIA related material in the Code of Federal Regulations (CFR), Title 40, Chapter 1, Part 2 – Public Information
- Developing and maintaining EPA FOIA Policy, procedures and guidance; and
- Updating the FOIA Delegation of Authority (known as 1-30).

The CFR takes precedence over the other documents which should be written to align with it. Each time a draft of one of the above documents is prepared General Law Office staff will review and provide comments to ensure that the material is legally in compliance with FOIA and DOJ FOIA guidelines. Drafts are then circulated for comment among the FOIA community. Finally, each document will go through the official Agency approval processes required for the specific document.

Information about the National FOIA Program can be found on both the EPA FOIA Internet and intranet sites. The sites are maintained by FORT staff. Extensive coordination with program and staff offices and regions is critical to keeping the sites usable and current. The Internet site is designed for customers and contains possible sources of information that may be used in lieu of FOIA requests as well as contacts and links to FOIAonline. Libraries with source information are maintained for each region, and Regional and program office FOIA coordinators and officers assist by maintaining local libraries with source information. The intranet site is for the FOIA community as well as EPA employees and grantees/contractors. It contains guidance, management reports and information about resources and training.

Providing FOIA training

The National FOIA program is responsible for coordinating FOIA training across the agency. Training changes frequently and covers a range of topics. Examples are:

- Training on current topics for FOIA professionals is included in the monthly Headquarters FOIA Coordinators Meeting and the monthly FOIA Officers' Teleconference for Regional FOIA Officers.

- A FOIA Boot Camp is offered for EPA Managers upon request. It is a two-hour class and is taught jointly by the Agency FOIA Officer and OGC staff.

- Online FOIA training is mandatory for all EPA staff and is distributed through the Agency's training system.

- Specialized training may be offered by DOJ at any time.

Managing and Enhancing FOIAonline

FOIAonline, launched October 1, 2012, allows users to search for records, file FOIA requests, check their status, run reports, and file appeals. Although it was developed and continues to be managed by EPA, it is now shared with other federal agencies and changes to the system must be approved by the interagency governing board. Effective use and growth of the system is essential to allow EPA to meet the increasing numbers of FOIA requests expected in the future. As the initiator of the system, the National FOIA program has a special role in promoting its use among other agencies. It is also responsible for collecting and managing EPA's requirements.

National FOIA Specialists support EPA FOIA professionals by answering questions about FOIAonline. They may need to clarify what is in the system or help users navigate screens. As experts in both FOIA processes and the system, they also collect and forward EPA's requirements for enhancements to the Agency FOIA Officer who consolidates them for consideration by the governing board.

Agencies participating in FOIAonline, share the costs of maintaining and enhancing the system.

Coordinating with General Law Office, Office of General Counsel

The Information Law Practice Group works closely with the National FOIA Program staff to provide interpretations of FOIA law and resolve legal issues. OGC is also the first level of appeal for requesters unless the original action office was the Office of the Inspector General (OIG). (OIG is an independent component of EPA and must handle its own FOIA responses and appeals). OGC follows federal guidance from the DOJ, Office of Information Policy. OGC and DOJ serve as co-counsels in FOIA litigation.

As mentioned above, OGC reviews and comments on FOIA policy, procedures and other material developed by the National FOIA Program. OGC staff may also assist with leading FOIA training.

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Message

From: Schumacher, Wendy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7AE5042E53E943728333B23CA294294F-SCHUMACHER,]
Sent: 2/7/2018 1:51:51 PM
To: Byrd, Jonda [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f7b4a274987843219b4df98cdb01891a-Byrd, Jonda]
CC: Gottesman, Larry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7b3dbf872f954fbeb950e98c56bdc431-LGottesm]
Subject: FW: National FOIA Office Operations Manual_20180130 WS edits.docx
Attachments: National FOIA Office Operations Manual_20180130 WS edits.docx

Jonda,

Per your reply.

Thanks, Wendy

From: Schumacher, Wendy
Sent: Wednesday, January 31, 2018 3:01 PM
To: Byrd, Jonda <byrd.jonda@epa.gov>
Subject: National FOIA Office Operations Manual_20180130 WS edits.docx

Jonda,

Would you like me to circulate to the rest of the office now or would you like to review first?

Thanks, Wendy

Message

From: Schumacher, Wendy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7AE5042E53E943728333B23CA294294F-SCHUMACHER,]
Sent: 5/25/2018 2:12:10 PM
To: Gottesman, Larry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7b3dbf872f954fbeb950e98c56bdc431-LGottesm]
Subject: FOIA Requests - FOIA Training 2019 mandatory.pptx
Attachments: FOIA Requests - FOIA Training 2019 mandatory.pptx

Larry,

Please send me your edits.

Thanks, Wendy

Wendy Schumacher, Ph.D., PMP
National FOIA Office
Government Information Specialist
(202) 566-2513
email: schumacher.wendy@epa.gov

Message

From: Schumacher, Wendy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7AE5042E53E943728333B23CA294294F-SCHUMACHER,]
Sent: 1/31/2018 2:25:02 PM
To: Gottesman, Larry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7b3dbf872f954fbeb950e98c56bdc431-LGottesm]
Subject: RE: National FOIA Office Operations Manual_20180130.docx
Attachments: National FOIA Office Operations Manual_20180130 WS edits.docx

Larry,

Addressed your comments and edits. Ready to share?

Thanks, Wendy

From: Gottesman, Larry
Sent: Tuesday, January 30, 2018 2:45 PM
To: Schumacher, Wendy <schumacher.wendy@epa.gov>
Subject: National FOIA Office Operations Manual_20180130.docx

Please see my comments.

Larry F. Gottesman
Agency FOIA Officer

202-566-2162 (Direct line)
202-689-4588 (Mobile)

Message

From: Nguyen, Quoc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DD07FEB4DA3343A885B9ED60EE5A8BD2-NGUYEN, QUOC]
Sent: 1/30/2018 6:46:13 PM
To: Schumacher, Wendy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7ae5042e53e943728333b23ca294294f-Schumacher,]; Miller, Kevin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2191d964c6bf4e2fb52817bee20213be-Miller, Kevin]; Gottesman, Larry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7b3dbf872f954fbeb950e98c56bdc431-LGottesm]
Subject: RE: Training meeting follow up
Attachments: A3 What to do when you receive a FOIA request - The Five Cs FINAL (090517).pptx

Thanks, Wendy. I think it would be helpful to start working off the 5C's powerpoint presentation from the national FOIA training conference. See attached.

From: Schumacher, Wendy
Sent: Tuesday, January 30, 2018 12:15 PM
To: Miller, Kevin <Miller.Kevin@epa.gov>; Gottesman, Larry <Gottesman.Larry@epa.gov>; Nguyen, Quoc <Nguyen.Quoc@epa.gov>
Subject: Training meeting follow up

Kevin, Quoc and Larry,

Thanks for all the ideas. I am waiting to hear back from the training office about this year's deadlines and costs to use their contract support to convert our Powerpoint slides into usable training.

Unless you say otherwise I will begin work on the Annual training for all employees and the PBI (target) training for FOIA professionals.

Wendy
Wendy Schumacher, Ph.D., PMP
Government Information Specialist
Office of Environmental Information
FOIA, Libraries & Accessibility Division
(202) 566-2513
email: schumacher.wendy@epa.gov

WHAT TO DO WHEN YOU RECEIVE A FOIA REQUEST: THE FIVE C'S

BEST PRACTICES TO SET YOU UP FOR FOIA SUCCESS!

NATIONAL FOIA TRAINING CONFERENCE, SEPTEMBER 12, 2017

PRESENTERS:

NICOLE REMENTER, OFFICE OF GENERAL COUNSEL, FOIA EXPERT ASSISTANCE TEAM

JENNIFER HAMMITT, OFFICE OF GENERAL COUNSEL, GENERAL LAW OFFICE

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FIVE C'S

- Comprehend
- Collaborate
- Calculate
- Communicate
- Carry Out

COMPREHEND

Understand the Request!

COMPREHEND

1. Who is the requester?
2. What is the fee category?
3. Is the requester seeking preferred status?
4. What is the request type?
5. Have these records been previously requested?
6. Is the request assigned to the correct Action Office?
7. How many days remain on the clock?
8. Is the request proper?

COMPREHEND

Who is the requester?

- FOIA permits "any person" to submit a request for agency records.
- A "person" for purposes of FOIA does not include:
  - Another federal agency;
  - Congressional committee or subcommittee; or
  - Fugitive from justice seeking records about their fugitive status.
- A "person" for purposes of FOIA does include:
  - Local, state, and foreign governments;
  - Individual members of Congress not acting on behalf of the chamber, committee, or subcommittee;
  - Non-U.S. citizens or residents;
  - Corporations or other legal entities; or
  - Etc.

COMPREHEND

What is the fee category?

- Commercial
- Preferred
  - Representative of the News Media
  - Educational Institution
  - Non-Commercial Scientific Institution
- All Other requesters

COMPREHEND

Is the requester seeking preferred status?

- Expedited Processing
  - Goes to the front of the line, not "drop everything."
- Fee Waiver
  - If the request is improper, hold off on the fee waiver!

COMPREHEND

- Expedited Processing
  - Factors for Analysis
  - Deadline to Respond: 10 **calendar** days!

8

Failure to timely respond to a request for expedited processing automatically provides the requester standing to sue the Agency in federal district court!

COMPREHEND

- Fee Waiver
  - Billable v. Non-billable and significance
  - Factors for Analysis

COMPREHEND

What is the request type?

- Simple vs. Complex Request
- Significance

COMPREHEND

Have these records been previously requested?

- Conduct a search of FOIAonline
- Publicly Available Records
- Rule of Three
- Aggregation of requests

COMPREHEND

Is the request assigned to the correct action office?

- Importance of assignment to appropriate Action Office in beginning

COMPREHEND

How many days remain on the clock?

- National FOIA Office will be perfecting requests prior to assignment to the Action Office.
- Clock management:
  - Clarification
  - Fees

COMPREHEND

Is the request proper?

- What is a proper FOIA request?
- Four considerations of a reasonably described request
- Hypotheticals

COMPREHEND

- What is a proper FOIA request?
  - Pursuant to §552(a)(3)(A), a proper FOIA request:
    - "Reasonably describes" the records sought; AND
    - Is made in accordance with EPA regulations.
- Agencies are only obligated to process proper FOIA requests.

COMPREHEND

- What is a reasonably described request?
  - One that enables an agency employee (or contractor or grantee!) familiar with the subject matter to locate the record with a "reasonable amount of effort."
  - Obligation to be reasonable:
    - Act with articulable purpose(s)
      - *Tip #1:* Interpret request with an aim for some flexibility—be careful not to read the request so strictly that the requester is denied information you know exists in agency records!
      - *Tip #2:* Take notes on your initial brainstorming of how and where you might search for responsive records. This can help inform you how reasonably described the request is.
      - *DON'T GUESS!* While you may think you know what the requester wants, you may be wrong (and may be challenged on the search). Let the requester tell you!

COMPREHEND

- Four Considerations of a Reasonably Described Request:
  1. Type(s) of records;
  2. Date range(s);
  3. Program Office(s)/Position(s)/Custodian(s); or
  4. Subject matter(s)/Search Term(s).
- These are four concepts to keep in mind when determining whether a request is proper or needs further clarification.

COMPREHEND

Hypotheticals – Reasonably Described Requests

- *Hypothetical #1*: I request all yellow candy in all of EPA.
- *Hypothetical #2*: I request all Nestle brand hard candy in Troop B, including, but not limited to Everlasting Gobstoppers, Nerds, and Sweetarts.
- *Hypothetical #3*: I request the following candy:
  - Violet candy;
  - Chewy candy;
  - Sour flavored candy.
- I also want all Hot Tamales.

COLLABORATE

Work together in EPA!

COLLABORATE

FOIA cannot be successful in a vacuum!

- Action Office v. Contributing Office
- Importance of team work
- Ideas to facilitate cooperation with Contributing Office

COLLABORATE

Action Office v. Contributing Office

- Agency FOIA Procedures outline specific responsibilities depending on your office's role in the request:
  - Action Office: Leader of the request.
  - Contributing Office: Possesses responsive records and works under the direction of Action Office in processing request.
- **Collaboration is part of our procedures!** *"For large, complex FOIA requests, it is suggested that the Action Office convene meetings with all interested Agency parties in order to clarify responsibilities, methods to be used for collection, and similar issues. Those meetings should include programmatic experts, Records Liaison Officers, FOIA Officers and FOIA Coordinators, information technology specialists, and legal counsel, as appropriate."*

COLLABORATE

- Within your Office:
  - Think of new ways to make processes more efficient and easier.
  - Exchange ideas as request progresses to completion.
- With Other Offices
  - Different perspectives may shed light on potential issues you may have missed.
  - Other offices have unique experiences that may be relevant and helpful.
- **Takeaway**: Some clichés are useful—Two (or more) heads are better than one!

COLLABORATE

- Working with Contributing Office(s)
  - Use Subject-Matter Experts (SMEs) to your advantage!
  - Set up coordination meeting with contributing office(s) that likely (not may) have responsive records.
    - Participants for meeting: SMEs, FOIA Coordinator(s), primary custodians.
    - Agenda:
      - Interpretation of request – discuss any clarification needed, potential scope of responsive records
      - Identify key custodians
      - Discuss search terms
      - Identify record systems
      - Talk about upcoming non-FOIA projects for each office and discuss where FOIA timeline/deadlines fit in
      - Responsibilities for each office – Manage expectations!
      - Hash out the issues to discuss with the requester

May need to be multiple meetings

CALCULATE

Let's talk fees!

CALCULATE

- Requester's Fee Limit
- Fee Waivers
- Delinquent requesters
- Advance Payment

CALCULATE

- In accordance with the FOIA statute and EPA regulations, FOIA requesters must give assurance of payment of at least $25 with submission of their requests.
- Assurance of payment is not required if the requester requests and receives a fee waiver.

CALCULATE

- Fee Waivers
  - Procedures
    - Requirements of a request for fee waiver
      - Submitted with FOIA request
      - Address the fee waiver factors
    - National FOIA Office makes determination on fee waivers requested for billable FOIA requests
      - Billable v. Non-billable and Significance
  - **Reminder! Even if the fee waiver is granted, per Agency FOIA Policy and Procedures, you still must to track your search and review time in FOIAonline!**

CALCULATE

Delinquent requesters

40 C.F.R. § 2.107(h)

- Defined: A requester who fails to pay all fees charged to process FOIA request(s) within 60 calendar days of the fees assessment.
- Significance: Subsequent FOIA requests will not be processed until payment of the overdue fees is satisfied.
- Be sure to routinely check the Delinquent Requesters list!
  - Delinquent Requesters list is available at: https://usepa.sharepoint.com/sites/oei_Work/FOIA%20Invoices/SitePages/Home.aspx.
  - If your requester appears on this list, contact the requester in writing to give notice that their delinquency status stops the clock for your FOIA request and provide information on how to remedy the delinquency.

CALCULATE

Advance Payment

40 C.F.R. § 2.107(j)

- If a fee estimate exceeds **$250**, the Agency may require an advance payment by the requester up to the amount of the entire anticipated fee before commencing process on the request **UNLESS** the requester has a history of prompt payment and provides satisfactory assurance of full payment.
- If a requester has previously been **30** or more days late in making payment on a properly charged **FOIA** request, the Agency may, before commencing or continuing process on the request, require:
  - Payment of full amount due, plus any applicable interest; and
  - Advance payment of the full amount of any anticipated fee.

COMMUNICATE

Pick up the phone!

COMMUNICATE

- Pros of Requester Engagement
- Requester Engagement Boosts FOIA Program Success
- Responses to Common Arguments Against Requester Engagement
- Put Theory Into Practice

COMMUNICATE

Pros of Requester Engagement

- Requester engagement is critically important to a good FOIA process.
- Requesters want to hear from you!
- Requester engagement helps to educate the requester community about our records, record systems, FOIA workloads, etc. They cannot read our minds!
- A good relationship with a requester may reap benefits beyond the FOIA request at hand!
- Requesters are talking about you – take control of your narrative!

COMMUNICATE

Requester Engagement Boosts FOIA Program Success

- Consistent with purpose of FOIA
- Improves litigation posture
- Benefits FOIA processing efficiency

COMMUNICATE

Put Theory Into Practice

- *Hypothetical #1*: I request all yellow candy in all of EPA.
- *Hypothetical #2*: I request all Nestle brand hard candy in Troop B, including, but not limited to Everlasting Gobstoppers, Nerds, and Sweetarts.
- *Hypothetical #3*: I request the following candy:
  - Violet candy;
  - Chewy candy;
  - Sour flavored candy.
- I also want all Hot Tamales.

CARRY OUT

CARRY OUT

- Importance of a Good Administrative Record
- Unusual Circumstances

CARRY OUT

Importance of a Good Administrative Record

- A good administrative record tells the story of the request – from cradle to grave.
- Use Comments and Correspondence features in FOIAonline to maintain your administrative record.
- Include:
  - All communications (phone calls, email, and letters) with requester
  - Summary of internal discussions about request, especially decisions regarding interpretation of request, search strategy, withholdings, productions
  - Procedural actions and reasoning (e.g., clock stoppage, office reassignment)
  - Search instructions
  - Applied and unapplied versions of redacted and withheld records
  - Any information you think would be helpful to GLO on appeal/litigation

CARRY OUT

Unusual Circumstances

5 U.S.C. § 552(a)(6)(B)

- The FOIA allows you 10 additional working days to process a request if one or more of the following elements is true:
  - The need to search for and collect records from "field facilities or establishments" separate from your location;
  - The need to search for, collect, and review a voluminous amount of records;
  - The need for consultation with another agency having a substantial interest in the determination of the request; or
  - The need to consult with two or more components of the agency having substantial subject-matter interest in the determination of the request.

CARRY OUT

Unusual Circumstances

5 U.S.C. § 552(a)(6)(B)

- To properly assert unusual circumstances and have 10 additional working days to respond to the request, you must:
  - Notify the requester in writing that unusual circumstances apply to their request and the reason(s); and
  - Provide the anticipated date of response that is not more than an extension of 10 working days.

CARRY OUT

- What if 30 working days still isn't enough time? You can extend the response time to be more than 30 working days upon notice to the requester *in writing*:
  - Unusual circumstances that apply to the request;
  - Agency response requires more than 10 additional working days to complete;
  - Provide an opportunity to limit the scope so that it may be processed within 30 working days or an opportunity to arrange an alternative time frame for processing the request or modified request;
  - Provide contact information for the FOIA Public Liaison to assist in the resolution of any disputes between the requester and agency; and
  - Provide notice of the requester's right to seek dispute resolution services from OGIS and OGIS' contact information.

CARRY OUT

Unusual Circumstances

- If the requester narrows the scope of the request so it can be processed within 30 working days, great!
- If, after clarification and consultation with the requester regarding the scope of the request, the request still cannot be processed within 30 working days, provide an estimated date of completion.
- As always, make sure to memorialize any agreements with the requester regarding extensions of time to respond or production schedules!

RECAP

- The Five Cs will help you remember what to do when you receive a FOIA request!
  - Comprehend
  - Collaborate
  - Calculate
  - Communicate
  - Carry Out
- These concepts can be put into practice at any point of the FOIA process, not just the beginning!
- Likely, you will find yourself visiting and revisiting each 'C' along the way.

QUESTIONS?

Thank you!

- Nicole Rementer, OGC, FOIA Expert Assistance Team
  - rementer.nicole@epa.gov
- Jennifer Hammitt, OGC, General Law Office
  - hammitt.jennifer@epa.gov

Message

From: Schumacher, Wendy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7AE5042E53E943728333B23CA294294F-SCHUMACHER,]
Sent: 1/30/2018 4:06:29 PM
To: Gottesman, Larry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7b3dbf872f954fbeb950e98c56bdc431-LGottesm]
Subject: National FOIA Office Operations Manual_20180122.docx
Attachments: National FOIA Office Operations Manual_20180122.docx

Draft per your request

Message

From: Gottesman, Larry [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7B3DBF872F954FBEB950E98C56BDC431-LGOTTESM]
Sent: 4/6/2018 1:20:49 PM
To: Bigioni, Neil [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b378c797c72f492eac41e1e47750471f-Nbigioni]
Subject: FW: National FOIA Office Operations Manual 2018
Attachments: National FOIA Office Operations Manual_2018 02 07 JB comments.docx

Never heard back from Becky. This may be helpful to you as we transition into OGC.

Thanks

Larry F. Gottesman
Agency FOIA Officer

202-566-2162 (Direct line)
202-689-4588 Personal Phone / Ex. 6

From: Gottesman, Larry
Sent: Tuesday, February 13, 2018 10:28 AM
To: Dolph, Becky <Dolph.Becky@epa.gov>
Subject: National FOIA Office Operations Manual 2018

Becky-

Attached is a draft SOP we have been working on for a while. We made a few edits, to reflect some of the knowns about the reorganization. Wanted to share the draft with you.

Thanks

Larry F. Gottesman
Agency FOIA Officer

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202-689-4588 Personal Phone / Ex. 6

Message

From: Gottesman, Larry [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7B3DBF872F954FBEB950E98C56BDC431-LGOTTESM]
Sent: 4/17/2018 6:50:43 PM
To: Bigioni, Neil [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b378c797c72f492eac41e1e47750471f-Nbigioni]
Subject: GC Memos Collection Project Tracking Chart.xlsx
Attachments: FOIA-Proc_August2014-09-30FINAL(with-electronic-signature).pdf; FOIA-Policy-August2014-09-30FINAL(with-electronic-signature).pdf; GC Memos Collection Project Tracking Chart.xlsx

Attached is the a PDF of the Policy and Procedures and the updated spreadsheet.

Thanks

Larry F. Gottesman
Agency FOIA Officer
Office of General Counsel
U.S. Environmental Protection Agency

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Procedures for Responding to Freedom of Information Act Requests	
EPA Classification No.: CIO 2157-P-01.1	CIO Approval Date: 09/30/2014
CIO Transmittal No.: 14-006	Review Date: 09/30/2017

Issued by the EPA Chief Information Officer,
Pursuant to Delegation 1-19, dated July 7, 2005

Procedures for Responding to Freedom of Information Act Requests

1. PURPOSE

These procedures provide basic instructions for responding to Freedom of Information Act (FOIA) requests submitted to EPA. They address statutory, regulatory, policy, procedural and processing requirements to be followed by all EPA organizations and must comprise the core of all office-specific FOIA processing procedures.

2. SCOPE AND APPLICABILITY

The scope of these procedures covers work performed by EPA employees, grantees, contractors, and interns in support of FOIA administration activities in Headquarters, regional offices, field offices and EPA laboratories.

3. AUDIENCE

The audience for these procedures includes all EPA organizations, officials, and employees. The audience for these procedures is also contractors or grantees and others operating on behalf of the EPA.

4. BACKGROUND

The FOIA, 5 U.S.C. § 552, was enacted in 1966. The law gives any requester the right to obtain access to federal agency records unless such records or portions of such records are protected

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from public disclosure by one or more of the nine exemptions or three law enforcement exclusions contained in the statute. There are nine FOIA exemptions:

1) Classified national defense and foreign relations information.
2) Internal agency rules and practices.
3) Information that is prohibited from disclosure by another federal law.
4) Trade secrets and other confidential business information.
5) Inter-agency or intra-agency communications that are protected by legal privileges.
6) Information involving matters of personal privacy (protected under the Privacy Act or containing sensitive personally identifiable information).
7) Information compiled for law enforcement purposes, to the extent that the production of those records:
   a) Could reasonably be expected to interfere with enforcement proceedings.
   b) Would deprive a person of a right to a fair trial or an impartial adjudication.
   c) Could reasonably be expected to constitute an unwarranted invasion of personal privacy.
   d) Could reasonably be expected to disclose the identity of a confidential source.
   e) Would disclose techniques and procedures for law enforcement, investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions.
   f) Could reasonably be expected to endanger the life or physical safety of any individual.
8) Information relating to the supervision of financial institutions.
9) Geological information on wells.

The FOIA applies only to administrative agencies within the federal Executive Branch. It does not apply to records held by Congress, the courts, or by state, local, or tribal government agencies. The FOIA has undergone several amendments since its passage, including the e-FOIA amendments of 1996 and the Open Government Act of 2007. The e-FOIA amendments clarified how electronic records should be handled under the FOIA and extended the statutory time to respond from ten working days to twenty working days. The Open Government Act of 2007 made changes to promote a more open and accountable government and established a requirement for each agency to have a Chief FOIA Officer and a FOIA Public Liaison to assist in reducing delays, increasing transparency and resolving disputes. It also established the Office of Government Information Services within the National Archives and Records Administration to provide mediation services for resolution of disputes between persons making FOIA requests and administrative agencies as well as to provide input and guidance on the effective administration of the FOIA across federal agencies.

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The Open Government Act promotes the use of technology to achieve more efficient disclosure of information to the public. To improve its FOIA management and processes, the EPA deployed FOIAonline, a shared service, as its new FOIA management system in October 2012. FOIAonline automates core processing and administrative activities. All FOIA requests received at the EPA will be managed throughout their lifecycle in FOIAonline. All records provided by the EPA in response to a FOIA request will be entered into FOIAonline for public viewing and searching unless the volume of paper records is very large and conversion to electronic format is not practical or the response is subject to special handling requirements or policies (e.g., contains Confidential Business Information that is only appropriate to release to the requester/owner of the CBI and is not appropriate for public release). These exceptions will be reviewed on a case by case basis by the Agency FOIA Officer. A copy of the exception decision will be maintained in the system. If records provided in response to a request are not entered into FOIAonline because of these conditions, a placeholder document must be uploaded with contact information for obtaining a copy of the response. The organizational unit that has responsibility for responding to the request (known throughout this document as the Action Office) must maintain the records and make them readily available for responding to future requests.

This document does not provide "how-to" instructions for using FOIAonline, but does reference features of the system that help accomplish certain FOIA tasks outlined in this procedure. The Agency sponsors FOIAonline trainings for managers, supervisors and staff and has developed FOIAonline user guides that are available at https://foiaonline.regulations.gov/foia/action/public/home.

These procedures are intended to ensure that the Agency responds to FOIA requests in accordance with statutory requirements, the EPA's implementing regulations, and open government and transparency policies.

Program Offices and Regions will develop or update organizational FOIA procedures to conform to this document within 180 days of this document being finalized. All procedures must be consistent with the EPA's FOIA regulations and statutory requirements.

These procedures will be supplemented by role-based and general awareness trainings for the audience identified under Section 3, above.

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5. AUTHORITY

Freedom of Information Act , 5 U.S.C. § 552.
EPA's FOIA Regulations, Title 40, C.F.R. Part 2, Subpart A.
CIO Policy 2157.0, Freedom of Information Act (FOIA) Policy

6. PROCEDURES

The Agency's FOIA regulations direct the public to send FOIA requests, in writing, to EPA Headquarters, Regional FOIA Offices or through a form on the Agency's FOIA website (which provides a link to FOIAonline). Requests received in any other Agency office should be immediately forwarded to the appropriate FOIA Officer so that the requester does not incur undue processing delays. See 40 C.F.R. 2.102(a).

The actions identified in Steps 1-5, below, are performed by staff in FOIA offices. Regions and Program Offices will decide who performs the steps identified in these procedures.

INITIATING THE PROCESS

The FOIA process officially begins when a request is received in any Agency FOIA Office. Requesters may request a fee waiver and/or expedited processing at the time they submit their request.

Step 1 – Receive, Review, and Acknowledge Incoming Requests. The public may submit requests to the Agency via FOIAonline, postal mail, email, or hand delivery. The FOIA Office receiving the request will verify that the request: 1) is in writing; 2) provides a mailing address; 3) asks for Agency records; and 4) reasonably describes the records sought. A description is sufficient if it enables an Agency employee familiar with the subject area to locate the record with a reasonable amount of effort. See also, 40 C.F.R. § 2.102(c).

- ***Improper FOIA requests include:***
  - *Requests that do not reasonably describe the records sought;*
  - *Requests that pose questions, rather than seek documents.*
- ***FOIA does not require EPA to:***
  - *Create new records or future records in response to a request;*
  - *Re-create records which were properly disposed of;*
  - *Produce records the Agency retains no control over;*
  - *Re-provide records which EPA already makes available to the public; or*
  - *Produce purely personal records.*

If the requestor provided an email address, FOIAonline will automatically send a receipt to the requester that includes the tracking number and submission date for all requests processed in the system. Requests received after 5 pm EST or on weekends or holidays are not considered received until the next business day. If a request is not received through FOIAonline, the FOIA Office will enter the request in the system within one working day of receipt and issue an acknowledgement through FOIAonline if an email address is provided. Postal mail will be used by the FOIA Office if an email address is not provided. The

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acknowledgement letter will provide the tracking number and the date the request was received by EPA.

Step 2 – Determine if the Request is in the Correct FOIA Office. The receiving FOIA Office will determine where responsive records are most likely located in the Agency. When a request is received at an Agency FOIA Office and all responsive records are determined to be located in another Region or Headquarters, the receiving FOIA Office will assign the request in FOIAonline to the appropriate FOIA Office for processing. If the receiving FOIA Office does not know where responsive records are located, the FOIA Office will consult with the Headquarters FOIA Office. See also, 40 C.F.R. § 2.103(a).

The FOIA allows agencies up to 10 working days to route a misdirected request before the 20 working day period to respond begins. For the purposes of this 10 day allowance, a request is "misdirected" if it is sent to a FOIA Office that is not located with the Program or Regional Office that will have the responsive records. Requests sent by the public to an office other than a FOIA Office are also misdirected and must be immediately sent to the local FOIA Office.

After steps 1 and 2 are complete, the request is considered "perfected." Requests should be "perfected" on the same day they are received by the correct FOIA Office. The FOIA Office will enter the "perfected" status in FOIAonline to initiate the 20 day working period. FOIAonline will automatically initiate the 20 working day period on the 11th working day after the request was received, even if the request has not been perfected.

Step 3 – Determine the Fee Category. EPA FOIA Offices will determine how requesters will be charged processing fees based on their fee category. The fee categories under the FOIA are: (1) Commercial Use, (2) Educational Institution or Non-Commercial Scientific Institution, (3) Representative of the News Media and (4) Other. See also, 40 C.F.R. § 2.107. (See Step 8 below for information on calculating fees.)

Step 4 – Process Fee-Waiver (FW) and Expedited Processing (EP) Requests. All requests for fee waivers and expedited processing must be submitted with the initial FOIA request (see 40 C.F.R. § 2.107(l) (5)). Decisions on FW and EP requests will be made by the Agency FOIA Officer based on the factors outlined in 40 C.F.R. § 2.107(l) (5) and 2.104(e), respectively.

FW and EP requests submitted to a Regional FOIA Office will be transferred by the Regional FOIA Officer to the Headquarters FOIA Office through FOIA-online for processing. (Please note that the region retains the responsibility for responding to the request for records.)

Whether a request is likely billable or unbillable will be communicated to the Headquarters FOIA Office by the organization to which the request is assigned within 48 hours of receipt of the request. The Agency FOIA Officer will determine if fees will likely be incurred by the requester before deciding on the request. (A request for a fee waiver is moot when no fees are associated with processing the request.)

The Agency FOIA Officer will make the initial decision whether to grant or deny a FW or EP request. The individual assigned the request will be notified via an email from FOIAonline that a determination has been issued. If the FW and EP request is assigned to a group rather than to an individual, FOIAonline will not send an email, but will alternatively provide an internal system message to each group member the next time that person logs on.

The Agency must decide whether to grant or deny an EP request within 10 calendar days of receipt. If the request is granted, it must be given priority by the Action Office and be the next request in line for processing. See C.F.R. § 2.104(3) (4). However, the request itself is not required to be processed within the 10 calendar days.

Step 5 – Assign the Request to the Action Office. In most cases, the FOIA Office will assign the request in FOIAonline to the primary FOIA Coordinator in the Program or Regional Office believed to most likely house the majority of responsive records. The FOIA Coordinator will assign a lead office within that organization (the "Action Office"). When the requester is seeking records about or created by an individual, the organization where the individual worked at the time the records were created will become the Action Office and have responsibility for processing the request.

Often, additional Programs and/or Regions may have responsive records ("Contributing Office"). The Action Office will assign each Contributing Office a task in FOIAonline for them to provide responsive records. These Contributing Offices will coordinate the Agency's response with the Action Office, including uploading responsive records to the system.

PROCESSING THE REQUEST IN ACTION OFFICES

An organization's[1] internal FOIA processing procedures will determine who performs steps 6-16 identified in this procedure on behalf of the Action Office and the FOIA Coordinator. However, the steps will remain the same regardless of who performs them.

At Headquarters, each Office of an Assistant Administrator and the Office of the Administrator has a primary FOIA Coordinator who receives the assignment from the Headquarters FOIA Office. FOIA requests in regions are received by the Regional FOIA Officer who selects the appropriate division, branch or individual within the organization which is known as the Action Office. Regions have a primary FOIA Coordinator and the function may be performed by various staff persons. At Headquarters, the primary FOIA Coordinator will assign the request to the Action Office. Non-primary FOIA Coordinators may also be located at the division and branch levels at Headquarters and in regions depending on the business practices of the particular organization. An organization's business practices determine the workflow and roles and responsibilities when a request is received for action. These practices will be detailed in the organization's FOIA procedures.

[1] An EPA region (e.g., Region 1) or the Office of an Assistant Administrator (e.g., OGC).

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When an assignment is received from a FOIA Office, the primary FOIA Coordinator or regional person (designated by the Regional FOIA Officer) will determine which of the offices in the organization (e.g., staff offices, divisions, or branches) are likely to have records responsive to the request. The primary FOIA Coordinator or regional person will assign the request to the appropriate office or FOIA professional using FOIAonline. If the description of the records requested is not sufficient for the primary FOIA Coordinator or regional person to assign the request to an office, the primary FOIA Coordinator or regional person will contact the requester for additional information. All communications, including verbal conversations with the requester, will be documented for the official record and entered into FOIAonline. Communications may include discussion of scope, deadlines, or other issues.

NOTE: For large, complex FOIA requests, it is suggested that the Action Office convene meetings with all interested Agency parties in order to clarify responsibilities, methods to be used for collection, and similar issues. Those meetings should include programmatic experts, Records Liaison Officers, information technology specialists, and legal counsel, as appropriate.

Step 6 – Determine Search Parameters. The Action Office will determine the cut-off date for records subject to the request. Under the EPA's regulations (40 C.F.R. § 2.103 (a)) for determining what records are within the scope of the request, the Action Office will usually include only those records in its possession as of the date the request was received by the FOIA Office, unless the request specifically seeks a more limited scope. If a different date is used, the Action Office will inform the requester of that date.

The request will also be reviewed to determine the subject matter of the records the requester is seeking. If it is deemed necessary for the person processing the FOIA to obtain clarification or additional information from the requester, the time necessary to reformulate the request will be excluded from the statutory 20 working day period (or any authorized extension of time) that the EPA has to respond to the request. The FOIA permits the Agency to "stop the clock" **one** time during the first 20 days after receipt, to seek information and clarification from the requester. Although the requester may be contacted as many times as needed to clarify the scope of the request, the clock may only be stopped once. Once the clock has been stopped, it should not be restarted until the information or clarification is provided. All communications must be documented for the official record and entered into FOIAonline, and the deadlines adjusted in the system, as appropriate.

Step 7 – Determine if Additional Responsive Records are in Other Agency Organizations. When additional responsive records are determined to be located in other Agency organizations, or the request is incorrectly assigned, the appropriate FOIA Office should be notified by the FOIA Coordinator or the organizational subject matter expert within two working days of receiving the assignment. Action Offices should return misdirected requests to the local FOIA Office for re-assignment within two working days.

NOTE: The FOIA Office will create a task in FOIAonline to request additional records from

another EPA organization.

Step 8 – Estimate Processing Fees. The EPA's FOIA regulations require an assurance of payment from the requester if fees are expected to exceed $25.00 or an amount specified by the requestor. Unless a waiver of fees has been granted by the Agency FOIA Officer, the Action Office will estimate the processing fee which will be charged as specified in 40 C.F.R. § 2.107. Search fees may apply even when no responsive records are identified or no responsive records are disclosed to the requester. The EPA's FOIA Regulations (40 C.F.R. § 2.107(j)) also define circumstances where it may be appropriate to require advance payment of the estimated fees, if the fees are expected to exceed $250.

Fees are determined by the type of staff performing the work, the type of requester, and the category of work performed. Fees are calculated as follows:

Type of Staff	Charge Per Quarter Hour
Clerical Staff	$4.00 per ¼ hr
Professional Staff	$7.00 per ¼ hr
Managerial Staff	$10.25 per ¼ hr

Type of Requester	Fee Category to be Charged		
	Search	Review	Duplication
Commercial	Yes *	Yes	Yes
Educational	No	No	Yes (100 pages free)*
Non-commercial Scientific	No	No	Yes (100 pages free)*
News Media	No	No	Yes (100 pages free)*
All Others	Yes (First 2 hours free)*	No	Yes (100 pages free)

*Fees shaded in grey above cannot be charged if the Agency fails to comply with time limits for response.

Step 9 - Determine Response Time. The FOIA requires agencies to provide a substantive response within 20 working days. In such instances when the Action Office determines the response cannot be completed within 20 working-days, the EPA may extend the due date if "unusual circumstances," as defined by the FOIA, apply.

An "unusual circumstance" exists when there is: (1) a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (2) a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; and (3) a need for consultation, which will be conducted with all practicable speed, with another

agency or among two or more components of the EPA having a substantial interest in the determination of the request.

If unusual circumstances exist and there is a need to extend the due date for 10 working days or less, the Action Office must, within the 20 working day time limit, notify the requester in writing that unusual circumstances exist and provide the new due date. When the unusual circumstances result in a need to extend the due date for more than 10 working days, the Action Office must also provide the requester, within the 20 working days, the contact information for the EPA's FOIA Public Liaison and an opportunity to either (a) modify the request so that it may be processed within the 10 working day extension or (b) arrange an alternative time period for processing the original or modified request.

If unusual circumstances do not exist, or if the due date has already been extended and additional time is needed to complete the response, the Action Office should seek a reasonable extension from the requester. To aid the requester, the Action Office will provide the requester the contact information for the EPA FOIA Public Liaison, who will assist in the resolution of any disputes between the requester and the EPA. If the requester does not agree to an extension, the Action Office will fulfill the request as soon as possible. The requester may file an administrative appeal or may pursue litigation. For instances where the FOIA requester is the prevailing party of a litigation case and the EPA is required to pay legal fees, please refer to Office of the Chief Financial Officer's FOIA Fee Policy, RMDS 2540-04-P2. In any event, the Action Office should communicate any extensions and expected completion dates with the requester. All communications must be documented for the official record and entered into FOIAonline.

The Action Office also enters the new requested due date and the justification for the extension into FOIAonline. The system generates a notice to the Headquarters or appropriate Regional FOIA Office for approval. The FOIA Office will make a decision within two working days, document the decision, with comments if necessary, in FOIAonline, and communicate the new date to the Action Office. The Action Office will communicate the new due date to the requestor.

Step 10 – Collect and Review the Records. The Action Office and each Contributing Office is responsible for identifying, collecting and reviewing records within the scope of the request as discussed in Step 6, and as outlined in any organization-specific procedures. This includes the responsibility for consultation and referral with other federal agencies. Contributing Offices are also responsible for coordinating responsive activities with the Action Office (i.e., the office that is determined to have the majority of responsive records) when more than one office has responsive records (see Step 5 above). The Action Office and each Contributing Office should also assure that protected information has been redacted from records before they are released.

The Action Office and Contributing Offices will: 1) ensure that redacted information cannot be read through photocopied records; 2) remove "hidden" metadata as appropriate (e.g. Microsoft Word document properties); and 3) annotate records with the applicable FOIA exemption(s) at the location of the redacted information. A copy of both the original and redacted record will be

stored in FOIAonline, unless subject to special handling requirements (e.g., large volume) or policies. Exceptions to this storage requirement are approved on a case by case basis by the Agency FOIA Officer. FOIAonline allows FOIA professionals to put records in the system that are not released to the public. This protects records that have been withheld.

If records provided in response to a request are not entered into FOIAonline because of special handling requirements or policies, or because the volume of files make it impractical to upload the complete response, a placeholder document must be uploaded with contact information for how to obtain a copy of the response that the responding office will maintain and make readily available.

NOTE: Only records that have been: 1) marked published and 2) approved for release are available to the public in FOIAonline.

Step 11 – Determine Which Records (or Portions) May Be Released. After thorough review, the Action Office will prepare to release responsive, non-exempt records or portions of records. All records released or being withheld in total in response to a FOIA request must be reviewed by at least two knowledgeable individuals, including one manager or supervisor to ensure openness, transparency, consistency, and the appropriate application of FOIA exemptions. One of the reviews may be performed by the individual who processes the request. Action Offices may consult with the Agency FOIA Officer, their Office of Regional Counsel (ORC), or Office of General Counsel (OGC) for questions regarding withholding of records under a FOIA exemption. If a discretionary FOIA exemption (Exemptions 2, 5, 7 (excluding 7(c)), 8 and 9) is implicated, Action Offices should only withhold records, or portions of records, when they reasonably foresee that disclosure would harm an interest protected by one of the exemptions or when disclosure is prohibited by law.

Responsive records that have been properly reviewed and redacted (if necessary) will be subject to one of the following outcomes:

a) Release in Full. The record, in its entirety, may be released to the requester.
b) Partial Grant/Partial Denial. Portions of the record will be withheld from the requester if covered by either one or multiple FOIA exemptions. The portions of the record that are not redacted are released to the requester.
c) Withhold in Full. The record, in its entirety, will be withheld from the requester if covered by either one or multiple FOIA exemptions.
d) No Record. If, after a reasonable search likely to uncover all responsive documents, no records are located that are responsive to the request, the requester will be informed in writing. A no records certification form must be completed for no record responses and entered in FOIAonline. Please note: This form is not sent to the requester.
e) Confidential Business Information (CBI). For records or parts of records that have been claimed as CBI or would be claimed as CBI if the business knew the EPA proposed to disclose the information, the procedures set out in 40 C.F.R. § 2.204 must be followed.

f) Glomar Response. In some instances, the EPA may expressly refuse to confirm or deny the existence of records responsive to a FOIA request; this is called a Glomar response. The response letter will inform the requester that the request is denied because "either the records do not exist or they are exempt from mandatory disclosure under the applicable provision of FOIA." The Action Office must obtain approval from OGC or ORC prior to issuing a Glomar response.

Step 12 – Prepare Response Letter. The Action Office will prepare the response letter using standard language, if suitable, and obtain necessary concurrences. All response letters must include: (1) the FOIA tracking number and (2) appeal language, as appropriate. FOIA requesters have the right to appeal initial FOIA decisions made by the EPA if:

- No records were found;
- The response time has exceeded the statutory authority or documented extensions;
- The request for expedited processing was denied;
- The request for a fee waiver was denied;
- The requestor believes some records or portions of records were improperly withheld;
- The requestor believes the search was inadequate; or
- The requestor believes the fee category in which they were placed is incorrect.

In addition, response letters that withhold Agency records, in total or in part, are required to identify the:

- Records withheld individually or by category of similar documents if voluminous;
- Applicable FOIA exemption(s) under which the record is being withheld and a brief statement explaining the reason for the denial; and
- Authorizing official by name and title (see Step 14 below for list of Authorized Officials).

Step 13 – Finalize Processing Fees. The Action Office will inform the requesters in the response letter if fees for processing the request are not billable (i.e., equal to or less than $14.00). If the processing fees are billable (i.e., greater than $14.00), FOIAonline will generate the invoice.

NOTE: The Administrative Cost section in FOIAonline must be completed to document billable and unbillable costs in FOIAonline. All offices working on a request will enter their administrative costs in FOIAonline. The EPA is required to document actual fees charged to the public (billable) and the administrative costs (unbillable) incurred by the agency in processing FOIA requests.

Step 14 – Obtain Approval from an Authorized Official to Release or Withhold Records. The Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices (or their appropriate designee) are delegated the authority to issue initial determinations

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to release or withhold records in response to FOIA requests. See EPA Freedom of Information Delegation of Authority, Section 1-30.

NOTE: Initial determinations (both release and withholding determinations) may be redelegated only to persons occupying positions not lower than division director or equivalent.

Step 15 – Respond to Request. The Action Office will provide the response letter, responsive records and invoice (when applicable) to the requester through FOIAonline. If an email address is provided, the requester will be notified via email that the responsive records are available in FOIAonline. Otherwise, the response package will be provided via postal mail.

The response letter must include a description of the information withheld either by category and volume, or by a list. In all cases the response letter must also include the standard administrative appeal language.

Step 16 – Finalize Actions. The Action Office will ensure all supporting documentation is entered in FOIAonline (e.g., records of conversations or notes to the record). The record copy of the FOIA response will be maintained in FOIAonline, including all responsive records. Once published, these records become available for public searching and viewing.

If the volume of paper records is very large and conversion to electronic format is not practical or the response is subject to special handling requirements or policies, the Agency FOIA Officer will consider granting an exception to the requirement to load the records into FOIAonline. Reviews are made on a case by case basis. A copy of the decision by the Agency FOIA Officer will be maintained in the system. If the exception is granted, a placeholder document must be uploaded in FOIAonline with contact information for obtaining a copy of the responsive records. The Action Office that has responsibility for responding to the request must maintain the records according to applicable record schedules and make them readily available for responding to future requests.

The Action Office will close the request in FOIAonline.

7. RELATED DOCUMENTS

- http://www.epa.gov/FOIA/FOIAregs.htm
- http://www.justice.gov/oip/amended-FOIA-redlined.pdf
- http://intranet.epa.gov/oei/imitpolicy/qic/ciopolicy/2171-p-01.pdf
- http://www.archives.gov/about/organization/summary/ogis.html

8. ROLES AND RESPONSIBILITIES

Action Office – The organizational unit that maintains the majority of records responsive to a FOIA request.

Agency FOIA Officer – The Agency FOIA Officer is the program manager for the National FOIA program. The Agency FOIA Officer coordinates and oversees the EPA FOIA administration responsibilities; issues expedited processing and fee waiver determinations; develops and reviews FOIA procedures, policies, and guidance; provides advice to Agency FOIA personnel in the program and regional offices; prepares annual reports to the Department of Justice (DOJ); and provides FOIA training to agency employees and other individuals covered under Section 3 of these procedures. The Agency FOIA Officer is located in the Office of Environmental Information at EPA headquarters.

Authorized Officials – The Deputy Administrator, Assistant Administrators, Associate Administrators, the Inspector General, the General Counsel, Heads of Headquarters Staff Offices and Regional Administrators (or their appropriate designee) are authorized under section 2.113(b) of EPA's FOIA regulations to issue initial determinations to release or withhold records in response to FOIA requests. Freedom of Information, EPA Delegations Manual, Chapter 1, Section 30, provides that this authority may be redelegated to the office director level or equivalent, who may redelegate to the division director level or equivalent.

Contributing Office – Organizational units that possess responsive records in addition to the Action Office.

Chief FOIA Officer – The designated high-level official within each federal agency who has overall responsibility for the agency's compliance with the FOIA. At the EPA, the Assistant Administrator for the Office of Environmental Information is the Chief FOIA Officer. The Chief FOIA Officer is responsible for ensuring the efficiency and effectiveness of the Agency's FOIA administration including compliance, accountability and reporting to the Administrator, the Department of Justice, and the Office of Management and Budget on the status of the Agency's FOIA program. NOTE: This role is different from that of the Agency FOIA Officer above.

FOIA Coordinators – FOIA Coordinators stay informed on requests and assignments; route requests to the appropriate Action Office or subject matter expert within the Program Office; track FOIA requests for timeliness; monitor the quality of the responses; and provide guidance to program personnel including overdue reports, in collaboration with the Agency FOIA Officer. Each Headquarters Program Office has a lead FOIA Coordinator who works under the general direction of the Agency FOIA Officer. See also "Primary FOIA Coordinators".

FOIA Officer – See "Agency FOIA Officer" or "Regional FOIA Officers."

FOIA Offices – The FOIA Office is the point of receipt for Agency FOIA requests where they are reviewed for conformance with the Act, acknowledged and assigned to the appropriate

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Action Office. The locations are identified in the EPA's FOIA regulations for submitting FOIA requests. Agency FOIA Offices are located in each Region and in the National FOIA Program at Headquarters.

FOIA Professional – An EPA employee or contractor who directly interacts with FOIA requesters and is responsible for the day-to-day FOIA processing activities.

FOIA Public Liaison – The FOIA Public Liaison is the EPA contact point for the public if they have any issues with the handling of their FOIA request by the Agency. In the EPA, the FOIA Public Liaison is the Chief of the FOIA and Privacy Branch in the Office of Information Collection within the Office of Environmental Information. The Public Liaison supervises the staff in the FOIA Requester Service Center and is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

FOIA Requester Service Center – The FOIA Requester Service Center (FOIA Hotline) provides the public information on the status of their requests if they do not have access to FOIAonline, general information on how and where to submit a FOIA request, or information about the types of information available on the EPA's websites. The Center is staffed by the FOIA Public Liaison, Agency FOIA Officer and National FOIA Specialists. The Hotline number is 202-566-1667.

Managers and Supervisors – EPA managers and supervisors oversee FOIA Officers and FOIA Coordinators to ensure that they have the knowledge, skills and ability to perform their duties and respond in a timely manner in accordance with the FOIA. They review and approve all FOIA responses before release.

National FOIA Program – The National FOIA Program is staffed by the Agency FOIA Officer and National FOIA Specialists who develop Agency-level policies, procedures and trainings, respond to questions, provide guidance, deliver training, and make decisions on fee waiver and expedited processing requests. The National FOIA Program is located in the Office of Environmental Information.

National FOIA Specialists – National FOIA Specialists manage the lifecycle of FOIA requests received at Headquarters; assign requests to Headquarter FOIA Coordinators; prepare responses to fee waiver and expedited processing requests; approve requests to extend due dates; respond to questions from Agency employees; and staff the FOIA Requester Service Center.

Office of General Counsel (OGC) – OGC provides legal advice on FOIA matters; issues final decisions on FOIA appeals, final confidentiality determinations for CBI claims originating in HQ, and fee waiver appeal determinations, except when a conflict of interest arises; provides counsel on FOIA exemptions and exclusions; and assists the U.S. Department of Justice attorneys in FOIA litigation.

Office of Inspector General (OIG) – OIG and the Counsel to OIG provide advice on FOIA matters pertaining to its organization; issue initial determinations and final decisions on FOIA appeals, final confidentiality determinations, except when a conflict of interest arises; provide counsel on FOIA exemptions and exclusions; and assist the U.S. Department of Justice attorneys in FOIA litigation.

Office of Regional Counsel (ORC) – ORC provides legal advice on FOIA matters, final confidentiality determinations for CBI claims originating in the Region, FOIA litigation support to regional employees, and information as needed to the Agency FOIA Officer on fee waiver requests. ORC also assists OGC on appeals, as appropriate.

Primary FOIA Coordinator – The lead FOIA Coordinator in an organization who works under the general direction of the Agency FOIA Officer.

Regional FOIA Officers – Regional FOIA Officers assign requests to the appropriate Action Office within the region; track FOIA requests; provide guidance to regional personnel in collaboration with the Agency FOIA Officer; coordinate with the Agency FOIA Officer and Action Offices on initial fee waiver decisions; compile data for the annual FOIA report; and monitor the quality and timeliness of responses in the regions. Regional FOIA Officers work under the general direction of the Agency FOIA Officer.

Subject Matter Experts – Subject matter experts identify and locate records requested under FOIA. These individuals are located in all EPA organizations and include all professional disciplines. If permitted under the applicable delegation and after obtaining any necessary concurrences, the subject matter experts may respond to requests directly or provide the responsive records to the FOIA Coordinator who facilitates the response for the Agency. They must, however, follow the review process prescribed in this procedure.

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9. DEFINITIONS

Administrative Appeal – An independent review of the initial determination made in response to a FOIA request. Requestors who are dissatisfied with the response made on their initial request have a statutory right under 40 C.F.R. § 2.104(j) to appeal the initial determination to an office in the Agency which will conduct an independent review. (*NOTE: OGC is responsible for managing all FOIA appeals at the EPA with the exception of appeals that involve FOIA requests to the OIG or FOIA requests where OGC is the Action Office on the initial response. OIG handles its own appeals. The Office of the Administrator processes appeals where the OGC is the Action Office on the initial response.)*

Case – All records pertaining to a FOIA request.

Commercial Use – A type of request from or on behalf of a person who seeks information for a use or purpose that furthers his/her commercial, trade, or profit interests, which can include furthering those interests through litigation.

Consultation – When an agency locates a record or a record that contains information provided by or of interest to another agency, it will ask for the views of that other agency on the disclosability of the records before any final determination is made. This process is called a "consultation." (See also "referral.")

Confidential Business Information – Trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.

Educational Institution – A preschool, public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education or an institution of vocational education, which operates a program or programs of scholarly research.

Existing records – Agency records that exist as of the date a FOIA request is received by the EPA.

Expedited Processing – The processing of a FOIA request out of the order in which it was received and prioritized over other pending FOIA requests. The standards for expedited processing are set out in the FOIA and in the regulations of each federal agency.

Fee Categories – Categories under FOIA that determine assessments of fees to requesters. Requesters fall into one of five fee categories: (1) commercial requesters; (2) educational; (3) noncommercial scientific institutions; (4) representatives of the news media; and (5) all other requesters (i.e., requesters who do not fall into any of the other four categories).

Fee Waiver – A request made to an agency to waive any applicable fees for its processing of a FOIA request. Fee waivers are limited to situations in which a requester can show that the disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester. Requests for a fee waiver are evaluated on a case-by-case basis.

FOIAonline – The EPA's FOIA tracking and management system.

FOIA Exemptions – Contained at 5 U.S.C. § 552(b) (1)-(9). See http://intranet.epa.gov/foia/exemptions.html or the box on page 2 of these procedures.

FOIA Time Limits – The time period in the FOIA statute for an agency to respond to a FOIA request (ordinarily twenty working days from the day a FOIA request is received and logged in by the appropriate FOIA Office).

Freedom of Information Act (FOIA) – The Freedom of Information Act (FOIA) was signed into law in 1966. The law provides individuals with a statutory right of access to certain federal agency records. The FOIA requires agencies to disclose requested records unless they are protected from public disclosure by the FOIA. Congress included in the FOIA nine exemptions and three law enforcement exclusions to protect important interests such as national security, personal privacy, privileged communications, and law enforcement.

Full Denial – An agency decision not to release any records in response to a FOIA request because the records are exempt in their entirety under one or more of the FOIA exemptions, or because of a procedural reason, such as when no records could be located. A denial response must be signed by an Authorized Official.

Full Grant – An agency decision to disclose all records in full in response to a FOIA request.

Glomar Response – An agency's express refusal to confirm or deny the existence or non-existence of records responsive to a FOIA request.

Initial Request – The request submitted by an individual to a federal agency for access to agency records on any topic. A FOIA request can generally be made by any person, to any federal agency, and only requires that requesters reasonably describe the records they are seeking and comply with agency regulations for making such requests.

Media Requester – Any person making a FOIA request who actively gathers news for an entity that is organized and operated to publish or broadcast news to the public that actively 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. A request for records that supports the news-dissemination function of the requester shall not be considered to be for a commercial use.

Non-Commercial Scientific Institution – An institution that is not operated on a commercial basis but operated solely for conducting scientific research, the results of which are not intended to promote any particular product or industry.

No Records Response – A FOIA request for which no responsive records were located.

Partial Grant/Partial Denial – An agency decision to disclose records or portions of records while withholding other records or portions of records that are exempt under the FOIA, or to otherwise deny a portion of the request for a procedural reason.

Pending Request or Administrative Appeal – A request or administrative appeal for which an agency has not taken final action in all respects.

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Perfected Request – A request for records that clearly describes the records sought and the procedures that will be followed to develop a response.

Processed Request or Processed Administrative Appeal – A request or administrative appeal for which an agency has taken final action in all respects.

Records – Information in an agency's possession and control in any format including electronic format. DOJ notes that for FOIA purposes, "records" includes *all* tangible documentations of information regardless of whether they are records under 44 U.S.C. § 3301. *(NOTE: This is a broader definition than that used by the EPA records program and records schedules.)*

Redact – The act of removing exempt information from responsive documents either manually or utilizing redaction software.

Referral – When an agency locates a record that originated with, or is of otherwise primary interest to another agency, it will forward that record to the other agency to process the record and to provide the final determination directly to the requester. This process is called a "referral." (See also "consultation.")

Requester – Any individual (including non-U.S. citizens), corporation or association, public interest group, and state, local, tribal, or foreign government making a FOIA request. Requests from federal agencies, the Government Accountability Office, or Congress (e.g., the Speaker of the House, the President of the Senate, or the chair of a committee or subcommittee) are not processed under these procedures.

Responsive Record – A record falling within the scope of a FOIA request that an agency has located that may be provided or is under consideration for inclusion in a response to a FOIA request. A record may be "responsive" to a FOIA request, but may still be withheld as protected from disclosure by a FOIA exemption.

Unusual Circumstances – When there is: (1) a need to search and collect documents from organizations separate from the organization processing the request; (2) a need to search and collect a large volume of records; or (3) a need to consult with another agency (or a separate subdivision of the same agency) having a substantial subject-matter interest in the request.

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10. WAIVERS

No waivers will be accepted from the requirements of this procedure.

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11. RELATED PROCEDURES, STANDARDS AND GUIDANCE

Not applicable.

12. MATERIAL SUPERSEDED

Interim Procedures for Responding to Freedom of Information Act (FOIA) Requests (CIO 2157-P-01-0/Transmittal 13-010 dated September 30, 2013)

13. ADDITIONAL INFORMATION

This document is not intended to create any rights or privileges for the public, or obligations on the part of EPA.

Renee P. Wynn
Acting Assistant Administrator for Environmental Information and Chief Information Officer
U.S. Environmental Protection Agency

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Message

From: Gottesman, Larry [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7B3DBF872F954FBEB950E98C56BDC431-LGOTTESM]
Sent: 8/22/2018 7:51:10 PM
To: Schumacher, Wendy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7ae5042e53e943728333b23ca294294f-Schumacher,]
Subject: FW: FOIA responses
Attachments: pl notice supp declaration McGrath ex A 082118.pdf

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From: Miller, Kevin
Sent: Wednesday, August 22, 2018 3:15 PM
To: Gottesman, Larry <Gottesman.Larry@epa.gov>; Walker, Denise <Walker.Denise@epa.gov>
Subject: FOIA responses

FYI – this showed up in our pattern and practice case (alleging EPA unlawfully requires a subject matter).

Message

From: Gottesman, Larry [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7B3DBF872F954FBEB950E98C56BDC431-LGOTTESM]
Sent: 4/16/2018 9:04:01 PM
To: Bigioni, Neil [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b378c797c72f492eac41e1e47750471f-Nbigioni]; Walker, Denise [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b10d83a48a5e4af7a9b1f01465330ff2-Walker, Den]
Subject: RE: GC Memos Collection Project (Due 4/27)
Attachments: FOIA-Policy-August2014-09-30FINAL(with-electronic-signature).pdf; FOIA-Proc_August2014-09-30FINAL(with-electronic-signature).pdf

http://intranet.epa.gov/foia/FOIA-Procedures.html

The Agency Policy and Procedures are attached and a link to all the Agency FOIA Procedures.

Larry F. Gottesman
Agency FOIA Officer
Office of General Counsel
U.S. Environmental Protection Agency

202-566-2162 (Direct line)
202-689-4588 (Mobile)
202-566-1667 (Main line)

From: Bigioni, Neil
Sent: Monday, April 16, 2018 5:00 PM
To: Gottesman, Larry <Gottesman.Larry@epa.gov>; Walker, Denise <Walker.Denise@epa.gov>
Subject: RE: GC Memos Collection Project (Due 4/27)

I think it sounds worth including. Please obtain a pdf of the document and fill out the tracking chart that was attached to the original email.

From: Gottesman, Larry
Sent: Monday, April 16, 2018 4:57 PM
To: Bigioni, Neil <bigioni.neil@epa.gov>; Walker, Denise <Walker.Denise@epa.gov>
Subject: RE: GC Memos Collection Project (Due 4/27)

I don't think this is relevant to the project, but we did issue a FOIA Policy and National FOIA Procedures about 3 years ago.

Larry F. Gottesman
Agency FOIA Officer
Office of General Counsel
U.S. Environmental Protection Agency

202-566-2162 (Direct line)
202-689-4588 (Mobile)
202-566-1667 (Main line)

From: Bigioni, Neil
Sent: Monday, April 16, 2018 4:50 PM
To: Walker, Denise <Walker.Denise@epa.gov>; Gottesman, Larry <Gottesman.Larry@epa.gov>
Subject: FW: GC Memos Collection Project (Due 4/27)

From the description of relevant documents below (under Explanation of Project), I would not think either side of the National FOIA Office would have much if anything responsive, but can you please either confirm that to me or let me know to the contrary. You may feel free to circulate as necessary to form your response.

There will be a new delegation designating Matt as the Chief FOIA Officer for the agency, but Elise has taken that over and it is not final.

Thanks,

Neil

From: Mills, Derek
Sent: Monday, April 16, 2018 2:38 PM
To: Albores, Richard <Albores.Richard@epa.gov>; Bigioni, Neil <bigioni.neil@epa.gov>; Blake, Wendy <Blake.Wendy@epa.gov>; Briskin, Jeanne <Briskin.Jeanne@epa.gov>; Dorka, Lilian <Dorka.Lilian@epa.gov>; Epp, Timothy <Epp.Timothy@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>; Grant, Brian <Grant.Brian@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Lattimore, Kraig <lattimore.kraig@epa.gov>; Lee, Terry <lee.terry@epa.gov>; Lewis, Jen <Lewis.Jen@epa.gov>; Michaud, John <Michaud.John@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>; Redden, Kenneth <Redden.Kenneth@epa.gov>; Rhines, Dale <rhines.dale@epa.gov>; Siciliano, CarolAnn <Siciliano.CarolAnn@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Youngblood, Charlotte <Youngblood.Charlotte@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Moora, David <moora.david@epa.gov>
Cc: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; Monson, Mahri <Monson.Mahri@epa.gov>
Subject: GC Memos Collection Project (Due 4/27)

Hello All,

This email kicks off the GC Memos Collection Project. This is the same project that I sent an email about on April 5. At that time I asked for feedback on the draft tracking sheet. Thank you very much for your review and comments. We are now moving to Phase 2: ADDs work with their respective offices, and designated point of contact, to populate the tracking sheet with relevant guidance in each office. While we are ultimately interested in completing this project for the date range of 1993 – present, Matt would like to have the project completed for 2008 – 2017 by May 1. As such, **please submit the filled out tracking sheet for years 2008 – 2017 to Marcella & Derek by COB on Friday April 27**. This will give us a day to compile all responses for Matt. Direct all questions to Marcella & Derek.

Explanation of Project with Additional Details

One of Matt's priorities is to establish an inventory in the form of a spreadsheet of all legal guidance related to (1) environmental statutes and regulations and (2) internal OGC operations (delegations, policies, internal guidance for OGC attorneys, hiring, personnel matters, etc.). This inventory is to include all formal memos, guidance documents, directives, opinions, or other similar official documents issued from either the General Counsel, or the Office of General Counsel. This is not an exact science. This project will require some discretion because there is not a standard naming convention, or a standard format, for these documents in this date range. We are looking for "formal" or "official" documents similar to what we already have on the OGC intranet page. Some nonexclusive signs to looks for are letterhead, date stamps, and pen signatures. The document definitely does not need to have these things to be included. For the environmental statutes, we are typically looking for documents that have been shared with the public / published somewhere. Memos on internal OGC management are not typically shared outside of the Agency. We do expect to collect some memos signed by Associates in OGC, or issued by Associates without any actual signature. I don't think that we will collect any documents issued by OGC staff attorneys. We do not want emails. In addition, this inventory will include recommendations on what, if anything, to do with each document.

Summary Guidelines

- The task is to locate, collect, document, categorize, and assess all legal guidance, per the parameters above.
- This should be comprehensive. **When in doubt, include the document**, but remember the parameters above.
- While we realize that some of this information already exists in repositories such as the OGC intranet, the E-Library within Lotus Notes, and in hard copy in the law library on the 1st floor, we are asking that this data be populated on the spreadsheet.
- Please collect and/or create digital copies to be posted on the OGC intranet page.
    - We will rely on each law office to provide a PDF version of each document listed in their tracking chart.
- Please note whether the document is still "live" and recommend to the GC if revision or recession is advised. Should OGC revise, revoke, or maintain the document, and why?
    - "Live" in this context means that the document is helpful to OGC practice, controlling, or binding in any way, to any extent, on EPA or OGC. Put another way, to be "live" means that the document is still good law. In some instances, GC memos specifically revoke other GC memos. In other instances, a GC memo may have been overridden by a court decision, the statute or regs may have changed, or circumstances make it irrelevant or obsolete now. There are many reasons that an old document may be "dead" or "bad law." Further, it may be possible for only a portion of the document to be "live." Please note this information in the relevant column of the spreadsheet.

Please direct all questions to Marcella & Derek. Thanks!

Derek Mills
Special Assistant, Office of General Counsel
U.S. Environmental Protection Agency
(202) 564-3341

INFORMATION DIRECTIVE PROCEDURE

Procedures for Responding to Freedom of Information Act Requests	
EPA Classification No.: CIO 2157-P-01.1	CIO Approval Date: 09/30/2014
CIO Transmittal No.: 14-006	Review Date: 09/30/2017

Issued by the EPA Chief Information Officer,
Pursuant to Delegation 1-19, dated July 7, 2005

Procedures for Responding to Freedom of Information Act Requests

1. PURPOSE

These procedures provide basic instructions for responding to Freedom of Information Act (FOIA) requests submitted to EPA. They address statutory, regulatory, policy, procedural and processing requirements to be followed by all EPA organizations and must comprise the core of all office-specific FOIA processing procedures.

2. SCOPE AND APPLICABILITY

The scope of these procedures covers work performed by EPA employees, grantees, contractors, and interns in support of FOIA administration activities in Headquarters, regional offices, field offices and EPA laboratories.

3. AUDIENCE

The audience for these procedures includes all EPA organizations, officials, and employees. The audience for these procedures is also contractors or grantees and others operating on behalf of the EPA.

4. BACKGROUND

The FOIA, 5 U.S.C. § 552, was enacted in 1966. The law gives any requester the right to obtain access to federal agency records unless such records or portions of such records are protected

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from public disclosure by one or more of the nine exemptions or three law enforcement exclusions contained in the statute. There are nine FOIA exemptions:

1) Classified national defense and foreign relations information.
2) Internal agency rules and practices.
3) Information that is prohibited from disclosure by another federal law.
4) Trade secrets and other confidential business information.
5) Inter-agency or intra-agency communications that are protected by legal privileges.
6) Information involving matters of personal privacy (protected under the Privacy Act or containing sensitive personally identifiable information).
7) Information compiled for law enforcement purposes, to the extent that the production of those records:
   a) Could reasonably be expected to interfere with enforcement proceedings.
   b) Would deprive a person of a right to a fair trial or an impartial adjudication.
   c) Could reasonably be expected to constitute an unwarranted invasion of personal privacy.
   d) Could reasonably be expected to disclose the identity of a confidential source.
   e) Would disclose techniques and procedures for law enforcement, investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions.
   f) Could reasonably be expected to endanger the life or physical safety of any individual.
8) Information relating to the supervision of financial institutions.
9) Geological information on wells.

The FOIA applies only to administrative agencies within the federal Executive Branch. It does not apply to records held by Congress, the courts, or by state, local, or tribal government agencies. The FOIA has undergone several amendments since its passage, including the e-FOIA amendments of 1996 and the Open Government Act of 2007. The e-FOIA amendments clarified how electronic records should be handled under the FOIA and extended the statutory time to respond from ten working days to twenty working days. The Open Government Act of 2007 made changes to promote a more open and accountable government and established a requirement for each agency to have a Chief FOIA Officer and a FOIA Public Liaison to assist in reducing delays, increasing transparency and resolving disputes. It also established the Office of Government Information Services within the National Archives and Records Administration to provide mediation services for resolution of disputes between persons making FOIA requests and administrative agencies as well as to provide input and guidance on the effective administration of the FOIA across federal agencies.

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The Open Government Act promotes the use of technology to achieve more efficient disclosure of information to the public. To improve its FOIA management and processes, the EPA deployed FOIAonline, a shared service, as its new FOIA management system in October 2012. FOIAonline automates core processing and administrative activities. All FOIA requests received at the EPA will be managed throughout their lifecycle in FOIAonline. All records provided by the EPA in response to a FOIA request will be entered into FOIAonline for public viewing and searching unless the volume of paper records is very large and conversion to electronic format is not practical or the response is subject to special handling requirements or policies (e.g., contains Confidential Business Information that is only appropriate to release to the requester/owner of the CBI and is not appropriate for public release). These exceptions will be reviewed on a case by case basis by the Agency FOIA Officer. A copy of the exception decision will be maintained in the system. If records provided in response to a request are not entered into FOIAonline because of these conditions, a placeholder document must be uploaded with contact information for obtaining a copy of the response. The organizational unit that has responsibility for responding to the request (known throughout this document as the Action Office) must maintain the records and make them readily available for responding to future requests.

This document does not provide "how-to" instructions for using FOIAonline, but does reference features of the system that help accomplish certain FOIA tasks outlined in this procedure. The Agency sponsors FOIAonline trainings for managers, supervisors and staff and has developed FOIAonline user guides that are available at https://foiaonline.regulations.gov/foia/action/public/home.

These procedures are intended to ensure that the Agency responds to FOIA requests in accordance with statutory requirements, the EPA's implementing regulations, and open government and transparency policies.

Program Offices and Regions will develop or update organizational FOIA procedures to conform to this document within 180 days of this document being finalized. All procedures must be consistent with the EPA's FOIA regulations and statutory requirements.

These procedures will be supplemented by role-based and general awareness trainings for the audience identified under Section 3, above.

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5. AUTHORITY

Freedom of Information Act , 5 U.S.C. § 552.
EPA's FOIA Regulations, Title 40, C.F.R. Part 2, Subpart A.
CIO Policy 2157.0, Freedom of Information Act (FOIA) Policy

6. PROCEDURES

The Agency's FOIA regulations direct the public to send FOIA requests, in writing, to EPA Headquarters, Regional FOIA Offices or through a form on the Agency's FOIA website (which provides a link to FOIAonline). Requests received in any other Agency office should be immediately forwarded to the appropriate FOIA Officer so that the requester does not incur undue processing delays. See 40 C.F.R. 2.102(a).

The actions identified in Steps 1-5, below, are performed by staff in FOIA offices. Regions and Program Offices will decide who performs the steps identified in these procedures.

INITIATING THE PROCESS

The FOIA process officially begins when a request is received in any Agency FOIA Office. Requesters may request a fee waiver and/or expedited processing at the time they submit their request.

Step 1 – Receive, Review, and Acknowledge Incoming Requests. The public may submit requests to the Agency via FOIAonline, postal mail, email, or hand delivery. The FOIA Office receiving the request will verify that the request: 1) is in writing; 2) provides a mailing address; 3) asks for Agency records; and 4) reasonably describes the records sought. A description is sufficient if it enables an Agency employee familiar with the subject area to locate the record with a reasonable amount of effort. See also, 40 C.F.R. § 2.102(c).

- ***Improper FOIA requests include:***
  - *Requests that do not reasonably describe the records sought;*
  - *Requests that pose questions, rather than seek documents.*
- ***FOIA does not require EPA to:***
  - *Create new records or future records in response to a request;*
  - *Re-create records which were properly disposed of;*
  - *Produce records the Agency retains no control over;*
  - *Re-provide records which EPA already makes available to the public; or*
  - *Produce purely personal records.*

If the requestor provided an email address, FOIAonline will automatically send a receipt to the requester that includes the tracking number and submission date for all requests processed in the system. Requests received after 5 pm EST or on weekends or holidays are not considered received until the next business day. If a request is not received through FOIAonline, the FOIA Office will enter the request in the system within one working day of receipt and issue an acknowledgement through FOIAonline if an email address is provided. Postal mail will be used by the FOIA Office if an email address is not provided. The

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acknowledgement letter will provide the tracking number and the date the request was received by EPA.

Step 2 – Determine if the Request is in the Correct FOIA Office. The receiving FOIA Office will determine where responsive records are most likely located in the Agency. When a request is received at an Agency FOIA Office and all responsive records are determined to be located in another Region or Headquarters, the receiving FOIA Office will assign the request in FOIAonline to the appropriate FOIA Office for processing. If the receiving FOIA Office does not know where responsive records are located, the FOIA Office will consult with the Headquarters FOIA Office. See also, 40 C.F.R. § 2.103(a).

The FOIA allows agencies up to 10 working days to route a misdirected request before the 20 working day period to respond begins. For the purposes of this 10 day allowance, a request is "misdirected" if it is sent to a FOIA Office that is not located with the Program or Regional Office that will have the responsive records. Requests sent by the public to an office other than a FOIA Office are also misdirected and must be immediately sent to the local FOIA Office.

After steps 1 and 2 are complete, the request is considered "perfected." Requests should be "perfected" on the same day they are received by the correct FOIA Office. The FOIA Office will enter the "perfected" status in FOIAonline to initiate the 20 day working period. FOIAonline will automatically initiate the 20 working day period on the 11th working day after the request was received, even if the request has not been perfected.

Step 3 – Determine the Fee Category. EPA FOIA Offices will determine how requesters will be charged processing fees based on their fee category. The fee categories under the FOIA are: (1) Commercial Use, (2) Educational Institution or Non-Commercial Scientific Institution, (3) Representative of the News Media and (4) Other. See also, 40 C.F.R. § 2.107. (See Step 8 below for information on calculating fees.)

Step 4 – Process Fee-Waiver (FW) and Expedited Processing (EP) Requests. All requests for fee waivers and expedited processing must be submitted with the initial FOIA request (see 40 C.F.R. § 2.107(l) (5)). Decisions on FW and EP requests will be made by the Agency FOIA Officer based on the factors outlined in 40 C.F.R. § 2.107(l) (5) and 2.104(e), respectively.

FW and EP requests submitted to a Regional FOIA Office will be transferred by the Regional FOIA Officer to the Headquarters FOIA Office through FOIA-online for processing. (Please note that the region retains the responsibility for responding to the request for records.)

Whether a request is likely billable or unbillable will be communicated to the Headquarters FOIA Office by the organization to which the request is assigned within 48 hours of receipt of the request. The Agency FOIA Officer will determine if fees will likely be incurred by the requester before deciding on the request. (A request for a fee waiver is moot when no fees are associated with processing the request.)

The Agency FOIA Officer will make the initial decision whether to grant or deny a FW or EP request. The individual assigned the request will be notified via an email from FOIAonline that a determination has been issued. If the FW and EP request is assigned to a group rather than to an individual, FOIAonline will not send an email, but will alternatively provide an internal system message to each group member the next time that person logs on.

The Agency must decide whether to grant or deny an EP request within 10 calendar days of receipt. If the request is granted, it must be given priority by the Action Office and be the next request in line for processing. See C.F.R. § 2.104(3) (4). However, the request itself is not required to be processed within the 10 calendar days.

Step 5 – Assign the Request to the Action Office. In most cases, the FOIA Office will assign the request in FOIAonline to the primary FOIA Coordinator in the Program or Regional Office believed to most likely house the majority of responsive records. The FOIA Coordinator will assign a lead office within that organization (the "Action Office"). When the requester is seeking records about or created by an individual, the organization where the individual worked at the time the records were created will become the Action Office and have responsibility for processing the request.

Often, additional Programs and/or Regions may have responsive records ("Contributing Office"). The Action Office will assign each Contributing Office a task in FOIAonline for them to provide responsive records. These Contributing Offices will coordinate the Agency's response with the Action Office, including uploading responsive records to the system.

PROCESSING THE REQUEST IN ACTION OFFICES

An organization's[1] internal FOIA processing procedures will determine who performs steps 6-16 identified in this procedure on behalf of the Action Office and the FOIA Coordinator. However, the steps will remain the same regardless of who performs them.

At Headquarters, each Office of an Assistant Administrator and the Office of the Administrator has a primary FOIA Coordinator who receives the assignment from the Headquarters FOIA Office. FOIA requests in regions are received by the Regional FOIA Officer who selects the appropriate division, branch or individual within the organization which is known as the Action Office. Regions have a primary FOIA Coordinator and the function may be performed by various staff persons. At Headquarters, the primary FOIA Coordinator will assign the request to the Action Office. Non-primary FOIA Coordinators may also be located at the division and branch levels at Headquarters and in regions depending on the business practices of the particular organization. An organization's business practices determine the workflow and roles and responsibilities when a request is received for action. These practices will be detailed in the organization's FOIA procedures.

[1] An EPA region (e.g., Region 1) or the Office of an Assistant Administrator (e.g., OGC).

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When an assignment is received from a FOIA Office, the primary FOIA Coordinator or regional person (designated by the Regional FOIA Officer) will determine which of the offices in the organization (e.g., staff offices, divisions, or branches) are likely to have records responsive to the request. The primary FOIA Coordinator or regional person will assign the request to the appropriate office or FOIA professional using FOIAonline. If the description of the records requested is not sufficient for the primary FOIA Coordinator or regional person to assign the request to an office, the primary FOIA Coordinator or regional person will contact the requester for additional information. All communications, including verbal conversations with the requester, will be documented for the official record and entered into FOIAonline. Communications may include discussion of scope, deadlines, or other issues.

NOTE: For large, complex FOIA requests, it is suggested that the Action Office convene meetings with all interested Agency parties in order to clarify responsibilities, methods to be used for collection, and similar issues. Those meetings should include programmatic experts, Records Liaison Officers, information technology specialists, and legal counsel, as appropriate.

Step 6 – Determine Search Parameters. The Action Office will determine the cut-off date for records subject to the request. Under the EPA's regulations (40 C.F.R. § 2.103 (a)) for determining what records are within the scope of the request, the Action Office will usually include only those records in its possession as of the date the request was received by the FOIA Office, unless the request specifically seeks a more limited scope. If a different date is used, the Action Office will inform the requester of that date.

The request will also be reviewed to determine the subject matter of the records the requester is seeking. If it is deemed necessary for the person processing the FOIA to obtain clarification or additional information from the requester, the time necessary to reformulate the request will be excluded from the statutory 20 working day period (or any authorized extension of time) that the EPA has to respond to the request. The FOIA permits the Agency to "stop the clock" **one** time during the first 20 days after receipt, to seek information and clarification from the requester. Although the requester may be contacted as many times as needed to clarify the scope of the request, the clock may only be stopped once. Once the clock has been stopped, it should not be restarted until the information or clarification is provided. All communications must be documented for the official record and entered into FOIAonline, and the deadlines adjusted in the system, as appropriate.

Step 7 – Determine if Additional Responsive Records are in Other Agency Organizations. When additional responsive records are determined to be located in other Agency organizations, or the request is incorrectly assigned, the appropriate FOIA Office should be notified by the FOIA Coordinator or the organizational subject matter expert within two working days of receiving the assignment. Action Offices should return misdirected requests to the local FOIA Office for re-assignment within two working days.

NOTE: The FOIA Office will create a task in FOIAonline to request additional records from

another EPA organization.

Step 8 – Estimate Processing Fees. The EPA's FOIA regulations require an assurance of payment from the requester if fees are expected to exceed $25.00 or an amount specified by the requestor. Unless a waiver of fees has been granted by the Agency FOIA Officer, the Action Office will estimate the processing fee which will be charged as specified in 40 C.F.R. § 2.107. Search fees may apply even when no responsive records are identified or no responsive records are disclosed to the requester. The EPA's FOIA Regulations (40 C.F.R. § 2.107(j)) also define circumstances where it may be appropriate to require advance payment of the estimated fees, if the fees are expected to exceed $250.

Fees are determined by the type of staff performing the work, the type of requester, and the category of work performed. Fees are calculated as follows:

Type of Staff	Charge Per Quarter Hour
Clerical Staff	$4.00 per ¼ hr
Professional Staff	$7.00 per ¼ hr
Managerial Staff	$10.25 per ¼ hr

Type of Requester	Fee Category to be Charged		
	Search	Review	Duplication
Commercial	Yes *	Yes	Yes
Educational	No	No	Yes (100 pages free)*
Non-commercial Scientific	No	No	Yes (100 pages free)*
News Media	No	No	Yes (100 pages free)*
All Others	Yes (First 2 hours free)*	No	Yes (100 pages free)

*Fees shaded in grey above cannot be charged if the Agency fails to comply with time limits for response.

Step 9 - Determine Response Time. The FOIA requires agencies to provide a substantive response within 20 working days. In such instances when the Action Office determines the response cannot be completed within 20 working-days, the EPA may extend the due date if "unusual circumstances," as defined by the FOIA, apply.

An "unusual circumstance" exists when there is: (1) a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (2) a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; and (3) a need for consultation, which will be conducted with all practicable speed, with another

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agency or among two or more components of the EPA having a substantial interest in the determination of the request.

If unusual circumstances exist and there is a need to extend the due date for 10 working days or less, the Action Office must, within the 20 working day time limit, notify the requester in writing that unusual circumstances exist and provide the new due date. When the unusual circumstances result in a need to extend the due date for more than 10 working days, the Action Office must also provide the requester, within the 20 working days, the contact information for the EPA's FOIA Public Liaison and an opportunity to either (a) modify the request so that it may be processed within the 10 working day extension or (b) arrange an alternative time period for processing the original or modified request.

If unusual circumstances do not exist, or if the due date has already been extended and additional time is needed to complete the response, the Action Office should seek a reasonable extension from the requester. To aid the requester, the Action Office will provide the requester the contact information for the EPA FOIA Public Liaison, who will assist in the resolution of any disputes between the requester and the EPA. If the requester does not agree to an extension, the Action Office will fulfill the request as soon as possible. The requester may file an administrative appeal or may pursue litigation. For instances where the FOIA requester is the prevailing party of a litigation case and the EPA is required to pay legal fees, please refer to Office of the Chief Financial Officer's FOIA Fee Policy, RMDS 2540-04-P2. In any event, the Action Office should communicate any extensions and expected completion dates with the requester. All communications must be documented for the official record and entered into FOIAonline.

The Action Office also enters the new requested due date and the justification for the extension into FOIAonline. The system generates a notice to the Headquarters or appropriate Regional FOIA Office for approval. The FOIA Office will make a decision within two working days, document the decision, with comments if necessary, in FOIAonline, and communicate the new date to the Action Office. The Action Office will communicate the new due date to the requestor.

Step 10 – Collect and Review the Records. The Action Office and each Contributing Office is responsible for identifying, collecting and reviewing records within the scope of the request as discussed in Step 6, and as outlined in any organization-specific procedures. This includes the responsibility for consultation and referral with other federal agencies. Contributing Offices are also responsible for coordinating responsive activities with the Action Office (i.e., the office that is determined to have the majority of responsive records) when more than one office has responsive records (see Step 5 above). The Action Office and each Contributing Office should also assure that protected information has been redacted from records before they are released.

The Action Office and Contributing Offices will: 1) ensure that redacted information cannot be read through photocopied records; 2) remove "hidden" metadata as appropriate (e.g. Microsoft Word document properties); and 3) annotate records with the applicable FOIA exemption(s) at the location of the redacted information. A copy of both the original and redacted record will be

stored in FOIAonline, unless subject to special handling requirements (e.g., large volume) or policies. Exceptions to this storage requirement are approved on a case by case basis by the Agency FOIA Officer. FOIAonline allows FOIA professionals to put records in the system that are not released to the public. This protects records that have been withheld.

If records provided in response to a request are not entered into FOIAonline because of special handling requirements or policies, or because the volume of files make it impractical to upload the complete response, a placeholder document must be uploaded with contact information for how to obtain a copy of the response that the responding office will maintain and make readily available.

NOTE: Only records that have been: 1) marked published and 2) approved for release are available to the public in FOIAonline.

Step 11 – Determine Which Records (or Portions) May Be Released. After thorough review, the Action Office will prepare to release responsive, non-exempt records or portions of records. All records released or being withheld in total in response to a FOIA request must be reviewed by at least two knowledgeable individuals, including one manager or supervisor to ensure openness, transparency, consistency, and the appropriate application of FOIA exemptions. One of the reviews may be performed by the individual who processes the request. Action Offices may consult with the Agency FOIA Officer, their Office of Regional Counsel (ORC), or Office of General Counsel (OGC) for questions regarding withholding of records under a FOIA exemption. If a discretionary FOIA exemption (Exemptions 2, 5, 7 (excluding 7(c)), 8 and 9) is implicated, Action Offices should only withhold records, or portions of records, when they reasonably foresee that disclosure would harm an interest protected by one of the exemptions or when disclosure is prohibited by law.

Responsive records that have been properly reviewed and redacted (if necessary) will be subject to one of the following outcomes:

a) Release in Full. The record, in its entirety, may be released to the requester.
b) Partial Grant/Partial Denial. Portions of the record will be withheld from the requester if covered by either one or multiple FOIA exemptions. The portions of the record that are not redacted are released to the requester.
c) Withhold in Full. The record, in its entirety, will be withheld from the requester if covered by either one or multiple FOIA exemptions.
d) No Record. If, after a reasonable search likely to uncover all responsive documents, no records are located that are responsive to the request, the requester will be informed in writing. A no records certification form must be completed for no record responses and entered in FOIAonline. Please note: This form is not sent to the requester.
e) Confidential Business Information (CBI). For records or parts of records that have been claimed as CBI or would be claimed as CBI if the business knew the EPA proposed to disclose the information, the procedures set out in 40 C.F.R. § 2.204 must be followed.

f) Glomar Response. In some instances, the EPA may expressly refuse to confirm or deny the existence of records responsive to a FOIA request; this is called a Glomar response. The response letter will inform the requester that the request is denied because "either the records do not exist or they are exempt from mandatory disclosure under the applicable provision of FOIA." The Action Office must obtain approval from OGC or ORC prior to issuing a Glomar response.

Step 12 – Prepare Response Letter. The Action Office will prepare the response letter using standard language, if suitable, and obtain necessary concurrences. All response letters must include: (1) the FOIA tracking number and (2) appeal language, as appropriate. FOIA requesters have the right to appeal initial FOIA decisions made by the EPA if:

- No records were found;
- The response time has exceeded the statutory authority or documented extensions;
- The request for expedited processing was denied;
- The request for a fee waiver was denied;
- The requestor believes some records or portions of records were improperly withheld;
- The requestor believes the search was inadequate; or
- The requestor believes the fee category in which they were placed is incorrect.

In addition, response letters that withhold Agency records, in total or in part, are required to identify the:

- Records withheld individually or by category of similar documents if voluminous;
- Applicable FOIA exemption(s) under which the record is being withheld and a brief statement explaining the reason for the denial; and
- Authorizing official by name and title (see Step 14 below for list of Authorized Officials).

Step 13 – Finalize Processing Fees. The Action Office will inform the requesters in the response letter if fees for processing the request are not billable (i.e., equal to or less than $14.00). If the processing fees are billable (i.e., greater than $14.00), FOIAonline will generate the invoice.

NOTE: The Administrative Cost section in FOIAonline must be completed to document billable and unbillable costs in FOIAonline. All offices working on a request will enter their administrative costs in FOIAonline. The EPA is required to document actual fees charged to the public (billable) and the administrative costs (unbillable) incurred by the agency in processing FOIA requests.

Step 14 – Obtain Approval from an Authorized Official to Release or Withhold Records. The Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices (or their appropriate designee) are delegated the authority to issue initial determinations

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to release or withhold records in response to FOIA requests. See EPA Freedom of Information Delegation of Authority, Section 1-30.

NOTE: Initial determinations (both release and withholding determinations) may be redelegated only to persons occupying positions not lower than division director or equivalent.

Step 15 – Respond to Request. The Action Office will provide the response letter, responsive records and invoice (when applicable) to the requester through FOIAonline. If an email address is provided, the requester will be notified via email that the responsive records are available in FOIAonline. Otherwise, the response package will be provided via postal mail.

The response letter must include a description of the information withheld either by category and volume, or by a list. In all cases the response letter must also include the standard administrative appeal language.

Step 16 – Finalize Actions. The Action Office will ensure all supporting documentation is entered in FOIAonline (e.g., records of conversations or notes to the record). The record copy of the FOIA response will be maintained in FOIAonline, including all responsive records. Once published, these records become available for public searching and viewing.

If the volume of paper records is very large and conversion to electronic format is not practical or the response is subject to special handling requirements or policies, the Agency FOIA Officer will consider granting an exception to the requirement to load the records into FOIAonline. Reviews are made on a case by case basis. A copy of the decision by the Agency FOIA Officer will be maintained in the system. If the exception is granted, a placeholder document must be uploaded in FOIAonline with contact information for obtaining a copy of the responsive records. The Action Office that has responsibility for responding to the request must maintain the records according to applicable record schedules and make them readily available for responding to future requests.

The Action Office will close the request in FOIAonline.

7. RELATED DOCUMENTS

- http://www.epa.gov/FOIA/FOIAregs.htm
- http://www.justice.gov/oip/amended-FOIA-redlined.pdf
- http://intranet.epa.gov/oei/imitpolicy/qic/ciopolicy/2171-p-01.pdf
- http://www.archives.gov/about/organization/summary/ogis.html

8. ROLES AND RESPONSIBILITIES

Action Office – The organizational unit that maintains the majority of records responsive to a FOIA request.

Agency FOIA Officer – The Agency FOIA Officer is the program manager for the National FOIA program. The Agency FOIA Officer coordinates and oversees the EPA FOIA administration responsibilities; issues expedited processing and fee waiver determinations; develops and reviews FOIA procedures, policies, and guidance; provides advice to Agency FOIA personnel in the program and regional offices; prepares annual reports to the Department of Justice (DOJ); and provides FOIA training to agency employees and other individuals covered under Section 3 of these procedures. The Agency FOIA Officer is located in the Office of Environmental Information at EPA headquarters.

Authorized Officials – The Deputy Administrator, Assistant Administrators, Associate Administrators, the Inspector General, the General Counsel, Heads of Headquarters Staff Offices and Regional Administrators (or their appropriate designee) are authorized under section 2.113(b) of EPA's FOIA regulations to issue initial determinations to release or withhold records in response to FOIA requests. Freedom of Information, EPA Delegations Manual, Chapter 1, Section 30, provides that this authority may be redelegated to the office director level or equivalent, who may redelegate to the division director level or equivalent.

Contributing Office – Organizational units that possess responsive records in addition to the Action Office.

Chief FOIA Officer – The designated high-level official within each federal agency who has overall responsibility for the agency's compliance with the FOIA. At the EPA, the Assistant Administrator for the Office of Environmental Information is the Chief FOIA Officer. The Chief FOIA Officer is responsible for ensuring the efficiency and effectiveness of the Agency's FOIA administration including compliance, accountability and reporting to the Administrator, the Department of Justice, and the Office of Management and Budget on the status of the Agency's FOIA program. NOTE: This role is different from that of the Agency FOIA Officer above.

FOIA Coordinators – FOIA Coordinators stay informed on requests and assignments; route requests to the appropriate Action Office or subject matter expert within the Program Office; track FOIA requests for timeliness; monitor the quality of the responses; and provide guidance to program personnel including overdue reports, in collaboration with the Agency FOIA Officer. Each Headquarters Program Office has a lead FOIA Coordinator who works under the general direction of the Agency FOIA Officer. See also "Primary FOIA Coordinators".

FOIA Officer – See "Agency FOIA Officer" or "Regional FOIA Officers."

FOIA Offices – The FOIA Office is the point of receipt for Agency FOIA requests where they are reviewed for conformance with the Act, acknowledged and assigned to the appropriate

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Action Office. The locations are identified in the EPA's FOIA regulations for submitting FOIA requests. Agency FOIA Offices are located in each Region and in the National FOIA Program at Headquarters.

FOIA Professional – An EPA employee or contractor who directly interacts with FOIA requesters and is responsible for the day-to-day FOIA processing activities.

FOIA Public Liaison – The FOIA Public Liaison is the EPA contact point for the public if they have any issues with the handling of their FOIA request by the Agency. In the EPA, the FOIA Public Liaison is the Chief of the FOIA and Privacy Branch in the Office of Information Collection within the Office of Environmental Information. The Public Liaison supervises the staff in the FOIA Requester Service Center and is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

FOIA Requester Service Center – The FOIA Requester Service Center (FOIA Hotline) provides the public information on the status of their requests if they do not have access to FOIAonline, general information on how and where to submit a FOIA request, or information about the types of information available on the EPA's websites. The Center is staffed by the FOIA Public Liaison, Agency FOIA Officer and National FOIA Specialists. The Hotline number is 202-566-1667.

Managers and Supervisors – EPA managers and supervisors oversee FOIA Officers and FOIA Coordinators to ensure that they have the knowledge, skills and ability to perform their duties and respond in a timely manner in accordance with the FOIA. They review and approve all FOIA responses before release.

National FOIA Program – The National FOIA Program is staffed by the Agency FOIA Officer and National FOIA Specialists who develop Agency-level policies, procedures and trainings, respond to questions, provide guidance, deliver training, and make decisions on fee waiver and expedited processing requests. The National FOIA Program is located in the Office of Environmental Information.

National FOIA Specialists – National FOIA Specialists manage the lifecycle of FOIA requests received at Headquarters; assign requests to Headquarter FOIA Coordinators; prepare responses to fee waiver and expedited processing requests; approve requests to extend due dates; respond to questions from Agency employees; and staff the FOIA Requester Service Center.

Office of General Counsel (OGC) – OGC provides legal advice on FOIA matters; issues final decisions on FOIA appeals, final confidentiality determinations for CBI claims originating in HQ, and fee waiver appeal determinations, except when a conflict of interest arises; provides counsel on FOIA exemptions and exclusions; and assists the U.S. Department of Justice attorneys in FOIA litigation.

Office of Inspector General (OIG) – OIG and the Counsel to OIG provide advice on FOIA matters pertaining to its organization; issue initial determinations and final decisions on FOIA appeals, final confidentiality determinations, except when a conflict of interest arises; provide counsel on FOIA exemptions and exclusions; and assist the U.S. Department of Justice attorneys in FOIA litigation.

Office of Regional Counsel (ORC) – ORC provides legal advice on FOIA matters, final confidentiality determinations for CBI claims originating in the Region, FOIA litigation support to regional employees, and information as needed to the Agency FOIA Officer on fee waiver requests. ORC also assists OGC on appeals, as appropriate.

Primary FOIA Coordinator – The lead FOIA Coordinator in an organization who works under the general direction of the Agency FOIA Officer.

Regional FOIA Officers – Regional FOIA Officers assign requests to the appropriate Action Office within the region; track FOIA requests; provide guidance to regional personnel in collaboration with the Agency FOIA Officer; coordinate with the Agency FOIA Officer and Action Offices on initial fee waiver decisions; compile data for the annual FOIA report; and monitor the quality and timeliness of responses in the regions. Regional FOIA Officers work under the general direction of the Agency FOIA Officer.

Subject Matter Experts – Subject matter experts identify and locate records requested under FOIA. These individuals are located in all EPA organizations and include all professional disciplines. If permitted under the applicable delegation and after obtaining any necessary concurrences, the subject matter experts may respond to requests directly or provide the responsive records to the FOIA Coordinator who facilitates the response for the Agency. They must, however, follow the review process prescribed in this procedure.

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9. DEFINITIONS

Administrative Appeal – An independent review of the initial determination made in response to a FOIA request. Requestors who are dissatisfied with the response made on their initial request have a statutory right under 40 C.F.R. § 2.104(j) to appeal the initial determination to an office in the Agency which will conduct an independent review. (*NOTE: OGC is responsible for managing all FOIA appeals at the EPA with the exception of appeals that involve FOIA requests to the OIG or FOIA requests where OGC is the Action Office on the initial response. OIG handles its own appeals. The Office of the Administrator processes appeals where the OGC is the Action Office on the initial response.)*

Case – All records pertaining to a FOIA request.

Commercial Use – A type of request from or on behalf of a person who seeks information for a use or purpose that furthers his/her commercial, trade, or profit interests, which can include furthering those interests through litigation.

Consultation – When an agency locates a record or a record that contains information provided by or of interest to another agency, it will ask for the views of that other agency on the disclosability of the records before any final determination is made. This process is called a "consultation." (See also "referral.")

Confidential Business Information – Trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.

Educational Institution – A preschool, public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education or an institution of vocational education, which operates a program or programs of scholarly research.

Existing records – Agency records that exist as of the date a FOIA request is received by the EPA.

Expedited Processing – The processing of a FOIA request out of the order in which it was received and prioritized over other pending FOIA requests. The standards for expedited processing are set out in the FOIA and in the regulations of each federal agency.

Fee Categories – Categories under FOIA that determine assessments of fees to requesters. Requesters fall into one of five fee categories: (1) commercial requesters; (2) educational; (3) noncommercial scientific institutions; (4) representatives of the news media; and (5) all other requesters (i.e., requesters who do not fall into any of the other four categories).

Fee Waiver – A request made to an agency to waive any applicable fees for its processing of a FOIA request. Fee waivers are limited to situations in which a requester can show that the disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester. Requests for a fee waiver are evaluated on a case-by-case basis.

FOIAonline – The EPA's FOIA tracking and management system.

FOIA Exemptions – Contained at 5 U.S.C. § 552(b) (1)-(9). See http://intranet.epa.gov/foia/exemptions.html or the box on page 2 of these procedures.

FOIA Time Limits – The time period in the FOIA statute for an agency to respond to a FOIA request (ordinarily twenty working days from the day a FOIA request is received and logged in by the appropriate FOIA Office).

Freedom of Information Act (FOIA) – The Freedom of Information Act (FOIA) was signed into law in 1966. The law provides individuals with a statutory right of access to certain federal agency records. The FOIA requires agencies to disclose requested records unless they are protected from public disclosure by the FOIA. Congress included in the FOIA nine exemptions and three law enforcement exclusions to protect important interests such as national security, personal privacy, privileged communications, and law enforcement.

Full Denial – An agency decision not to release any records in response to a FOIA request because the records are exempt in their entirety under one or more of the FOIA exemptions, or because of a procedural reason, such as when no records could be located. A denial response must be signed by an Authorized Official.

Full Grant – An agency decision to disclose all records in full in response to a FOIA request.

Glomar Response – An agency's express refusal to confirm or deny the existence or non-existence of records responsive to a FOIA request.

Initial Request – The request submitted by an individual to a federal agency for access to agency records on any topic. A FOIA request can generally be made by any person, to any federal agency, and only requires that requesters reasonably describe the records they are seeking and comply with agency regulations for making such requests.

Media Requester – Any person making a FOIA request who actively gathers news for an entity that is organized and operated to publish or broadcast news to the public that actively 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. A request for records that supports the news-dissemination function of the requester shall not be considered to be for a commercial use.

Non-Commercial Scientific Institution – An institution that is not operated on a commercial basis but operated solely for conducting scientific research, the results of which are not intended to promote any particular product or industry.

No Records Response – A FOIA request for which no responsive records were located.

Partial Grant/Partial Denial – An agency decision to disclose records or portions of records while withholding other records or portions of records that are exempt under the FOIA, or to otherwise deny a portion of the request for a procedural reason.

Pending Request or Administrative Appeal – A request or administrative appeal for which an agency has not taken final action in all respects.

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Perfected Request – A request for records that clearly describes the records sought and the procedures that will be followed to develop a response.

Processed Request or Processed Administrative Appeal – A request or administrative appeal for which an agency has taken final action in all respects.

Records – Information in an agency's possession and control in any format including electronic format. DOJ notes that for FOIA purposes, "records" includes *all* tangible documentations of information regardless of whether they are records under 44 U.S.C. § 3301. *(NOTE: This is a broader definition than that used by the EPA records program and records schedules.)*

Redact – The act of removing exempt information from responsive documents either manually or utilizing redaction software.

Referral – When an agency locates a record that originated with, or is of otherwise primary interest to another agency, it will forward that record to the other agency to process the record and to provide the final determination directly to the requester. This process is called a "referral." (See also "consultation.")

Requester – Any individual (including non-U.S. citizens), corporation or association, public interest group, and state, local, tribal, or foreign government making a FOIA request. Requests from federal agencies, the Government Accountability Office, or Congress (e.g., the Speaker of the House, the President of the Senate, or the chair of a committee or subcommittee) are not processed under these procedures.

Responsive Record – A record falling within the scope of a FOIA request that an agency has located that may be provided or is under consideration for inclusion in a response to a FOIA request. A record may be "responsive" to a FOIA request, but may still be withheld as protected from disclosure by a FOIA exemption.

Unusual Circumstances – When there is: (1) a need to search and collect documents from organizations separate from the organization processing the request; (2) a need to search and collect a large volume of records; or (3) a need to consult with another agency (or a separate subdivision of the same agency) having a substantial subject-matter interest in the request.

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10. WAIVERS

No waivers will be accepted from the requirements of this procedure.

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11. RELATED PROCEDURES, STANDARDS AND GUIDANCE

Not applicable.

12. MATERIAL SUPERSEDED

Interim Procedures for Responding to Freedom of Information Act (FOIA) Requests (CIO 2157-P-01-0/Transmittal 13-010 dated September 30, 2013)

13. ADDITIONAL INFORMATION

This document is not intended to create any rights or privileges for the public, or obligations on the part of EPA.

Renee P. Wynn
Acting Assistant Administrator for Environmental Information and Chief Information Officer
U.S. Environmental Protection Agency

ED_002194_00002402-00019

Message

From: Gottesman, Larry [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7B3DBF872F954FBEB950E98C56BDC431-LGOTTESM]
Sent: 3/22/2018 2:29:10 PM
To: Byrd, Jonda [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f7b4a274987843219b4df98cdb01891a-Byrd, Jonda]
Subject: Not-a-Proper-Request-seeking-clarification-March-30-2017.docx
Attachments: Not-a-Proper-Request-seeking-clarification-March-30-2017.docx

Mr./Ms. NAME
ADDRESS
CITY, STATE ZIP

RE: Request Number: EPA-HQ-201X-00XXXX

Dear Mr./Ms. NAME:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA) Freedom of Information Office in which you are seeking DESCRIPTION.

Your request does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them. The EPA's FOIA regulations explain:

> "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." 40 C.F.R. § 2.102(c).

We would like to provide you the opportunity to clarify the records that you are seeking so that EPA can process your request. As indicated in 40 C.F.R. § 2.102(c), please include any specific information about the records you seek, including time period, authors, or a more detailed description of the records' subject matter. Additionally, the FOIA does not require federal agencies to respond to questions so please consider that as you are modifying your request.

Please contact NAME via email at EMAIL ADDRESS@epa.gov with your clarification or I can be reached at (202) 566-2162 if you have any questions concerning this letter. If we do not hear back from you by DATE, we will administratively close your request.

Sincerely,

Larry F. Gottesman
National FOIA Officer

Message

From: Gottesman, Larry [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7B3DBF872F954FBEB950E98C56BDC431-LGOTTESM]
Sent: 3/14/2018 9:16:51 PM
To: Lewis, Monica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e30c5be0e73b47359ad703d4e6fde807-MLEWIS02]
Subject: Not-a-Proper-Request-Closure-Letter-March21-2017.docx
Attachments: Not-a-Proper-Request-Closure-Letter-March21-2017.docx

Mr./Ms. NAME
ADDRESS
CITY, STATE ZIP

RE: Request Number: EPA-HQ-201X-00XXXX

Dear Mr./Ms. NAME:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA) Freedom of Information Office in which you are seeking DESCRIPTION.

Your request does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them. The EPA's FOIA regulations explain:

> "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." 40 C.F.R. § 2.102(c).

We sent you a letter dated DATE providing you the opportunity to clarify the records that you are seeking so that EPA can process your request. We asked that you contact us by DATE, with your clarification, and we have not received additional information from you, so we are administratively closing your request.

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals *received* after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510 , 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

Sincerely,

Larry F. Gottesman
National FOIA Officer

Message

From: Gottesman, Larry [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7B3DBF872F954FBEB950E98C56BDC431-LGOTTESM]
Sent: 6/6/2018 3:09:18 PM
To: Lewis, Judith [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7f755fc9e1104e3fb4f70db9980ea395-Lewis, Judith]
Subject: response.docx
Attachments: Henson response.docx

Draft

Message

From: Gottesman, Larry [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7B3DBF872F954FBEB950E98C56BDC431-LGOTTESM]
Sent: 6/6/2018 2:52:21 PM
To: Lewis, Judith [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7f755fc9e1104e3fb4f70db9980ea395-Lewis, Judith]
Subject: Henson response.docx
Attachments: Henson response.docx

A modified version of this letter will work.

Larry F. Gottesman
Agency FOIA Officer
Office of General Counsel
U.S. Environmental Protection Agency

202-566-2162 (Direct line)
202-689-4588 (Mobile)
202-566-1667 (Main line)

Message

From: Gottesman, Larry [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7B3DBF872F954FBEB950E98C56BDC431-LGOTTESM]
Sent: 1/30/2018 7:44:58 PM
To: Schumacher, Wendy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7ae5042e53e943728333b23ca294294f-Schumacher,]
Subject: National FOIA Office Operations Manual_20180130.docx
Attachments: National FOIA Office Operations Manual_20180130.docx

Please see my comments.

Larry F. Gottesman
Agency FOIA Officer

202-566-2162 (Direct line)
Personal Phone / Ex. 6 (Mobile)

Message

From: Farren, Victor [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B4E4EF4434E44BB488AB822E82780809-FARREN, VIC]
Sent: 8/29/2018 5:47:50 PM
To: Newton, Jonathan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8a0f1a1699564041bd74c49a526c0fe5-Jnewton1]; No, Fredrick [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=422039a7a4804d38a105e25f983fd39a-No, Fredrick]; Espinoza, Ana [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5e62ee5dcf1a473ab4c4875df22d90d2-Espinoza, Ana]; Yaeger, Ryan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c4d2fdd93ebf4d43996316a333c80985-Yaeger, Rya]
CC: Tran, Victoria [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=99fa7aa1484444f98f10029e88f91058-Tran, Victo]; Hope, Brian [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c27b55619fb248cc8776fc46cd3f8b0d-BHope]; Ferris, Lena [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a61ae0c82239415eb0ceb4c0b9d3920a-Ferris, Lena]
Subject: Organizing Relativity workspace
Attachments: OAR FOIA Toolkit.Checklist.Edits.docx

As I mentioned in today's Staff Meeting, I met with Jonathan Lubetsky in OAR to go over the process of how they set up and organize a Relativity workspace.

Please note that you will need Super User rights in order to carry out many of the required functions. eDiscovery grants Super User rights to people who have been approved to receive them by their management. If you think you need these rights, please have this discussion with Brian and/or Beth. If you are not going to be one of the persons responsible for this task, it may still be helpful to follow along so that you understand the underlying logic behind how a workspace is organized.

I think their process for organizing a workspace makes logical sense and it is something we should deploy here in the AO. I have attached some OAR training materials Jonathan shared with me, please refer to pages 42-52.

Victor

OAR FOIA TOOLKIT

Steps to Efficiently Address both Simple and Complex Requests

Abstract

This document contains best step-by-step instructions, best practices, and guidelines to assist staff in complying with the Freedom of Information Act and EPA Policy without straining office resources. It draws almost in entirety from the Life Cycle of a FOIA – The Key Steps to Processing Any FOIA Request, which can be accessed at intranet.epa.gov/FOIA.

This document contains hyperlinks that allow you to navigate to the part of the document you're looking for. Click Ctrl and then click on one of the sections below be directed to its location.

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9. Wells

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TRACKING THE FOIA PROCESS

The below checklist outlines the order of steps and action items to complete an individual FOIA request. Use this as a guideline to track the progress of your FOIA and to ensure you have completed all the necessary steps. Additional steps for 'complex' FOIA requests are colored in blue.

FOIA PROCESSING CHECKLIST- Simple and Complex FOIAs

Action Required	Target Deadline	Date Complete	Comments
Identify Action Office(s)			
Refine Scope of request			
Identify Custodians and Key Terms			
Submit Document Search to OEI			
Task appropriate EPA Offices in FOIA Online			
Organize Relativity Workspace			
Request a FOIA extension			
Obtain assurance of payment (applicable only for commercial requests without a fee waiver)			
Create and share a production schedule with action offices			
Identify Relativity Reviewers			

Obtain access for reviewers			
Assign batches to reviewers			
Submit document review instructions to reviewers.			
Determine additional review requirements. ☐ Triage ☐ Document Collection ☐ Review Setup ☐ 1st Line Review	Equity: Doc Collec: Review Setup: 1st Line:	Equity: Doc Collec: Review Setup: 1st Line:	
Produce and release documents ☐ OAR ☐ OGC ARLO ☐ Final Awareness ☐ FEAT ☐ Closeout	OAR: OGC: FA: FEAT: Closeout:	OAR: OGC: FA: FEAT: Closeout:	
Create reports of document review time.			
Enter admin costs into FOIA Online			
Load all relevant correspondence and supporting documentation to FOIA case file.			

Submit case for closure.			

ACKNOWLEDGE RECEIPT OF THE REQUEST

How do I acknowledge receipt of a FOIA request?

FOIAonline

FOIA requesters can submit their written FOIA requests to EPA electronically via FOIAonline. FOIA requesters can also submit written requests to EPA's Headquarters or Regional FOIA Officers, in which case the National FOIA Program Office, or Regional Office, if applicable, will input the request into FOIAonline. All requests are processed through FOIAonline.

Once a request is submitted to FOIAonline, the requester receives notification immediately via the FOIAonline website confirming submission of a request. In this request confirmation, the requester is provided with a tracking number, the date submitted, and a brief description of the request as provided by the requester in the submission. An example of the response a FOIA requester receives upon submission of a request via FOIAonline is below:

FOIAonline then automatically generates an acknowledgement e-mail to the requester like the one below:

Reply Reply All Forward IM

Wed 8/16/2017 2:13 PM

foia_hq@epa.gov

FOIA Request EPA-HQ-2017-010565 Submitted

To Walker, Denise

Retention Policy Inbox (Never) Expires Never

This message is to confirm your request submission to the FOIAonline application: View Request. Request information is as follows:

- Tracking Number: EPA-HQ-2017-010565
- Requester Name: Denise A. Walker
- Date Submitted: 08/16/2017
- Request Status: Submitted
- Description: This is a TEST of EPA's FOIA online system. I am trying to find out what kind of acknowledgement is sent to requesters. This is not an actual FOIA.

The submission confirmation and the acknowledgment email are the first communication the requester receives from the Agency. The acknowledgment email also appears as the first correspondence entry as a system-generated email, which appears under the correspondence tab in FOIAonline.

Be sure to turn on the notification feature under the "My Account" tab in FOIAonline, as the system will then generate e-mails to your Outlook account notifying you to check FOIAonline for requests or tasks that have been assigned to you. Be sure also to check regularly the "My Cases" tab in FOIAonline, as you will find all pending requests and tasks listed here.

Initial Communication from Action Office

When you or your office is assigned as the lead (also known as the Action Office) on a FOIA request, you should immediately review the request and ensure that assignment to your office is appropriate. If you believe that your office should not be the Action Office for a particular FOIA request, immediately notify the FOIA Coordinator or FOIA Officer in the office that you believe should be the appropriate Action Office. If there is agreement, the FOIA request should immediately be reassigned via FOIAonline to the correct office. If you are unsure of the appropriate Action Office, you should immediately work with your office's FOIA Coordinator or FOIA Officer to resolve the issue in conjunction with the National FOIA Program Office. Be sure to communicate with the FOIA Coordinator or FOIA Officer in the other office before re-assigning the matter in FOIAonline.

After ensuring that the request is properly assigned to your office as the Action Office, as a best practice you should reach out to the requester by sending a short note through FOIAonline, letting the requester know your contact information, that you are reviewing the request and that you will be back in touch

promptly once you have had a chance to review the request fully. This can be accomplished by clicking the "Create Correspondence" in FOIAonline. The note might look like this:

Subject: [FOIA ID # XXX-XXXX]

Dear [FOIA Requester]:

My office has received your FOIA request. I will contact you again after we have had an opportunity to review the request fully. I will be your point of contact.

Please feel free to contact me directly with any questions or concerns. Additionally, at any point in time, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail at: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; by email at: ogis@nara.gov; by telephone at: (202) 741- 5770 or (877) 684-6448; or fax, (202) 741-5769

Sincerely, [Your Name]

[Your Phone Number]

Regular communication with the requester is fundamental to good FOIA processing. Start early!

OGIS, which is referenced in the sample noted above, is a FOIA resource for the public and the government. It can be found here. The FOIA Improvement Act of 2016 (hereinafter referred to as "the 2016 Amendments to FOIA") requires agencies to notify requesters of their right to pursue alternative dispute resolution through OGIS at certain points in the FOIA process, as explained below.

How much time do I have to respond to a FOIA request?

Statutory and Regulatory Time Limits

Under FOIA, you have 20 working days to process a request. 5 U.S.C. § 552(a)(6)(A)(i) (2006 & Supp. IV 2010). FOIAonline has a clock in the upper right hand corner that will help you keep track of how many days have passed since the National FOIA Program Office perfected the request. If you believe you can complete the request in 20 working days, let the requester know. If the request is not clear, you should seek clarification of the request.

Tolling Time Limits

You can stop the clock one time while you are waiting for clarification from a requester. 5 U.S.C. § 552(a)(6)(A)(ii). To do this, select "Stop the Clock" in FOIAonline and select the appropriate reason. Although you can only stop the clock once to clarify a request, you can stop the clock as many times as you need for fee-related reasons, including when the requester is required to provide an assurance of payment and has failed to do so. Fees are addressed more fully here.

Once the request is clarified or the fee issue is resolved, be sure to go back into FOIAonline and select "Start the Clock."

How do I get more time to respond to a FOIA request?

Unusual Circumstances and the 10-day extension, as provided in 5 U.S.C. § 552(a)(6)(B)(i). If you think you will need additional time beyond the 20 working days, you can provide the requester with a notice that you are invoking a 10-day extension for "unusual circumstances" per 5 U.S.C. § 552. This will give you a total of 30 days to respond to the request. This notice must: (1) be in writing; (2) include information on how to contact OGIS (as required by the 2016 Amendments to FOIA); (3) provide the requester with an opportunity to narrow the request (5 U.S.C. § 552(a)(6)(B)(ii)); and (4) be for one of the following reasons:

- the request requires EPA to collect responsive records from a field office or other entity separate from the office processing the request;
- the request involves a "voluminous" amount of records that must be located, compiled, and reviewed; or
- the request requires EPA to consult with another federal agency or other EPA components that have a substantial interest in the responsive information. 5 U.S.C. § 552(a)(6)(B)(iii).

As such, these circumstances are not all that unusual.

Extension of Time Beyond 30 days. If there are unusual circumstances and the request cannot be processed in 30 working days, you must provide the requester an opportunity to modify the request so that it can be processed within 30 working days or arrange for an alternative timeframe for completion of processing. 5 U.S.C. § 552(a)(6)(B)(ii). This notice must: (1) be in writing; (2) include information on how to contact OGIS (as required by the 2016 Amendments

to FOIA); (3) provide the requester with an opportunity to narrow the request; and (4) be for one of the unusual circumstances set forth in section 3.a. above. Requests that require the assistance of the Office of Environmental Information's (OEI) Discovery Services Division will likely exceed the 30-day limit. Please see Step 3 for additional information on how to submit search requests to the Discovery Services Division.

Consequences of not responding to a FOIA within time limits

While it's very common to take longer than 20 working days to complete a response, it is important to pay attention to statutory deadlines. Failing to respond to a FOIA within the statutory timeframe enables requesters to go directly to district court for relief, per 5 U.S.C.§ 552(a)(6)(C)(i). Failing to respond within statutory timeframes can also preclude the Agency from being able to charge fees, per 5 U.S.C. § 552(a)(4)(A)(viii).

Best Practice: Be sure to think about whether you will need additional time beyond the statutory 20 working days when you receive the request. Do not wait! Most complex FOIA requests cannot be processed in 30 working days (i.e., 20 working days plus 10 days for unusual circumstances), so take appropriate steps to notify the requester and arrange for additional time as soon as possible.

EVALUATE THE FOIA REQUEST AND DETERMINE FEES TO BE CHARGED, IF ANY

What is a proper FOIA request?

Before commencing a search for records pursuant to the FOIA, evaluate the FOIA request and confirm that it is proper. A proper FOIA request is one that sufficiently describes the records sought, i.e. it enables an Agency employee familiar with the subject area to locate the records with a reasonable amount of effort.

The FOIA was not intended to make government agencies full-time investigators on behalf of requesters or to allow requesters to conduct fishing expeditions through Agency files. The FOIA is about access to Agency records, but does not require the Agency to answer questions or create records to respond to a request. However, the breadth of the FOIA request or its burden on the Agency alone does not make a request improper – requests can be very large, yet still be proper. Instead, the key inquiry is whether the request sufficiently describes the records sought such that you have enough information to begin a search.

Applicable Legal Requirements

EPA's regulations at 40 C.F.R. § 2.102(c) state that the "request should reasonably describe the records you are seeking in such a way that will permit EPA employees to identify and locate them." Further, the regulations state "when possible, your request should include specific information about each record sought." Finally, the regulations state that this specific information should include (whenever possible):

- Date
- Title or name
- Author
- Recipient
- Subject

Requests do not need to have ALL of these elements to be proper requests; however, requests that contain none of these pieces of information (or only one) likely require clarification.

FOIA does not require EPA to do the following:

i. FOIA does not require EPA to create new records by compiling data or manipulating existing records, nor does it require the Agency to re-create records that were properly disposed of. Examples of this type of improper request include:
    a. "Make me a list of all Agency actions that …"
    b. "I want to know what the Agency is doing about …"
    c. "Provide me with information about who is working on …"

ii. EPA does not have to produce records over which it retains no control. An example of this type of improper request includes:
    a. "Provide me emails and communications between staff at XX Contractor" (if Agency employees are not included).

iii. EPA does not have to answer questions, interrogatories, or perform research to answer requests. Examples of this type of improper request include:
    a. "What files does EPA have on . . . ."
    b. "What did the EPA consider or rely on to ..."
    c. "How does EPA justify..."
    d. "Produce any documents that prove or disprove (statement or argument)."

iv. EPA does not have to produce purely personal records. Recall that the FOIA only requires the release of "agency records," *i.e.*, records that are created or obtained by an agency and under the agency's control at the time of the request. More information about what constitutes and "agency record" vs. a "personal record" is available here. An example of this type of improper request includes:
    a. "Please provide me EPA employee John Smith's recent home appraisal."

v. EPA does not have to explain or justify Agency decisions. Examples of this type of improper request:
    a. "Provide the basis for the Agency's decision to ..."
    b. "Provide any records supporting the statement that ..."

vi. EPA does not have to "hold" a request open for FOIA requests that seek records that EPA may create at some point in the future (i.e. records that do not exist at the time the request is received). Example of this type of improper request:
    a. "Provide the final XYZ Report when it is finished next month."

Tip: If, when reading the request, you think "I don't even know how we would begin to search for this", you probably have an improper request. Don't try to guess what the requester is searching for—contact them to clarify. Skip to the section on Communicating with Requesters for more best practices.

Requests that Only Seek Information Already Publicly Available on EPA Websites

These types of requests can be closed once you respond to the requester and direct the requester to the specific location where EPA has made the information publicly available. Locations may include the following:

- EPA's website
- EnviroFacts
- ECHO
- MyProperty
- FOIAonline
- ChemView

Perfecting Requests

Under current EPA procedures, the National FOIA Program Office documents the date on which the request is received as both the "submitted" date and "perfected" date in FOIAonline.

Because the request will be assigned to the Action Office as "perfected", it is that office's responsibility to determine if the request is proper and, if necessary, to seek clarification. Again, you can only stop the clock once to clarify the request during the first 20 working days.

If you determine a request is not proper, below are the steps to take:

1. Prepare the Improper Request/ Seeking Clarification Letter (you can access a template here).

2. Send the letter through FOIAonline or regular mail to the requester, as appropriate. If the letter is sent through regular mail, ensure that a copy is included in FOIAonline under the "correspondence" tab, so all communications can be kept as part of the FOIAonline case file.

3. In the FOIAonline case file, click the "Stop the Clock" button on the Left Navigation.

4. Select "Clarification" in the Reason drop down menu.

5. Explain the reason for stopping the clock in the Notes field. Also, to avoid confusion later, be sure to type in the Notes field the date by which you expect a response from the requester.

6. Click the "Stop the Clock" button on the left side of the page in FOIAonline.

7. Wait for the requester to respond or the due date to pass. When the requester responds and clarifies the request, click the "Start the Clock" button on the left side of the page in FOIAonline.

8. Once you are on the "Start the Clock" screen, press the "Start the Clock" button on the bottom of the page.

9. If the requester does not respond by the due date or fails to provide a clarification that sufficiently describes the records sought, begin the close-out process using the Closure for Failure to Modify Template, accessible here.

10. If the requester responded or you were able to clarify over the phone, confirm the modification or clarification in writing. (For template, see Confirmation of Clarification Template Appendix, Step 2).

11. Once confirmed, go to the "Submission Details" tab in FOIAonline and click the box saying "Has Description Been Modified?"

12. Type the modified description in the box.

13. Click "Save Changes" button at the bottom of the page.

14. Process the request according to the modified description.

If you determine that the FOIA request could be deemed "improper" per EPA's regulations, you **must** contact the requester and ask them to clarify or modify the request. Note that under the FOIA, you have one opportunity to "stop the clock" to clarify.

Evaluate the FOIA Request with Your Review Team and Clarify as Needed

This document will clarify who is on your office's review team for processing a request.

Building your Review Team

For simple FOIA requests:

Your team consists of:

- Your office's FOIA Coordinator or FOIA Officer
- Subject-matter experts (SMEs) of the requested records
- Custodians of the request, or office staff that may have created or handled responsive records
- Anyone else willing to help
  Note: you should coordinate with your SMEs early and often, even on simple requests. They will be able to identify whether, where, and what records exist that need to be reviewed.

For more complex requests:

Your team will consist of:

- The Action Office (who is receiving the request)
- Any contributing offices (including federal agencies other than the EPA, if necessary)
- Subject-matter experts (SMEs) of the requested records
- FOIA Coordinator(s)/Officer(s)
- FOIA Analyst(s), if needed

If your request requires you to work with other offices, coordinate with them every step of the way. Act as a group and regularly check in with each other to avoid redundant actions or unnecessary confusion. The Action Office is responsible for clarifying the FOIA request in such a way that all affected offices agree, so it's imperative to stay in communication with all parties involved.

The most important question you should keep asking as you identify the relevant Contributing Office(s): *Are there any other program office(s) or custodian(s) that are likely to have responsive records?*

With your team, discuss the request and ensure it meets all the requirements of a proper request:

- Does it sufficiently describe the records sought such that your subject matter expert(s) know where to search for records?
- Is the following provided: date range, program office(s), custodian(s), and search terms?
- Can you, as the Action Office, articulate a search plan of action for the records sought?

If the answer to any of these questions is "No", or "I'm not sure", ***reach out to the requester for clarification of the request.*** *Refer to the section on Communicating with Requesters for communication best practices.*

Other questions to consider with your team include:

- Has this information been requested through FOIA previously?
- What, if anything, could be a hurdle to efficient processing of this request?
    - Does it concern any sensitive issue(s)? (*e.g.,* litigation, ongoing rulemaking)
    - Potential resource concerns? (Is your team in the middle of another large project? Is the request unreasonable as is, given the timeframe, cost, etc.?)

From these discussions, your team should have:

- A common understanding of the request
- A plan of action if the team determines the request is improper or requires clarification
- A sense of any obstacles/hurdles going forward that may need to be addressed as a team
- An idea of what needs to be discussed with the requester

COMMUNICATING WITH REQUESTERS

If at any point in processing the request, the team is unsure or feels a sense of hesitation about how to resolve a question about the scope of the request, it is best to reach out to the requester for clarification and discussion. Such an approach will go far in establishing a positive relationship with the requester and is good customer service. Below are some tips for efficient and productive communication with requesters.

Prepare.

Upfront preparation is imperative to ensure efficient and positive communications with requesters.

- If you need clarification about the **type(s)** of records sought, gather information about the types of records the custodians create, the record systems, how the records are organized, and how the records are maintained.
- If you seek clarification on the **topic(s)** of records sought, gather information about the issue(s) on which the relevant office(s) is focused. Consider any relevant/timely issue(s) affecting the office(s), recent or upcoming projects, and similar issues.
    - *Sometimes requesters deliberately submit a very broad request without much direction about a topic because, while they have an idea, they're not quite sure of how to articulate exactly the information they seek. Having current topics on hand when contacting the requester can be useful, so you can ask questions like, "You mention X in your request, but X is a very broad topic. Our office is working on a rulemaking related to issues like X, are you interested in documents about the rulemaking?", etc.*
- If you seek clarification regarding **custodian(s)**, consider who are the individuals in your program office who are most likely to have relevant records. While the entire program office might have response emails, for example, helping the requester to nail down the custodian list to the primary individuals with relevant responsive documents increases the likelihood that the requester will receive the relevant information they seek.

Call.

Most requesters are glad to hear from the Agency about their FOIA requests, even if the discussion might require giving the requester "bad news", such as the length of time needed to process the request. **Calling the requester on the phone** is often a better technique than emailing them, since it is a more personal and, often, a more time-efficient way to clarify uncertainties and expectations.

- Communication with the requester is very important because the Agency can help manage the requester's expectations. Most requesters are not familiar with EPA records, organizational structure, or technical capabilities. Educating requesters about EPA is often productive for the requester and helps inform the public about the Agency.
- This technique can also be a way to reduce the burden of the request on the Agency. Open, verbal communication with the requester about the nature of the request can often reveal more specifically what they're looking for.
    - *Practice Tip: If managing multiple requests on a similar topic, and another requester submits a narrower request or you have worked with another requester to clarify/narrow a request, consider proffering those ideas to other requesters. The more*

similar you can make related requests, the more straightforward your management of the FOIA projects will be.

Engage.

Engage in an open, friendly discussion with the requester. An adversarial approach will not help anyone. Requesters are more likely to participate in some give and take if they trust that the Agency staff want to assist them in fulfilling their FOIA requests.

Document.

If communications occur via email, upload all email communications to FOIAonline. If via telephone, be sure to memorialize your discussion in an email to the requester, and upload the email to FOIAonline. You may also communicate with the requester directly through the correspondence tab in FOIAonline. If for some reason you are unable to document your communications via email with the requester, at the very least, create a comment in FOIAonline recording the details of your communication.

What if the requester does not want to clarify?

- The Office of Government Information Services (OGIS) provides mediation services to resolve disputes between FOIA requesters and Federal agencies. FOIA requesters and agencies may request OGIS's assistance in resolving a dispute at any point in the FOIA process. OGIS works with the parties to attempt to reach a mutually agreeable resolution.
- Remember, under the 2016 Amendments to FOIA, the Agency must notify requesters of their right to pursue alternative dispute resolution through OGIS at three points in the FOIA process in response to:
    - Initial determination letters;
    - Appeal response letters; and
    - Letters regarding requests in which unusual circumstances allow for 10 additional working days to respond.
- Below is the language regarding OGIS to include in letters to the requester:
    - *You may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.*

Remember: We still have an obligation to respond to parts of the request that are unambiguous! One imperfect part of a FOIA request does not permit the Agency to fail to respond to the entire request!

FOIA FEES

The FOIA allows agencies to charge certain fees to requesters to process their FOIA requests. Requesters are placed into one of three fee categories, which determine the types of fees an agency may charge. In some circumstances, the FOIA allows for a waiver or reduction of fees. Below includes an overview as well as certain restrictions that apply to an agency's ability to charge fees.

Types of Fees

- *Search fees* may be charged for the time spent looking for responsive documents, even if the Agency does not locate any responsive documents or if the documents are withheld under a FOIA exemption. Examples of actions that are chargeable as "search fees" include time spent for meetings to discuss search strings/how to conduct searches, time spent searching one's computer and hard copy files, and time spent looking at the records to see if they are responsive.
- *Review fees* may be charged for "direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed." This includes reviewing documents to determine which, if any, exemptions apply. Review fees may *not* be charged for subsequent levels of review.
- *Duplication fees* include the direct costs of making copies of the documents. They also include, if documents are scanned, the staff time spent scanning the documents. For paper copies, EPA currently charges 15 cents per page. For electronic copies, you may charge for a physical medium, such as a CD, but *not* for uploading documents into FOIAonline.
- Some FOIA requesters may also ask that the records be "certified." This is a service for which the OMB Fee Guidelines allows agencies to charge fees. EPA charges $25 to certify records. For certification requests, contact the Program Assistant in the General Law Office in the Office of General Counsel.

Categories of Requesters

Which types of fees an agency may charge for processing a FOIA request further depends on the category into which the requester falls. The FOIA provides three fee categories:

Category 1: Commercial Use Requesters

According to the OMB Fee Guidelines, "commercial use" requesters are those who ask for records for "a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made." The focus is how the requested information will be used, not the identity of the requester. Accordingly, the fact that a requester has been placed in a "commercial use" category in the past does not mean that the requester will be similarly placed in the future. When the intended use of the records is not clear from the wording of the request, an agency can seek additional information from the requester to make a fee category determination. Common uses of the requested records that result in a "commercial use" fee categorization include using the documents in litigation. ***Commercial use requesters are charged all three types of fees (search, review***

and duplication).

Category 2: Educational institutions, noncommercial scientific institutions, and representatives of the news media

Educational Institutions include schools such as universities and vocational institutions. The requirement is that the institution must operate a program of scholarly research. The OMB Fee Guidelines specify that to qualify for this fee category, the purpose of the request must relate to the goal of the educational institution, not the goal of the individual requester. For example, a requester asking for documents to write a term paper would not qualify for the "educational institution" fee category. However, a professor requesting records related to her field of study for use in instructing students might qualify.

Noncommercial scientific institutions are defined by the OMB Fee Guidelines as simply a noncommercial institution that is "operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry."

The FOIA defines a "representative of the news media" as "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." The FOIA also explains that this category includes news agencies as well as freelance journalists if they "can demonstrate a solid basis for expecting publication through [a news media] entity, whether or not the journalist is actually employed by the entity."

Requesters in the Category 2 fee category are only charged duplication fees, but receive the first 100 pages of paper copies for free.

Category 3: Other Requesters

The "other" category is simply a catchall category for any requester that does not fall into either of the other two categories. Requesters in this fee category are charged search fees and duplication fees; however, they receive the first two hours of search time and the first 100 pages of paper copies for free.

The table below summarizes which fees an agency can charge for the processing of a FOIA request based on the fee category of the requester.

Fee Waivers and Determination

The National FOIA Program Office processes initial fee waiver requests. The FOIA provides that agencies should waive or reduce fees "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."

Any FOIA requester may request that EPA waive all fees associated with the request, but the request for a waiver of fees must be submitted with the accompanying FOIA request. The initial fee waiver determination is made by the National FOIA Program Office and may be directly appealed by the requester to the Office of General Counsel by filing an administrative appeal.

Fee waiver determinations are made on a case-by-case basis using the information accompanying the FOIA request and are made based on six factors outlined by the Department of Justice in its January 1, 1987 Fee Waiver Policy Guidance. Those factors take into account the following considerations:

- *The subject of the request*: Whether the subject of the requested records concerns "the operations or activities of the government."
- *The informative value of the information to be disclosed:* Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records are meaningfully informative about government operations or activities and are "likely to contribute" to an increased public understanding of those operations or activities.
- *The contribution to an understanding of the subject by the public is likely to result from disclosure:* Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.
- *The significance of the contribution to public understanding:* Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.
- *The existence and magnitude of a commercial interest:* Whether the requester has a commercial interest that would be furthered by the requested disclosure.
- *The primary interest in disclosure:* Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

Advanced Payments and Assurances of Payment

EPA can ask for an advance payment of fees from the requester in two circumstances:

1. When the fees will exceed $250.
2. When the requester has previously failed to pay fees in a timely fashion.

If you are working with a requester who has a history of prompt payment, you may simply ask for an assurance of payment, discussed below. If you are working with a requester with no history of payment, you may either ask for an assurance of payment or an advance payment. For requesters who have failed to pay in a timely fashion in the past, you should ask for an advance payment.

Per EPA regulations, you must provide written notice to requesters of anticipated fees more than $25 if the requester did not agree to pay a higher amount in the initial FOIA request or subsequently. EPA then requires a written assurance of payment from the FOIA requester, unless an advance payment was received.

A requester can also designate a fee limit with a FOIA request. The main request page in FOIAonline indicates whether a fee limit has been set by the requester. An assurance of payment is required if the estimated costs of processing the request exceed the fee limit.

Changes to fees after the 2016 Amendments to FOIA

The 2016 Amendments to FOIA added a new limitation to the ability of agencies to charge search fees. Generally, agencies can no longer charge search fees if the response is beyond the 20-day deadline (or 30-day in the case of "unusual circumstances"), even with an agreement from the requester.

The exception to this rule is that agencies may charge search fees (or duplication fees for "news media" or "educational" requesters) if:

- "Unusual circumstances" apply; AND
- "More than 5,000* pages are necessary to respond to the request;" IF:
    - Timely written notice has been made to the requester; and
    - "The agency has discussed with the requester how the requester could effectively limit the scope of the request." The agency must make at least three good-faith attempts to discuss limiting the scope of the request with the requester and the communication must be by written mail, electronic mail, or telephone.

*Note: "5,000 pages" refers to the number of pages in the total universe of documents required for review, (i.e., "collected" documents), not the number of pages that will ultimately be released to the requester.

TIP: If you expect the final FOIA response to occur beyond the 10-day extension and more than 5,000 pages are necessary to respond, notify the requester before the 10 days expires and discuss how they can limit the scope of the request.

- If you know that unusual circumstances will apply when you receive the request, invoke the additional 10 days in your acknowledgement letter and invite the requester to narrow.
    - This will satisfy the "timely notice" requirement and will qualify as your first attempt to discuss with the requester how to limit the scope of the request.
- If a fee assurance letter is sent later, include another opportunity for the requester to discuss how to limit the scope.
    - This will qualify as your second attempt to discuss with the requester how to limit the scope of the request if the first request went unanswered. If the requester has not responded to either attempt, you will only need to make one additional attempt to contact them before satisfying the requirement that the Agency make three good-faith attempts.
    - If in response to any attempt to discuss how to limit the scope of the request, the requester refuses to limit the scope, it is not necessary to make any additional attempts.

For fee tips pertaining to more complex FOIAs, skip to the section on Complex FOIA Fees.

Fee Tips for Complex FOIAs

As with processing any FOIA request, when processing complex requests, you should be aware of the requester's fee category (or whether the requester has been granted a waiver) when evaluating the request. When you receive the request, consider whether the fee limit is reasonable considering what's requested. If the fee limit is not reasonable, consider preparing a fee estimate and reaching out to the requester to discuss the issue.

If you have unusual circumstances and followed the steps to extend the due date an additional 10 working days, but you are not confident you can process the request within 30 working days, give notice to the requester *before* the 30th working day of the unusual circumstances! Otherwise, you forfeit the ability to charge certain fees to the requester.

Consequences for failing to assert unusual circumstances:

- If a commercial requester, Agency cannot charge search fees.
- If a media/educational or noncommercial scientific institution, Agency cannot charge for duplication fees.
- If other requester, Agency, cannot charge search fees.

For more information, see the National FOIA Program Office's FOIA Fees Decision Tree here.

PLAN AND CONDUCT A SEARCH FOR RESPONSIVE RECORDS

*This document will identify the roles and responsibilities of each office in processing a FOIA request. The **Action Office**, which is the office that has been assigned the FOIA request, is responsible for taking the lead in developing and implementing the search plan. The Action Office needs to identify the other offices, if any, where responsive records may reasonably be located. If the Action Office determines that other offices may have potentially responsive documents, the Action Office needs to work with those Offices (called **Contributing Offices**), as discussed below, to develop and implement a search plan.*

Throughout this section, we will refer to the Action Office and Contributing Office(s) and discuss each office's role in the search process. To ensure efficient processing and avoid duplication, the Action Office should take the lead in developing a search plan and disseminating clear, consistent direction to Contributing Offices. Avoid situations that would allow Contributing Offices to have different interpretations of a FOIA request and thus use different search strategies or terms in processing the request. An effective search requires planning and, most importantly, coordination.

Legal Requirements for a Search under the FOIA

The FOIA requires federal agencies to make available to a requester any agency record that is responsive to a proper request. See 5 U.S.C.§ 552(a)(3)(A). To locate responsive records, agencies must conduct a reasonable search for records, i.e. a search that is reasonably calculated to uncover all relevant documents. A "reasonably calculated" search does not require a "perfect search," and failure to produce "one specific document" does not deem a search inadequate. See e.g., Defenders of Wildlife v. Dep't of Agric., 311 F. Supp. 2d 44, 54 (D.D.C. 2004); Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003).
Rather, the adequacy of the search is examined based on the reasonableness of the search given the totality of the circumstances. Weisberg v. U.S. Dep't. of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The Action Office needs to ensure that the Agency makes a good faith effort to conduct a search through methods that can be reasonably expected to produce the information requested. See Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 67-68 (D.C. Cir. 1990).

1. Develop a Search Plan.

   Before developing a search plan, you should have already confirmed that the FOIA request is a Proper Request and, if it is not, sought clarification from the requester. If not, return to the section on Communication With Requesters.

   a. Review the request again and consider what the request seeks.
   b. Regardless of whether your FOIA involves a request for records in a single office or multiple, you need to:
      i. Identify where to search.
         1. What offices might have documents?
         2. Are the records requested located solely in one office?
            a. If not, the Action Office should identify the offices (both HQ and Regional offices) where responsive records may reasonably be located. If responsive documents are located in more than one office, the Action Office needs to identify those offices

(Contributing Offices) and ensure that those offices understand the scope of the FOIA request.

3. Where are the documents?
    a. Once the Action Office has identified whether records are located in one or multiple offices, it next evaluates where to search for records within each office, e.g. repositories for paper files, emails electronic documents. In doing this, again refer back to the FOIA request. If it asks for documents in only one repository (e.g., Outlook emails) the search can be tailored accordingly. If the request is not limited to a repository but rather seeks topics on a topic in a timeframe, be sure to evaluate the locations where responsive records may be located.

    Potential locations include, for example:
        - Outlook email, calendars
        - Skype/Lync Chats
        - Lotus Notes mailboxes or calendars, other Lotus Notes databases
        - Enterprise Content Management System (CMS)
        - Local or shared computer drives (e.g., C:, F:, G:)
        - SharePoint sites
        - OneDrive
        - Mobile devices (e.g., text messages and photographs)
        - External drives and discs
        - Hard-copy files
        - And other locations reasonably likely to contain responsive records.

ii. Determine who should search.
    1. Once the Action Office identifies *which offices* potentially have responsive documents and where to search for those documents, the Action Office next needs to identify *who* would have potentially responsive documents. In identifying this list of individuals (referred to as custodians or individuals likely to have responsive records), include any custodians who are specifically named in a FOIA request or whose positions at the Agency suggest they are reasonably likely to possess responsive records. Also consult with subject-matter experts (SMEs) to determine which other custodians may have potentially responsive documents.
    2. Once the Action Office has coordinated with the Contributing Offices and has received the lists of potential custodians from Contributing Offices, the Action Office should compile the complete list of custodians and document that list in the search plan.

a. Before moving on to the next step in developing the search plan, take a moment and document in FOIAonline: (1) which offices beyond the Action Office may contain potentially responsive documents, (2) where to search for those documents, and (3) the list of custodians (including custodians from the Action Office and all Contributing Offices).

i. **Remember to consider former employees, employees who transferred to a different office, and contractors and assess whether any of these individuals would be potential custodians based on the information requested.**

iii. Determine how the search should be conducted.
Once you identify the locations of potentially responsive documents and their custodians, consider how you will conduct your search. See the section on Centralized Searching In EPA's Microsoft Office 365 System or How To Search For Items Not Located On EPA's Microsoft Office 365 System.

c. These three items represent the core elements of your search plan.

d. Consider the content of the request and where responsive documents would be located. If the request seeks only Outlook emails, then your search should be focused accordingly on Outlook emails. However, FOIA requests tend to be broad and seek, for example, documents regarding a particular topic during a particular timeframe.

TIPS ON DOCUMENTING SEARCH AND COMPLETING IMPLEMENTATION OF SEARCH

It is important to document the search that was conducted. It's recommended that the lead for the Action Office develop a memorandum or checklist to track the search. Specifically, the lead for the Action Office should note:

- The Contributing Offices searched
- The locations within those offices and the Action Office searched
- The list of custodians and whether the custodians have completed their search
- The number of responsive records

PERIODIC UPDATES TO THE REQUESTER

As a best practice, you should periodically contact the requester to provide updates on the status on the Agency's processing of the request, particularly if it will take longer than 20 working days to issue a final response. Communication with the requester is important so that they understand that the Agency is actively working to complete its response to the request. Consider providing interim or partial releases to demonstrate to requesters that you are actively processing the request. Such releases also give the requester insight into the types of records responsive to the request and may even result in the narrowing of the request.

Best Practice: Document your search plan and update it as you implement the search. This will enable you to track the process and build a strong administrative record, which is important if the requester appeals and/or later sues EPA challenging the adequacy of the Agency's search.

Centralized Searching in EPA's Microsoft Office 365 System

Searches for information in EPA's Microsoft Office 365 System are generally conducted by OEI's centralized search service. This service can locate records located in:

- Outlook email messages
- Outlook calendar entries
- Skype/Lync Chats.

Before contacting OEI, the Action Office should evaluate the request carefully and determine whether a centralized search is warranted. For example, if a FOIA request seeks a specific document, the document can be retrieved and produced without a centralized search. By contrast, if the request seeks all communications between two EPA individuals for a one-year period, the Action Office should pursue a centralized search request.

The Action Office is responsible for submitting the centralized search request to its Search Point of Contact (SPOC), who, in turn, will submit the request to OEI's Discovery Service Division for processing. Each organization has a SPOC, and that SPOC works directly with OEI's Discovery Services Division in processing search requests. Contributing Offices should not submit any search requests to OEI.

For each FOIA request, only one search request should be submitted to OEI, and it should be submitted by the Action Office.

If this does not occur, OEI is left in the untenable position of trying to consolidate search requests on a single FOIA. The Action Office should consult with the Discovery Services Division about the estimated timeframes for beginning and completing a requested search/collection, so other steps in the process can be planned accordingly.

Instructions for submitting a centralized search request through your SPOC are located here.

Before the Action Office Initiates the Centralized Search, ensure that information provided to the SPOC that will provide it to OEI's Discovery Services division includes:

- All custodians (by name and email address) from both the Action Office and all Contributing Offices
- Search terms reasonably likely to yield responsive records.

It's important for the Action Office to coordinate with the Contributing Office(s) to ensure that the search terms capture the scope of the records sought.

Searching for Documents in Repositories that are Not Captured by a Centralized Search

OEI runs the centralized search for Outlook records for EPA, including Outlook emails, calendar entries, and Skype for Business chat messages. For routine FOIA requests, the Discovery Services Division **will not** search:

- Lotus Notes mailboxes, calendars, or databases of any kind
- The Enterprise Content Management System (ECMS)
- The Correspondence Management System (CMS)
- Local or shared computer drives
- SharePoint sites
- OneDrive
- External drives
- Hard-copy files
- Any other non-Outlook locations where you may find responsive records.

It's important for custodians to evaluate all repositories that are reasonably likely to contain responsive records. This could include a personal email account if that account was used to conduct government business and if the email has not yet been forwarded into the Agency's system. Consistent with the Federal Records Act Amendments of 2014 and the Agency's Records Policy, any employee who uses a personal messaging system, such as email, to conduct government business has 20 days to forward that information into the Agency's Outlook system. Once forwarded into EPA's email system, the information can be captured via the centralized search.

OEI's centralized search also does not extend to data that are uniquely retained on mobile devices, such as text messages, photos, or notes that are unique to the mobile device. Custodians should be reminded of the Agency's guidance regarding forwarding text messages into the Agency's Outlook system, as such messages can be captured via the centralized search once the messages are in Outlook.

Instructions on how to forward text messages to EPA email accounts are located here.

Consistent with its search plan, the Action Office should email to all custodians providing specific search instructions to be followed regarding all non-Outlook document repositories. The instructions should read something like: "The agency has received a FOIA request for which you may have responsive documents. A centralized search for your Outlook emails is already being conducted. You should conduct a manual search for non-Outlook documents potentially responsive to the FOIA request.", etc. The instructions should also include:

- The FOIA request number;
- A clear description of the FOIA request (and any narrowing/clarification);
- A copy of the FOIA request and any relevant correspondence with the requester;
- Recommended search locations and instructions to search all non-Outlook repositories where responsive documents may be held;
- Recommended search terms;
- Recommended document collection method (i.e., where responsive documents should be provided); and

- Date by which documents collected are to be transferred to the Action Office.

To provide custodians ample time to search for non-Outlook documents, it is recommended that the Action Office provide custodians the search instructions for non-Outlook documents at or shortly after the Action Office submits the Outlook centralized search request. In the search instructions, ask custodians to document, with as much specificity as possible, how they conducted their search.

After distributing the search instructions, and before the collection period ends, the lead contact for the Action Office should touch base with the custodians to ensure that they understand their responsibilities and how to conduct the search.

Below are tips the Action Office may want to consider as it develops search instructions to custodians to search for non-Outlook responsive records.

Lotus Notes

If a FOIA request seeks emails or information located in Lotus Notes, the Action Office should:

- Contact EZ Tech to set up a collection database. EZ Tech will send the lead contact for the Action Office a link to the database that the lead can then circulate to custodians via email. Custodians will then use this database to upload responsive documents.
- As noted above, identify in the search instructions, keywords and search terms for the custodians' use during the search of Lotus Notes.
- Provide custodians the step-by-step instructions for searching Lotus Notes.

Electronic Content Management System (ECMS), or EZ Email Records

Even though emails saved through EZ Email Records are archived into ECMS as Agency records, they are not captured by OEI's centralized search. So, if a responsive outlook email message was saved to ECMS and then deleted from the user's Outlook account, a centralized search will not retrieve that record in Outlook. Thus, it is important to remind custodians to search manually ECMS for any non-duplicative emails that may be responsive to the request.

Detailed instructions for ECMS are available here.

Note: Depending on the office, the Records Liaison Officer (RLO) may be able to conduct a centralized ECMS search for the RLO's office. If there are multiple offices, you may need to coordinate with RLOs from each office. Contact your RLO or the RLO from the relevant office(s) for more information.

Correspondence Management System (CMS)

CMS is an electronic document management system that captures, stores, and tracks correspondence that is addressed to EPA or any of its employees in their official capacity. Some offices may use CMS, for example, to document correspondence received, including responses to such correspondence. If a custodian determines that CMS may contain records responsive to the request, CMS should be searched.

Custodians may not have used CMS previously and may not have access to the system. In this case, the custodian can identify the individual in the office responsible for maintaining CMS and work with that person to complete the search. All CMS records are full- text indexed and searchable by any data element.

Other Locations

For all other locations, including, for example, local or shared computer drives, OneDrive, SharePoint sites, external drives and discs, and hard-copy files, custodians should conduct a reasonable search of these locations based on the request for records, as described in the FOIA request and any subsequent communications with the requester.

Access to Separated Employee Records

The Action Office and Contributing Offices should work together to ensure that custodians' files are searched, **even** if those custodians are on-leave and not in the office when the request is received, or if they have separated from the Agency.

Searching Document Repositories when a Centralized Search is Not Conducted

If a centralized search is not conducted, the custodian would need to search manually the locations where potentially responsive documents may be located. The Action Office, consistent with its search plan, should email all custodians providing specific search instructions to be followed. See above for guidance in preparing and disseminating search instructions.

Tips on Documenting Search and Completing Implementation of Search

It is important to document the search that was conducted. The lead for the Action Office should develop a memorandum or checklist to track the search. Specifically, the lead for the Action Office would note:

- the Contributing Offices searched
- the locations within those offices and the Action Office searched
- the list of custodians and whether the custodians have completed their search; and

- the number of responsive records.

Once the search is complete, the team can develop and implement a review plan.

Periodic Updates to the Requester

You should periodically contact the requester to provide updates on the status of the Agency's processing of the request, *particularly* if it will take longer than 20 working days to issue a final response. Communication with the requester is important so that the requester understands that the Agency is actively working to complete its response to the request.

Consider providing interim or partial releases to demonstrate to requesters that you are actively processing the request. Such releases also give the requester insight into the types of records responsive to the request and may result in the requester narrowing the request.

Documenting and Updating your Search Plan

Document your search plan and update it as you implement the search. This will enable you to track the process and build a strong administrative record, which is important if the requester appeals and/or later sues the EPA challenging the adequacy of the Agency's search.

DEVELOP AND IMPLEMENT A REVIEW PLAN FOR POTENTIALLY RESPONSIVE DOCUMENTS

Develop your Review Plan

Identify Levels of Review

The Agency's FOIA procedures call for Division Director or equivalent approval of FOIA responses. The approval applies to both withholdings and releases. Before you begin to review the records, review your office's FOIA procedures here and think through who will likely need to review the records.

Depending on the size and complexity of the FOIA request, it may be just you doing first level review and your manager completing the second level review of the records, or it could involve multiple levels of review.

Practice Tip: If there are multiple offices involved or if you are working on a FEAT FOIA, individual office procedures may need to be adapted to accommodate overall processing of the request.

Regardless of the complexity of your FOIA, the review cycle of a FOIA should include consideration of all the steps below. Bear in mind that not every review will include documents that will require review at each of these steps; however, be mindful of these steps as you plan your review process.

It is imperative that you plan your review process early so reviewers at every step have adequate time to review the materials.

1. **First Level Review**. You (and your team, if you have one) take the first step to review the records. In doing so, evaluate the following:
    - Responsiveness: Responsive documents are those documents that match the description in the request. Be sure you clearly understand what the requester wants. Non-responsive records do not need to be produced.
    - Disposition: If the record is responsive, the first level reviewer then evaluates the documents to determine what, if any, FOIA exemptions apply and based on that analysis, whether a document should be released in full, withheld in full, or released with redactions.
    - Exemptions: If the record is responsive and should be withheld or redacted, identify the exemption(s) that applies(apply) and redact the document consistent with the claimed exemption(s).
    - Equities of other EPA offices: If the record is responsive and contains discussions or information from another EPA office, identify those records for internal equity review, as described below.
    - Equities of other federal agencies or the White House: If the record is responsive and contains discussions or information from another federal agency or involving the White

House, you will need to identify those records for external equity review, as described below.

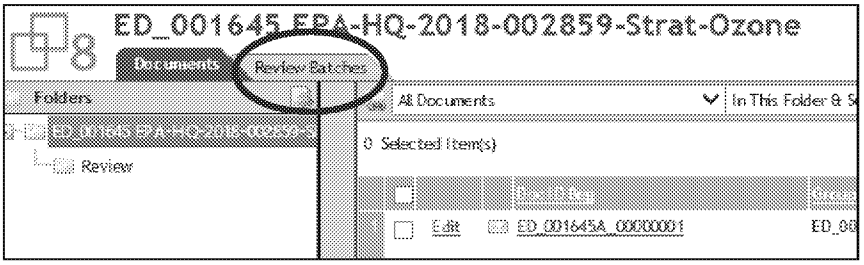
- Documents that upper management should be aware of prior to release: During first level review, you should mark for further review any documents you think management may have a specific interest of being aware of prior to release.

2. **Second Level Review**
    - Consistent with EPA's procedures, all FOIA responses in which documents are released or withheld must have approval of someone at least at the Division Director level or equivalent.
    - For many FOIAs, particularly those that are complex or voluminous, there may be other layers of review prior to the final management review. For example, your office may decide that a particular project warrants a second level review at the staff level prior to documents going through management review. Second level review can take many forms. This should be discussed with the FOIA team in conjunction with your management.
3. **Equity Review**
    - An office other than the office that conducted the first-level review may have an interest, or equity, in certain documents. Many factors go into determining when an office has "equity" in a document. In general, an office has equity in a document when the document includes information of substantive interest to that office. This includes documents that were created in that office, emails involving personnel from that office, and opinions or advice given by an attorney in a legal office. In general, any office with equity in the document should have the opportunity to review the document, and weigh in on whether they agree with the determinations made with respect to responsiveness and FOIA exemptions.

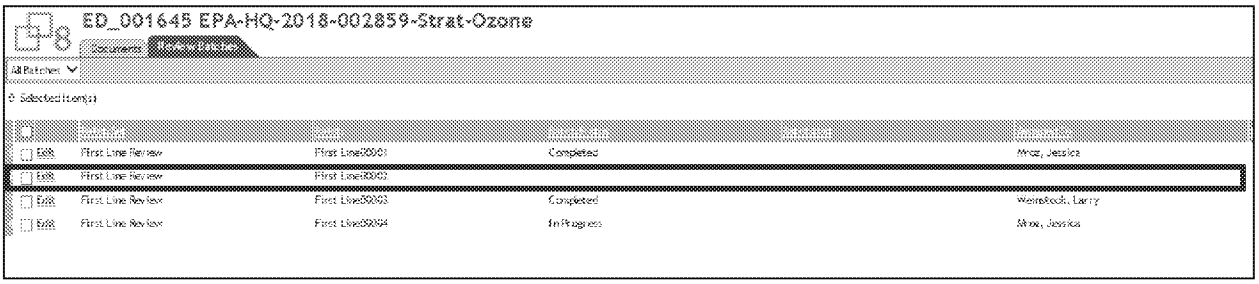
Practice Tip: If there is another agency or EPA office involved, notify that agency or office early and find out where to send the records for review. If the request involves only a few documents, you may consider discussing the records over the phone.

Assign Documents in Relativity

1. Go to https://webreview.epa.gov/ and log in.
2. Open up the appropriate workspace.
3. Go to the "Review Batches" tab at the top left of the page.

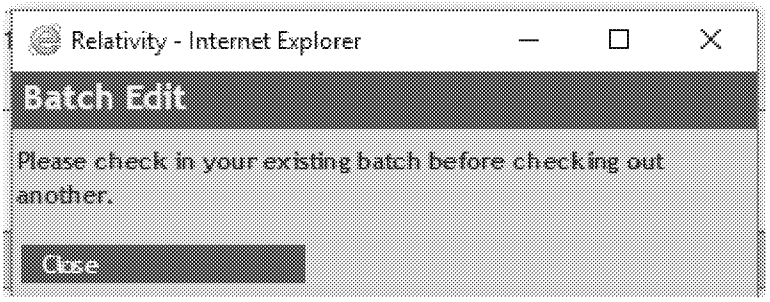


4. Look under the "Batch Status" column to and select a batch that is blank. This means it is not yet assigned to a reviewer.



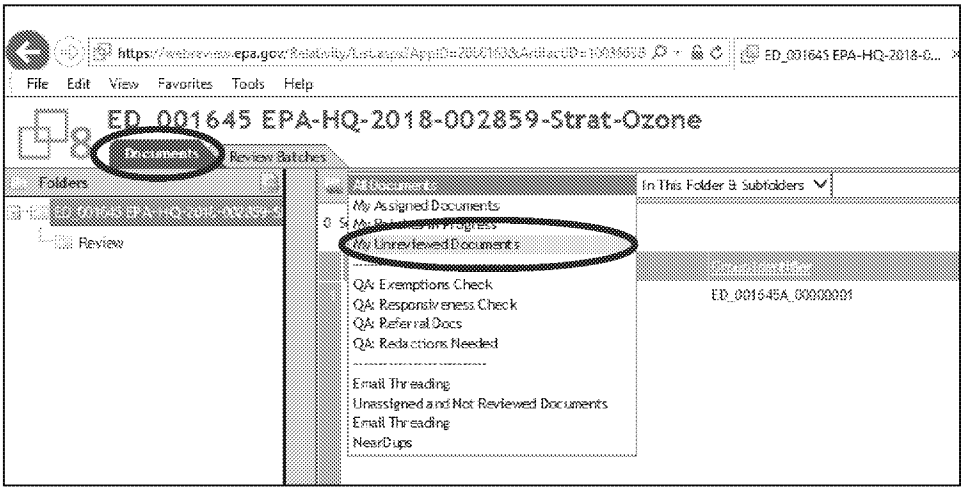
5. Click "Edit" on the row of documents you would like to assign.
6. A separate window will open. Click "Check Out."

If you see this window –



Click "Edit" next to the documents you were previously assigned and click either "Check In As Complete" or "Check In As Pending" as applicable.

7. Begin reviewing documents in the "Documents" pane by selecting "My unreviewed documents" from the dropdown menu.



Guidelines for Reviewer Instructions on How to Determine Which Offices May Have Equity in a Document

The following provides some general guidelines to follow when developing instructions for reviewers on how to determine which offices may have equity in a document; in other words, if the document includes information of substantive interest to that office. Any office with equity in a document should have the opportunity to review it and weigh in on its responsiveness/exemptions.

OEX - Office of the Executive Secretariat (Administrator's Office)

- Any document containing the Administrator's primary or secondary email address.
- Any document generated by a senior member of the Administrator's staff: Deputy Administrator, Chief of Staff, Deputy Chief of Staff, political appointees in the AO.
- Prior Administrators.

Public Affairs Office

- Any document to or from a member of the press, or discussing a media or press inquiry.
- Any document related to the drafting of press releases or other press materials.

Congressional Affairs Office

- Interactions between EPA employees and elected officials (or their staff). This includes mayors, governors, and members of Congress.
- Interactions between congressional affairs staff and other arms of the government, including internal communications related to these interactions.
- Congressional hearing preparation.
- Development of responses to formal correspondence from Congress.
- Development of responses to Questions for the Record.
- Substantive input from an OCIR employee.

OGC/ORC - Offices of General Counsel/ Regional Counsel

- Any document generated by OGC/ORC attorneys, except scheduling documents.
- Any document containing non-public information discussing litigation or legal strategy.
- Any communication between an attorney and program client containing legal advice.

Program Offices

- Documents created or originating from that office.
- Substantive emails involving personnel from that office.

When in doubt about another office's interest in conducting an internal equity review or reviewing a specific document, call and ask.

<u>Best Practice:</u> If your request has significant attention or you anticipate the release of records will generate media attention, reach out to your public affairs office and congressional affairs offices early in the review process to discuss what role they would like in the document review.

Other Federal Agencies

- If another federal agency has equities in a document in an EPA FOIA review, we need to give that agency the opportunity to consult on EPA's disposition of the document or refer the document to the other agency for processing. It is ultimately the Action Office's responsibility to ensure this coordination occurs; however, when document review is tasked to a Contributing Office, the offices may agree that the Contributing Office is the one to reach out to the other agency.
- For assistance in determining whom to contact at another agency, please reach out to the National FOIA Program Office or the General Law Office or FEAT in OGC. Staff in those offices often have established FOIA contacts with other agencies. Other options are to check with your fellow FOIA Officers/Coordinators or to check the agency's website.

Interagency Consult	Interagency Referral
Another agency has a significant interest in a record, like an email exchange between EPA and another agency. **EPA may ask for that agency's recommendation as to how to treat the record.**	**A record was created by another agency but is in EPA's possession.** **EPA may refer the record to the relevant agency for them to process.**
Communicate with other relevant agencies about your request. They may not want to review records, but they should be aware of them.	**The other agency will be responsible for responding directly to the requester. Notify the requester that the documents have been referred. Provide the point of contact for the other agency.**

Practice Tip: If you have a large volume of records to share with other agencies, consider using the free platform OMB Max, found here.

White House

The FEAT Office in OGC coordinates all White House equity reviews. If you have documents in which the White House has equities, you should contact the Director of the FEAT Office.

Awareness Review

Awareness review is one of the final steps before documents are released. Awareness review is a "heads up" to upper management, the press office and the congressional affairs office that documents are about to be released to the public. Whether and to what extent an awareness review may be necessary in a production should be discussed with your management.

Final Approval

Consistent with the Agency's FOIA Procedures, after all necessary review is complete, a Division Director (or equivalent) should approve and sign off on the release and/or withholding of any documents under FOIA.

Identify Technology Options for Review

The Agency has two primary tools for reviewing documents:

- Relativity
- Adobe Pro DC

Adobe Pro DC is generally used only in cases where there is a small number of responsive documents. Relativity is used in most other cases.

See Setting Up Your Relativity Workspace and The Use Of Boolean Logic For Relativity Searches for more tips on using Relativity for more complex requests.

SETTING UP YOUR REVIEW TEAM'S RELATIVITY WORKSPACE

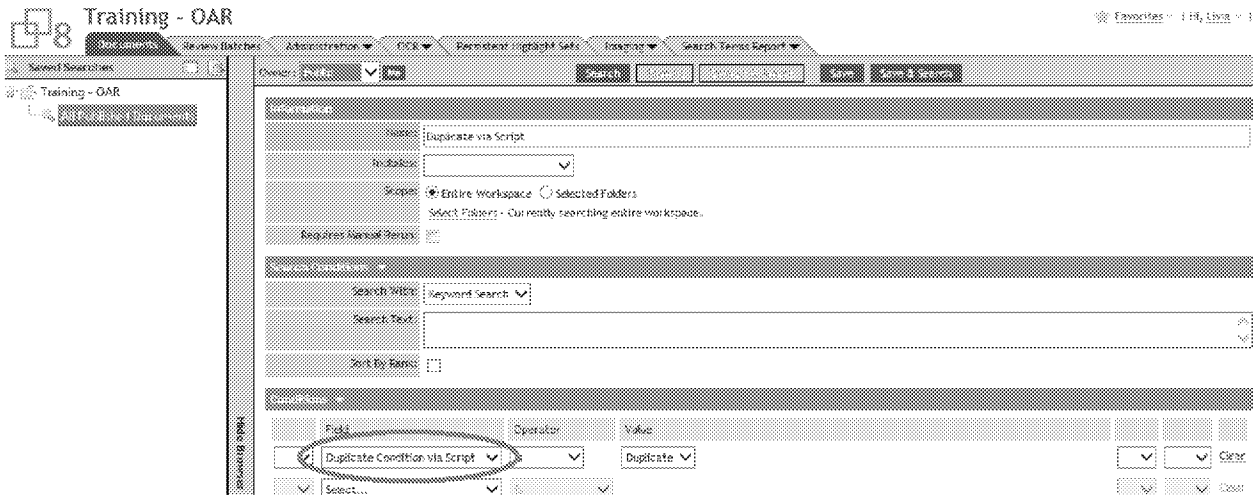
This document will show you how to get your Review Team's Relativity Workspace set up and organized. Before you actually start reviewing all the documents produced in a search, take the following steps. They will make Relativity much easier to navigate and should minimize the amount of review necessary for any request. Hit Ctrl and one of the links below to skip to that section.

Identify and Remove Duplicates
Identify and Remove Non-Responsive Documents
Create a Review Set of All Potentially Responsive Documents
Create Saved Searches and Batches for Different Stages of Document Review
Create Folders to Organize your Workspace

Log into your workspace, which can be identified using the last 4-5 digits of its ED number (e.g., ED_001333.)

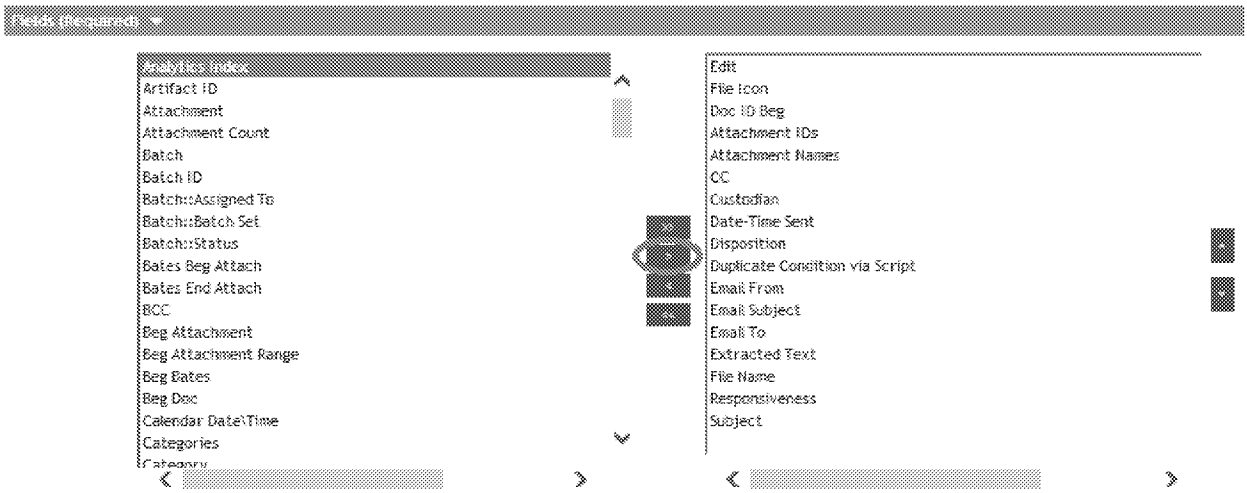
These instructions will get your review team's workspace and review pane set up.

1. **To reduce the number of files you have to filter through, first pull out all duplicate documents.** Some searches produce thousands, so this step can save you a lot of time.
    a. Create a new search using the icon at the bottom of the left pane. Click "New Search."
    b. Create a Save Search titled "Duplicate via Script".
        i. Under Conditions, set the field to Duplicate Condition via Script -> is-> Duplicate. *See below.*

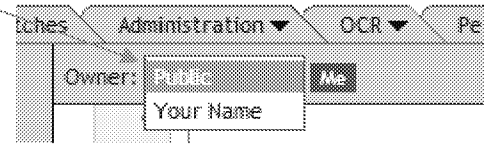


        ii. The **Field** section allows you to add which document elements will be visible for this search. These will vary depending on the kinds of documents you expect may be responsive (e.g., emails, spreadsheets, and/or text documents.) Select all fields that you think will contain useful information. Below, a number of options that are generally helpful have been selected and moved to the right

pane. You may not need all of these. Select each term so that it's highlighted in blue, then use the > arrow to add your selection(s) to the right pane. *See below.*

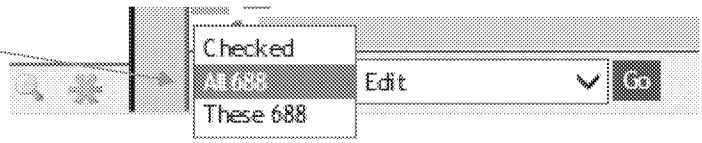


iii. *IMPORTANT: If you're creating a search that will be used by anyone other than yourself, be sure to set the Owner to "Public" using the pulldown arrow in the upper left corner so that the entire review team has access.*



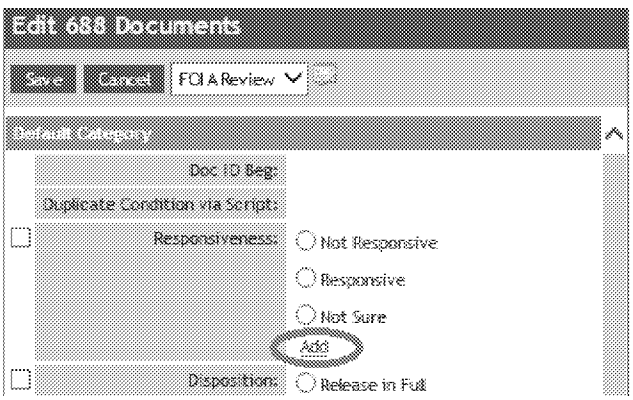
c. After following the above steps, click "Search."

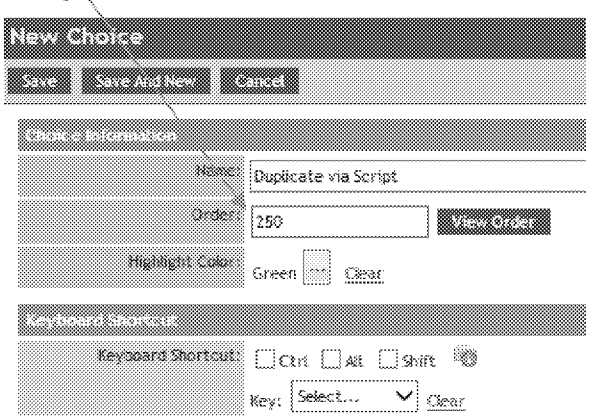
d. If your search brings up any duplicates, select them all by clicking **All [#]** in the pulldown tab on the bottom left of the screen.



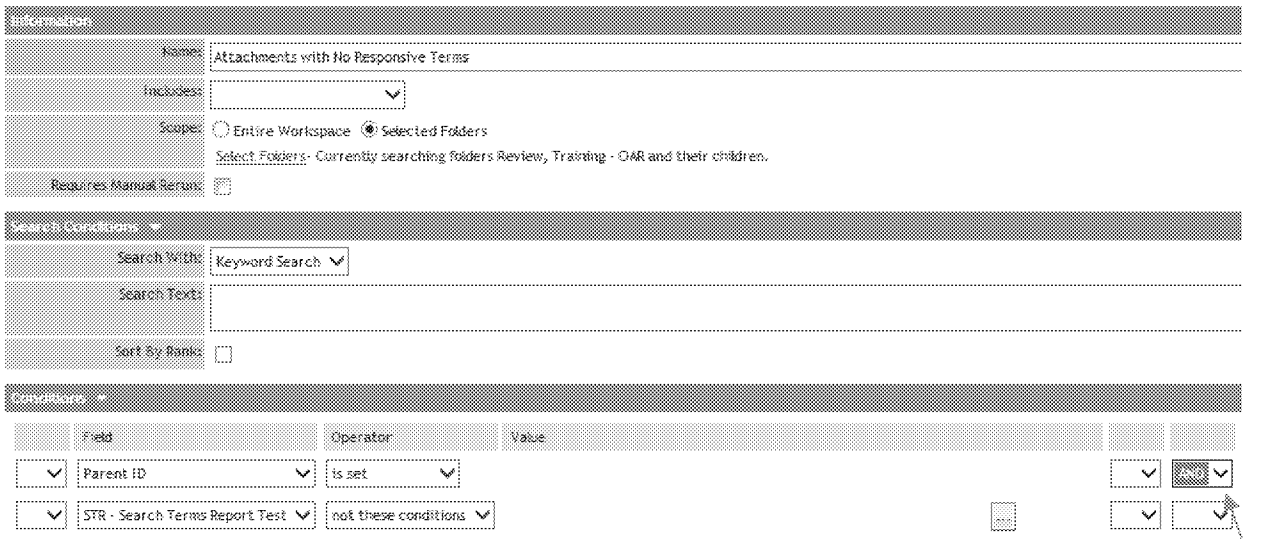
e. Click **Edit**, then click **Go**.

f. You should now see an **Edit [#] Documents screen**. Under **Responsiveness**, click Add to add a new check box for duplicates. On the New Choice screen, name this new choice "Duplicate via Script." [*Click View Order to determine what to enter for **Order**. In this case, the "Not Sure" button is 240. We want Duplicate via Script to appear underneath "Not Sure" as a choice, so the order should be 250.*]

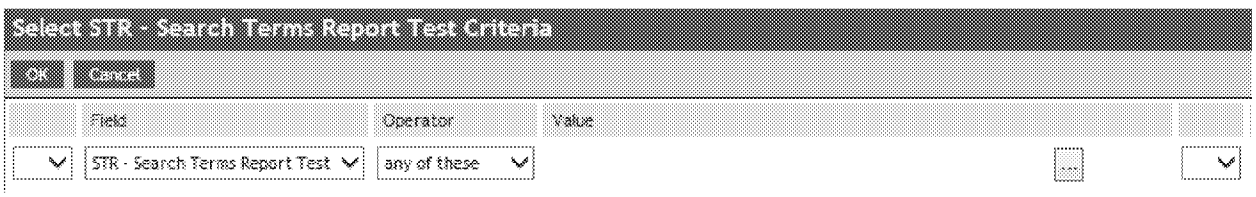


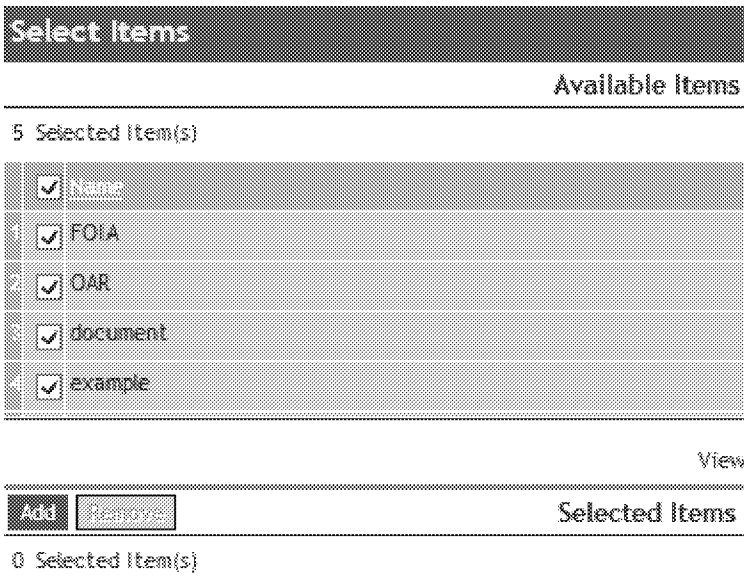


2. Remove unresponsive attachments to further narrow documents for review.



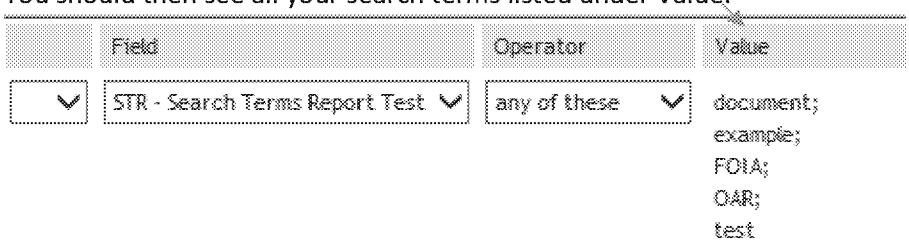
a. Create a new search titled "Attachments with No Responsive Terms".
b. Under Conditions, set Field to Parent ID and → is set. [*This is because we want families of documents, like email chains, to be pulled together so they're easier to read and understand.*]
c. Before setting the next condition, set the rightmost operator to AND so that the search accounts for *both* conditions. This is because we want the documents to be pulled only if they meet both conditions. See Boolean Logic for more tips on searches.
d. Also set Field to STR-Search Terms Report *Name*→not these conditions→then click the icon. *Note that the name that comes after "STR" may be different for your workspace.*
e. This will bring you to the "Select STR-Search Terms Report *Name* Criteria" screen (*below*.) Select STR once again→any of these→and then select the icon once again.





f. Select all necessary search terms on the "Select Items" screen *(above),* then click Add, followed by Set.

g. You should then see all your search terms listed under Value.



h. Click OK.

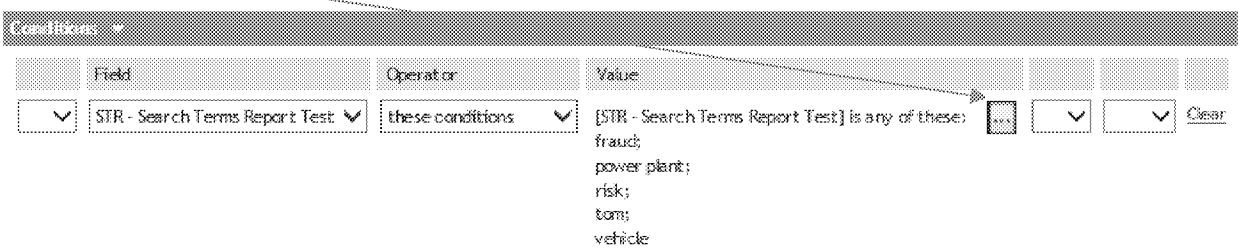
i. On the original Saved Search screen, click Save and Search.

   i. Depending on the nature of the FOIA request, you may decide to mark all of the documents pulled from this search as Not Responsive. To do so, simply mark them all as Not Responsive by selecting and editing all of them after saving your search, like above. (Note that you will simply have to select "Not Responsive"—you will not have to create a new choice for this step like you did above.) However, for many requests, it will be sufficient just to get these unresponsive documents in this folder and forget about them.

3. **Create a "review set" of all potentially responsive documents that need review.**

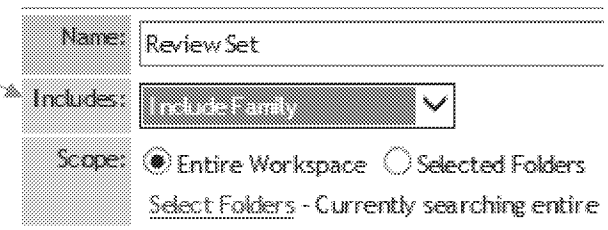
   a. Create a New Search titled "Review Set".

      i. Under **Conditions**, Set STR-Search Terms Report Name→these conditions→and, using this icon, select all search terms that would make a document responsive.



      ii. You could also add other elements to the search to filter through documents that are irrelevant. For example, if a requester specifically asked for documents from a certain year, you could add another condition that "Date-Time Sent" is a certain period of time.

      iii. Make sure to set **Includes: Include Family** to allow the search to produce all related documents, such as email attachments, together.



      iv. Just as you did for the Duplicates via Script search (*above*), select all **Fields** that you'd like to be visible for the search and use the > icon to pull them into the right pane.

   b. Click "Save and Search".

First Line Review

4. Create a New Search titled "First Line Review". This will pull out documents whose responsiveness has not yet been set, *i.e.*, they have not yet been reviewed by anyone.
    a. Under **Conditions**, set Responsiveness→ is not set.
    b. Set the rightmost operator to AND, and for the next **Conditions**, set (Saved Search)→document is in→ and use the icon to select Review Set.
    c. Like you did for all previous searches, use the icon to pull all relevant fields to the right pane.
    d. Save and Search.

TIP: It can save you a lot of time to create a new search by editing an existing one, particularly when using a lot of the same settings/fields. To do this, right-click on an existing search and select "Edit." You can then make changes to the existing settings, and clicking "Save As and Search" will save your changes as an entirely new search without changing or removing the original.

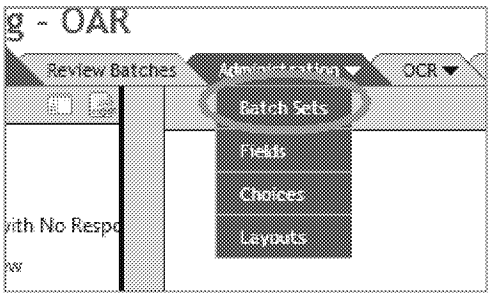
Equity Review

5. Create a New Search titled "Equity Review", for documents that have been marked responsive but require equity review from another office or agency. See the section on Equity Review for tips to determine which other offices may have equity over a document.
    a. Under Conditions, set Responsiveness→any of these→and use the icon to check "Responsive." Click Add, then Set.
    b. Set the rightmost operator to AND, then set Disposition→any of these→ and use the icon to check Release in Full and Release with Redactions. Click Add, then Set again.
    c. Pull all relevant fields to the right pane.
        i. For more complex requests, you can create multiple Second Line Review searches for use by any other offices/agencies that have equity in a set of documents. Simply name these searches so that they're easily distinguishable for the office responsible, *i.e.,* "Equity Review: OGC". See Setting Up a Relativity Review Pane to learn how to easily mark documents for equity review so they can automatically be placed in these folders.
6. Create a New Search titled "Withheld in Full", for documents that will not be released.
    a. Using the same method as the previous two searches, set Responsiveness→any of these→Responsive.
    b. Set the rightmost operator to AND, then set Disposition→any of these→Withhold in Entirety.

Production Set Review

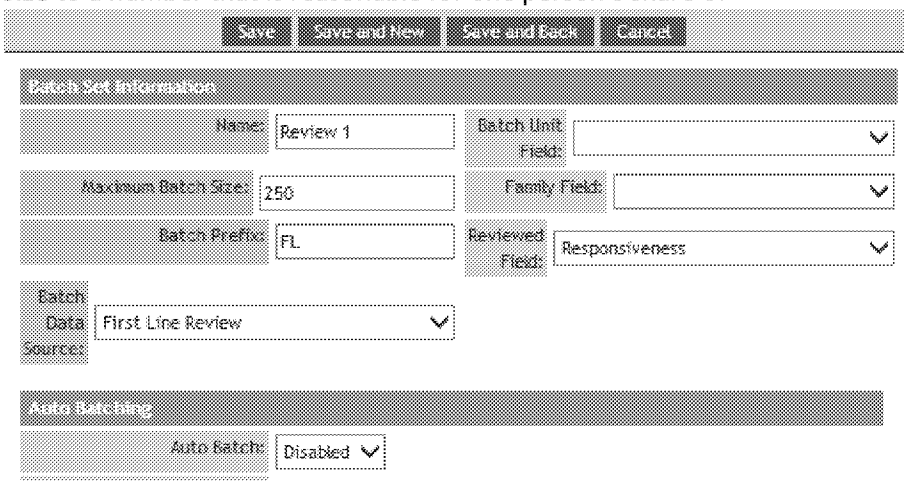
7. Create a New Search titled "Production Set Review", for documents that are ready for final review before being released either for agency awareness or directly to the requester.

Review Batches



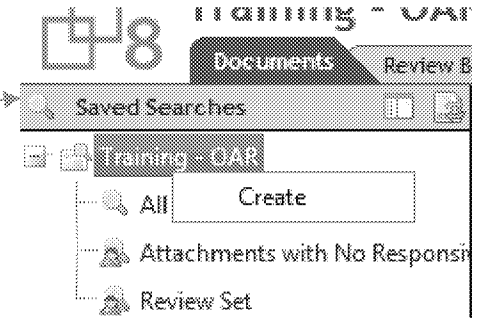
To create a document review batch for each person on your review team, click on the pulldown arrow on the Administration tab on the upper left, then click "Batch Sets."

a. Click New Batch Set on the upper left.
b. **Name** the batch so that the office/employee responsible for it can recognize it as their own.
c. Set the **Maximum Batch Size** to a number that is reasonable for one person's share of document review, e.g., 250 documents.
d. Set **Batch Prefix** to delineate it for the correct stage of review *(in this case, FL stands for First Line. The prefix is required but simply helps to organize sets of batches. Both the name and the prefix can be set to whatever is most helpful for your office.)*



e. Set the **Batch Data Source** to the "First Line Review" saved search.
f. Set the **Reviewed Field** to Responsiveness.
g. It is not likely that you'll need to enable **Auto Batch**.
h. Click "Save and Back".

8. **Create folders to organize your workspace and stages of review.**
   a. Right click on any existing search folder in the left pane to create a new one. *(Make sure you're still in the Saved Searches pane—this will not work if you click the icon.)*



   b. Right-click on the created folder to rename it. For example, you can name this one "Office Review" and put all searches your office will be conducting to accommodate this FOIA request inside it with subsequent organization.
   c. You can click and drag searches to different folders for different stages of review to keep them organized.

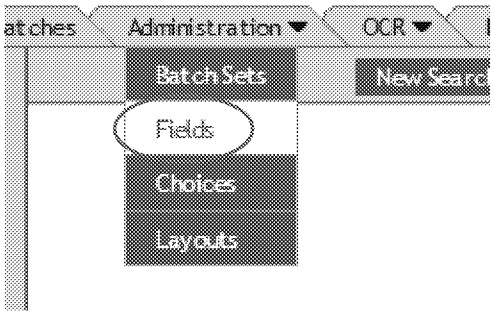
Your workspace will now be much easier to use. You can follow the same procedures to create folders and batches that require review from other offices. After the production set is created and reviewed, you can then create a Save Search from the remaining documents titled "Final Review" for the last review process.

Return to top of page.

SETTING UP A RELATIVITY REVIEW PANE

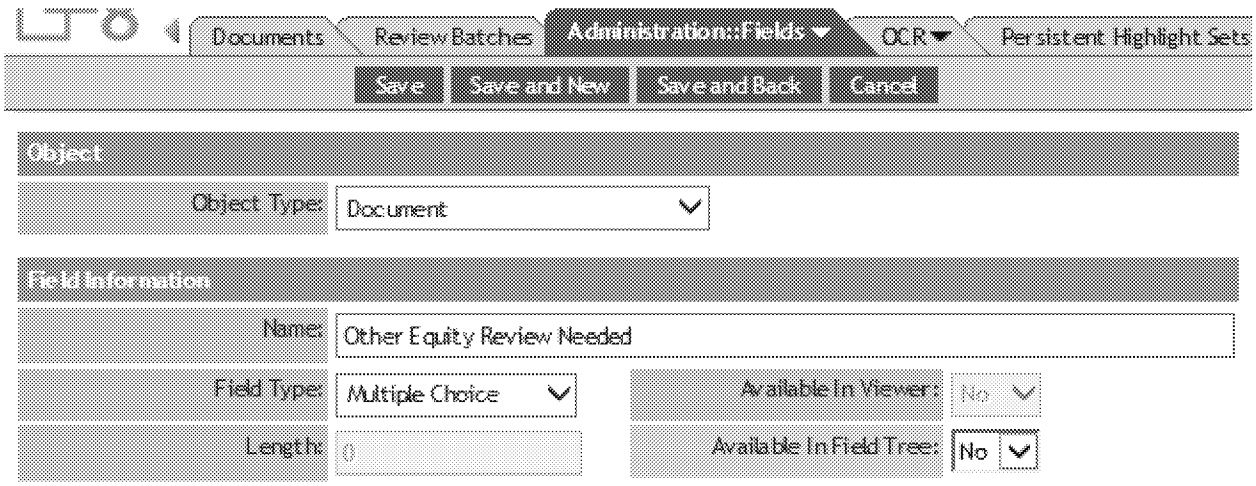
Create a New Field to Mark Documents that Need Review from Other Offices/Agencies

The below steps will show you how to create new fields in the review pane to categorize potentially responsive documents, such as multiple choice options to signify needed equity review.



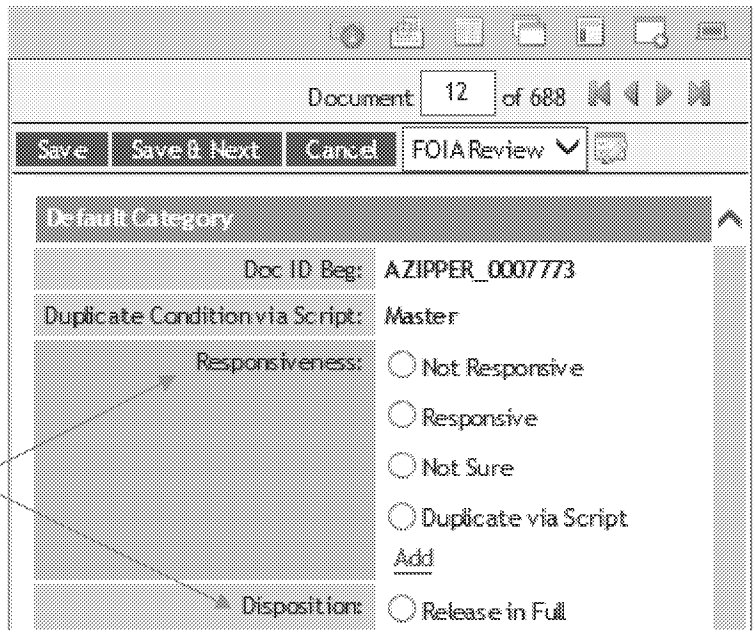
Click the arrow on the blue "Administration" tab on the upper right, then select Fields.

1. Click New Field.
2. For the new field, set **Object Type** to Document. **Name** it "Other Equity Review Needed", and set the Type to Multiple Choice *(like below)*.
3. Hit "Save and New" to create another field.

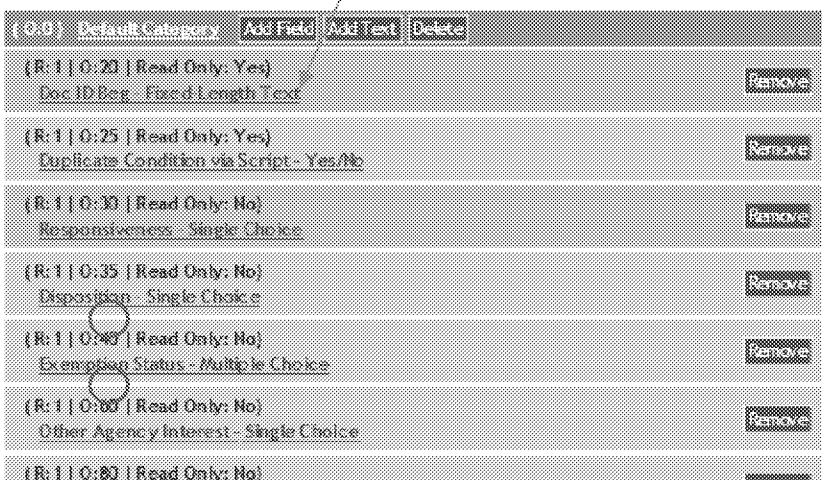


4. Use the same settings, but name this field "Other Equity Review Complete".
    a. These new fields will allow document reviewers to mark documents that either need further review or that have passed certain levels of review.

Add the New Field to the Review Pane



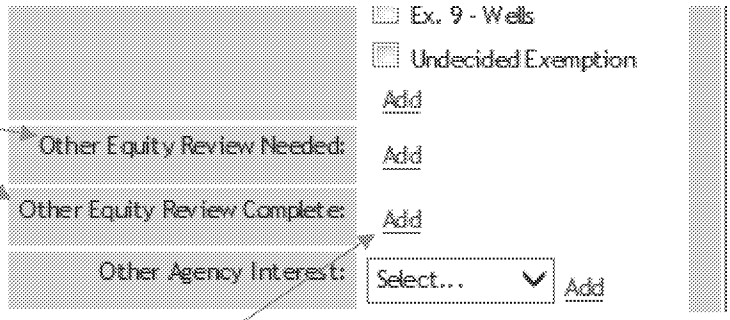
1. Click **Edit** on any document in the workspace. Any edits you make to the review pane will be for the entire workspace.
2. The screen you see on the right is the **Review Pane**. Click the icon to edit its layout.
3. The **Building Layout** screen will then pop up. You'll see a list of all the fields that are visible in the review pane. The field names that you saw on the review pane are blue and underlined on the Building Layout Screen (*below*), like so.



R: signifies row. There's no need for this to be any value other than 1. **O:** signifies the order of the fields (*circled on left*). These are spaced out by 5s/10s to allow reviewers to insert a new field between two others without having to update all other order values.

4. Click Add Field.
5. You'll then see the **Add Field to Layout** screen. Using the pulldown arrows, set **Field:** to the name of the field you just created (*e.g., Other Equity Review Needed*), set **Read Only:** to No (because we want to reviewers to be able to check the multiple choice options), and, using the order numbering on the previous screen, pick an order number that will allow you to drop the new field wherever is most appropriate.
    a. For example, on the Building Layout screen (*above*), "Exemption Status" is ordered O:40, and "Other Agency Interest" is ordered O:60. Therefore, if we set order to 45 for this field, it will be place right after Exemption Status.
6. Hit Save and New, then follow the same steps to add the "Other Equity Review Complete" field to the pane.
7. Hit Save. You should then see the two new fields in the Building Layout screen in the desired order. Hit Close on this screen to return to the document viewer/review pane.

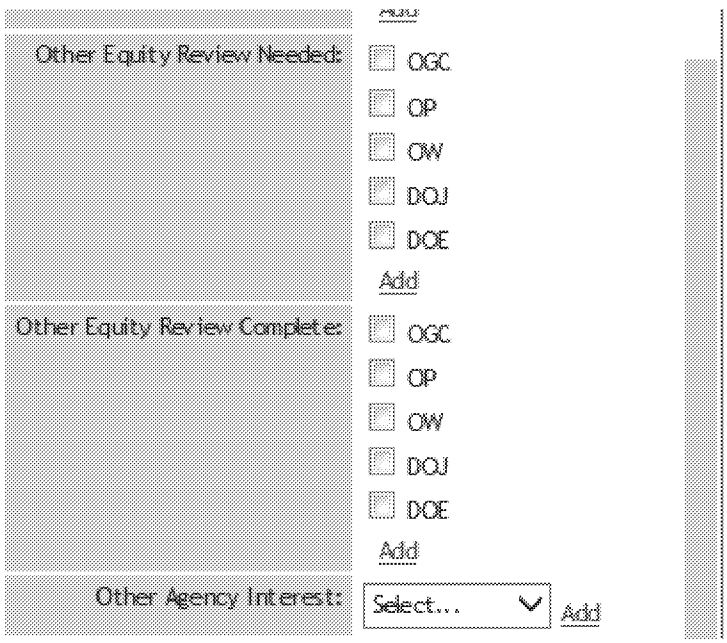
8. The two new fields should then be listed in the desired order on the review pane, like so.



Creating Choices for New Fields

Since these fields were created as multiple choice, you now need to create the choices. The choices we're creating below are the checkboxes that will allow reviewers to automatically place documents that require review from other offices/agencies in a search folder for that agency. There are a few ways to do this, but the easiest way is directly in the review pane.

1. While still in the viewer pane, click **Add** to add choices for the fields you just created. The **New Choice** screen will pop up.
    a. By now, you should have firmly established which offices or agencies may have equity in any of the documents being reviewed. If you have not, return to the EQUITY FOR DOCS page.
    b. Once you've developed a list of all offices/agencies that should be listed as needing additional outside review, create a choice for *each* of them.
    c. Under **Name:** list the office/agency that may need to review the document, i.e.:
        - OGC
        - OW
        - OP
        - DOJ
        - DOE
        - Etc.
    d. Use the same logic for Order as you did above. Each choice can simply be ordered 1,2,3,4, etc., but if you want to place a new choice in a specific location later, it may be wiser to number by 5s or 10s. Remember that Relativity simply interprets order as ascending.
    e. Hit Save and New and continue creating new choices as necessary. Then hit Save and repeat the process *identically* for the "Other Equity Review Complete" field (*see right*), so that documents needing external review can be marked and automatically moved to the Production Set folder once that review is complete.



BOOLEAN LOGIC IN RELATIVITY SEARCHES

Boolean logic defines logical relationships between terms in a search. You can use Boolean logic when creating Saved Searches to pull up potentially responsive documents in Relativity.

Boolean logic allows you to create a much narrower search and return the least possible number of potentially responsive documents to review, much like the Advanced Search function you'd find in most search engines. It does this using "operators", or commands that can be used to combine or filter search terms to return only the documents that meet very specific criteria.

The three main Boolean search operators are AND, OR, and NOT. For the sake of searching within Relativity, you only need to understand AND and OR.

AND

And combines search terms so that results **must contain all** of them.

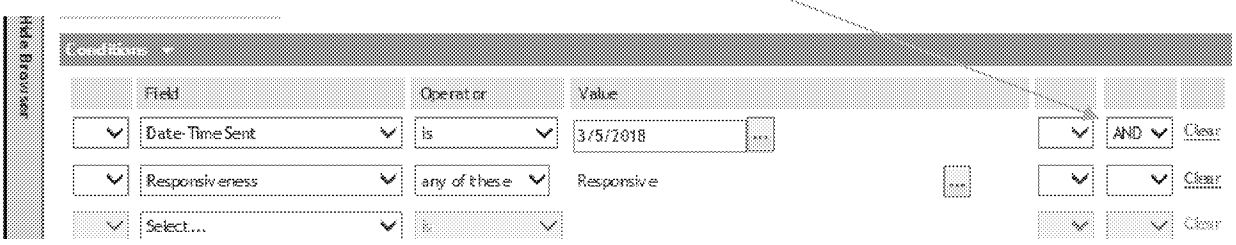
Simple Example

The search *diesel* AND *engine* returns only documents that contain **both** "diesel" and "engine". It does not return documents that return only one of these terms.

Relativity Example

The below search would **only** return documents that meet **both** conditions.

ONLY documents that were both sent on 3/5/2018 AND that have been marked as Responsive will be produced from this search.



OR

OR combines search terms so that results contain **at least one** of them.

Simple Example

The search *diesel* OR *engine* returns documents that only contain "diesel", as well as documents that only contain "engine". It also returns documents that contain both of these terms.

Relativity Example

The below search would return three kinds of documents:

1. emails in which crim.livia@epa.gov is CC'ed;
2. any documents (emails or not) that have been marked Responsive; and

3. emails that have been marked responsive AND in which crim.livia@epa.gov is CC'ed.

W/N

The W/N operator is used to return documents with two words or phrases that occur within a certain proximity of each other. W/N can be translated as "within N words". For example, a result only meets W/5 criteria if the two words are within 5 words of each other.

Simple Example
The search *diesel W/15 engines* would return:

- "diesel engines"
- "…State Clean Diesel Grant Program. Any engines that…."

However, it would NOT return:

- "The Diesel Emissions Reduction Act grants (DERA) program, first authorized by Congress in the Energy Policy Act of 2005, and reauthorized in 2010, supports state, Tribal, and local air quality management agency projects to reduce harmful emissions from engines."

Booleans and Parentheses (Search Order)

For even *more* efficient searches, you can use parentheses to "nest" search terms and operators within others. This will convey to Relativity *in which order* they should be interpreted.

If there are nested parentheses, Relativity will analyze the **innermost** expression first, then the one outside it, and so on.

Simple Example
(emissions OR diesel) AND standards would return all documents that contain the following combinations:

- emissions, standards
- diesel, standards
- emissions, diesel, standards

Since this search uses the AND operator for the term "standards", all results must contain that term. But since we placed parentheses around "emissions OR diesel", any combination of the three terms is possible.

Note that in Boolean search order logic, AND always takes precedence over other operators. For example, the above results differ from the results you would get if you searched *emissions OR diesel AND standards*. The only documents that meet these requirements contain **both** "diesel" and "standards", or neither. This search would return all documents that contain the following combinations:

- emissions, diesel
- emissions, diesel, standards
- standards

You can use parentheses to create a search that captures possible synonyms:

(children OR kids) AND health

Results:

- children, health
- kids, health
- children, kids, health

You can also use multiple sets of parentheses to make a more detailed search:

((children OR kids OR public) AND health) AND pollution)

Results would contain:

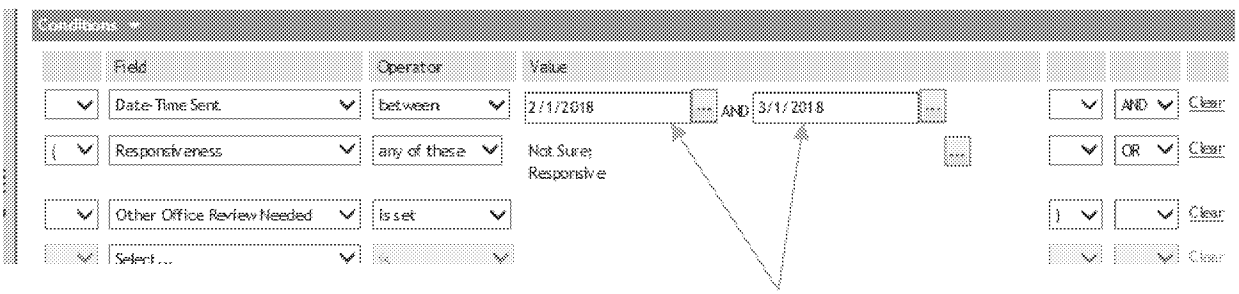
- children, health, pollution
- kids, health, pollution
- public, health, pollution
- children, kids, public, health, pollution
- children, public, health, pollution;
- etc.

Relativity Example

In a Relativity search, you can insert parentheses around commands in the Conditions section to use Boolean search order.

The search below puts parentheses around the statement with an OR operator, while leading with an AND operator statement. It can be interpreted like this:

> *Date-Time Sent=between 2/1/2018 and 3/1/2018* AND (*Responsiveness=Not Sure,Responsive* OR *Other Office Review=Is Set*)



This search will **only** return documents that fall within the timeframe described, and only if they meet at least one of the two other criteria (Responsiveness, Other Office Review Needed).

Documents that would result from this search:

- An email sent on 2/10/2018 with Responsiveness marked "Not Sure" but not marked for Other Office Review.
- An email sent on 2/24/2018 marked for Other Office Review but Responsiveness not marked.

Documents that would *not* result from this search:

- An email sent on 3/1/2018 that has been marked Responsive.
- An email sent on 2/15/2018 that has not been marked for Responsiveness or Other Office Review.

Other Boolean Syntax

There are other symbols you can use to make your Relativity searches more effective. Below are just two that are most likely to be helpful, particularly when creating Search Terms for a request. You can learn to do much more complex searches by viewing the Relativity Search Guide here.

Quotation Marks

Quotation marks can be used to return documents that contain the exact phrase enclosed within them.

For example, searching *"public health"* would **only** return documents that contain the exact phrase "public health". Documents that contain the words "public" and "health" separately scattered around the document would not be returned.

Asterisks

Searching with an asterisk returns results that include the root of the word that you type, but with any variation by where the asterisk is located.

For example, searching *child** would return:

- child
- children
- children's
- childhood
- etc.

Searching wom*n would return:

- woman
- women

Ensuring Consistency in Review Among your Review Team

For complex or even straightforward requests, a memorandum with review instructions (known as a "coding memo") can help your team achieve consistency in its document review. The coding memo serves as a protocol for how reviewers make determinations on documents, whether reviewing in Adobe Pro DC or Relativity. A coding memo can include, for example:

- **Responsiveness**
  - Describe the scope of the FOIA request.
  - Include a list of key words and acronyms that can help reviewers identify responsive material--use this list to help develop your persistent highlighting set for Relativity.
  - Include a list of key events and/or background on the issue that can help put the documents in context.
  - Include a list of key custodians and their roles in the issue.
  - Identify names of key attorneys (for attorney-client and attorney work product designations) -- consider including these names in your Relativity persistent highlighting set as a unique color.
  - Identify names of key people outside the Agency to assist with identifying records that are internal vs. external, and records that would need consultation from the White House or other agencies.
  - Explain whether non-responsive material may be redacted. Remember, you may only redact non-responsive material contained within a responsive FOIA record if you have an agreement with the requester.
- **FOIA Exemptions**
  - Describe the FOIA exemptions, and provide any key information specific to the FOIA request that will benefit reviewers in applying exemptions properly.
  - If a FOIA Exemption is not applicable to the FOIA request, do not include in the memo.
- **Equity Review**
  - Describe the EPA offices and/or other agencies for which review is needed.
- **Upper Management Review**
  - Documents may need to be flagged for upper management review. Providing this review enables management to be aware of documents that will be released and that may garner public or media attention.

REVIEWING POTENTIALLY RESPONSIVE RECORDS

Once you have collected potentially responsive records, you must review the records to determine whether they are actually responsive to the request and you must review the records to determine which, if any, FOIA exemptions apply.

For most FOIAs, responsiveness review and the FOIA exemption review are done concurrently during the first level review. During first level review, reviewers will determine if documents are responsive to the request (as narrowed or modified), if any FOIA exemptions apply, whether other EPA offices need to review the documents ("EPA Equity Review"), whether other Federal agencies or the White House need to review the documents ("Interagency Equity Review"), and whether any documents should be flagged for upper management awareness.

The levels of additional review beyond the first level of review will depend upon the scope of the FOIA and the need for equity reviews as set forth above. The review process should be set forth in the Review Plan, as explained above.

Don't Forget about the Requester!

Manage Expectations! Contact the requester right before you begin the Review Phase and discuss the results of your document collection. You can discuss the number of documents collected, your review process, and give candid time estimates for production. This gives the requester another opportunity to narrow their request or steer the review if they are unsatisfied with the time to complete review.

As you progress through the Review Phase, consider scheduling standing updates with the requester to discuss the status and progress of the request. For voluminous records requests, it can be very valuable to have the requester weigh in on how they would like the review of records to be prioritized. For example, perhaps the universe of documents to review includes 25,000 emails from 35 custodians. Ask the requester if there are custodians or timeframes the requester would like reviewed and released first; this is good customer service, and you know your review time is well spent.

As always, document these communications and upload any written communication with the requester into FOIAonline.

Are the Documents Responsive to the Request?

Once you have collected documents potentially responsive to a FOIA request, you must make sure that all reviewers have a single unified interpretation of the request. This ensures consistent responsiveness calls throughout the review process. If multiple people are reviewing documents to determine whether they are responsive to the request, consider having an initial meeting to discuss the FOIA request and what constitutes a responsive document.

- Occasionally, you may come across documents that are technically responsive (e.g., one of the search terms appears in an email) but that might have little to no informative value to the requester. Under the FOIA, agencies may not make value judgments on the utility of documents

to the requester. Accordingly, such documents should be considered responsive. However, you may ask the requester whether it wants certain categories of minimally-informative documents (e.g., newspaper clips) to be processed. If you come across large numbers of such documents, the requester may want to narrow its request to exclude those documents, which may enable the Agency to process the FOIA more quickly with fewer fees.

- You also may come across documents that discuss several different subjects in a single document, only some of which are responsive to the FOIA request. An example could include a staff meeting agenda addressing multiple topics. Under the FOIA and consistent with recent case law, if a FOIA record contains information responsive to the FOIA, the entire record is responsive, including the arguably non- responsive information. Information in the record can, however, be withheld based on one of the FOIA exemptions. If you identify large portions of material that are not responsive to the FOIA, consider meeting with the requester to determine if the requester is interested in narrowing the scope of the FOIA request to remove that material.

Do Any of the FOIA Exemptions Apply to Your Documents?

The FOIA provides for nine exemptions that agencies may use to protect specific types of information.

Exemption 1: Classified Information

Exemption 1 applies only to information that has been properly classified according to criteria established by an Executive Order. This exemption is rarely asserted by the EPA.

Exemption 2: Personnel Rules and Practices

Exemption 2 of FOIA exempts from mandatory disclosure records that are “related solely to the internal personnel rules and practices of an agency.” The Supreme Court has held that Exemption 2 covers only records “relating to issues of employee relations and human resources” and that such records must be internal and relate solely to those personnel rules and practices. Exemption 2 is narrow in scope and, thus, is rarely used.

Exemption 3: Federal Statute Prohibits Disclosure

Exemption 3 protects from disclosure information that is prohibited from disclosure by another federal statute, provided that the other federal statute explicitly requires matters to be withheld from the public. Statutes found to qualify under Exemption 3 include, for example, FIFRA, the Internal Revenue Code, and the Patent Act. Note that if you withhold information under Exemption 3, you must identify the statute under which you are withholding information in your response letter.

Exemption 4: Trade Secrets and Confidential Business Information (CBI) or Proprietary Business Information (PBI)

Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Based on this wording, the exemption covers two distinct categories

of information in federal agency records, (1) trade secrets, and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. For purposes of Exemption 4, "trade secret" is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end-product of either innovation or substantial effort." *See below for further information about reviewing documents that may contain CBI.*

Exemption 5: Privileged Communications

Exemption 5 protects "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." In simpler terms, Exemption 5 protects those documents that are normally privileged in the civil discovery context. This includes memoranda and letters but extends to many other types of documents as well. The three most common types of privilege asserted with Exemption 5 are the Deliberative Process Privilege, the Attorney-Client Privilege, and the Attorney Work Product Privilege.

- Deliberative Process Privilege (DPP)
    - Internal: communication must be internal to the executive branch (e.g., EPA, WH, DOT);
    - Pre-decisional - prepared to assist an Agency decision maker in arriving at his decision, rather than to support a decision already made;
    - Deliberative - Reflects the give-and-take discussion of the consultative process;
    - Privilege exists to: (1) encourage open, frank discussions; (2) protect against premature disclosure of proposed polices; and (3) protect against public confusion;
    - Apply DPP redaction "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption."
    - Some common examples include:
        - Draft documents, staff analysis, recommendations, advice, or opinions, internal e-mail discussions of potential courses of action, internal discussions about how to respond to a public inquiry, comments on draft rule-making documents, and e-mails or memos discussing Agency options.
- Attorney-Client Privilege (ACP)
    - Internal: communication must be internal to the executive branch (EPA, WH, DOT, etc.);
    - Legal advice is sought or relates to legal advice;
    - Communication between an attorney(s) and client(s);
    - Made in confidence; and
    - May have to show disclosure restricted to those who need to know within the Agency/Executive branch.
- Attorney-Client Work Product (AWP)
    - Internal to the Executive Branch (EPA, WH, DOT, etc.);
    - Prepared or obtained by or at the direction of an attorney;
    - In reasonable anticipation of litigation or active litigation; and
    - Extends to documents prepared by or for a representative of a party, including an agent

Exemption 6: Personal Privacy

Exemption 6 protects information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." When considering whether to assert Exemption 6, balance the privacy interest of the individual

against the public interest in disclosure. Common examples of content to withhold include private home addresses, personal phone numbers, personal email addresses, and medical information.

Exemption 7: Law Enforcement

Exemption 7 protects from disclosure certain types of "records or information compiled for law enforcement purposes." This exemption is comprised of six subsections, as described below. When asserting Exemption 7, remember to specify which subsection you are using.

- Exemption 7(A) protects records that "could reasonably be expected to interfere with enforcement proceedings." This includes information that would hinder the government's ability to control or shape the investigation, enable targets of the investigation to elude enforcement or suppress or fabricate evidence, or prematurely reveal the government's evidence or strategy. Note that this exemption is "temporary" because it is applicable only for the duration of the investigation.

- Exemption 7(B) is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding, protects "records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication."

- Exemption 7(C) protects information that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption is like Exemption 6 except that it requires EPA to meet a lower standard ("reasonably expected to" under exemption 7(C) vs "clearly unwarranted" for Exemption 6) and is applicable only in the law enforcement context. For example, Exemption 7(C) is sometimes used to protect identities of employees working on sensitive cases.

- Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes [which] 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 a 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."

- Exemption 7(E) affords protection to law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

- Exemption 7(F) protects law enforcement information that "could reasonably be expected to endanger the life or physical safety of any individual." Courts have routinely upheld the use of Exemption 7(F) to protect the identities of law enforcement agents. EPA has also used this exemption to protect the identities of members of security details and to withhold schematics detailing drinking water sources.

Exemption 8: Financial Institutions

Exemption 8 protects certain information related to financial institutions, but is only applicable for agencies responsible for regulating or supervising financial institutions. Accordingly, EPA does not assert Exemption 8.

Exemption 9: Wells

Exemption 9 exempts from disclosure "geological and geophysical information and data, including maps, concerning wells." This exemption can be applied to any type of well, including gas or water. An example of information withheld under Exemption 9 would be maps showing the exact locations of wells.

Do your Documents Contain Confidential Business Information or Trade Secrets?

FOIA Exemption 4 covers two categories of information, (1) trade secrets and (2) confidential Business information (CBI).

CBI is commercial or financial information obtained from a person that is privileged or confidential. (See 5 U.S.C § 552(b)(4)).
Trade secrets are a "secret, commercially valuable plan, formula, process, or device that is used in making, preparing, compounding or processing of a trade commodity, and that can be said to be the end product of either innovation, or substantial effort." (See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983)).

- Trade secret data may be found in contracts, manufacturing descriptions, schematics, product formulas, software, or quality control data/quality assurance procedures.

A business may explicitly assert a CBI claim, such as by marking or stamping a document with a confidential or proprietary business information label. Even if no explicit claim was made, the information can still be potential CBI.

If no claim was made, EPA regulations require the reviewer to apply the following standard to the business information:

> "[A]lthough [the business] has not asserted a claim, [it] might be expected to assert a claim if it knew EPA proposed to disclose the information." (*See 40 C.F.R. § 2.204(c)(2)(i)*).
>
> If you have identified potential CBI, you must ask the affected business if they claim the information as CBI, via telephone, email, or letter. The affected business has three working days to respond to your inquiry pursuant to EPA's regulations. (*See 40 C.F.R. § 2.204(c)(2)(ii)*).
>
> Please note that this standard does not apply in some circumstances. Specifically, if EPA follows the notice requirements of 40 C.F.R. § 2.203(b) when

it collects the information (such as including the required notice on a form), EPA may make the information available to the public without further notice to the business. (*See 40 C.F.R. §§ 2.203(b), 2.204(c)*).

Practice Tip: Look for labels on documents that indicate that a business intended for information to remain confidential, such as "trade secret," "proprietary," or "confidential." Also, a coversheet may contain a CBI claim for the attached material. Examples of information typically determined to be CBI include pricing information, information related to production, volume, and the manufacturing process, and customer lists.

Note that an affected business may waive its right to assert a CBI claim in which case you may release the information. You may always check with an affected business to see if the business will waive its claim.

If an affected business claims, or waives, confidentiality verbally, follow up in writing.

When potential CBI is identified, the Action Office must include the appropriate language in the initial denial letter and follow the proper procedures for tracking and processing a request for CBI as outlined in PBI Case Tracking Procedures. After the creation of the PBI case in FOIAonline, the Action Office works with OGC/ORC to send affected businesses substantiation requests, draft program recommendations, and revise the treatment of responsive records where necessary due to the final confidentiality determination.

More information about EPA's CBI Regulations are accessible here.

Separate Non-Exempt Information and Redact Exempt Information

The FOIA requires that "any reasonably segregable portion of a record" must be released "after deletion of the portions which are exempt" under the Act's nine exemptions. This requires you to redact the exempt information while producing the non-exempt information.

The FOIA states "[t]he amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made." Redaction marks should be visible and the exemption under which you are withholding information should be indicated. Note that judgment calls about what may be "helpful" to the requester are inappropriate when analyzing what, if any, information in a document can be segregated and released. If information does not fall within one of the nine exemptions, it should be released.

Once you have determined which FOIA exemptions apply to a document and what information needs to be redacted, use the redaction tools in Adobe Pro DC or Relativity to "black out" the content subject to a FOIA exemption, as discussed below.

Practice Tip: Redact the exempt information in the document and release the remainder.

Quality Assurance/Quality Control (QA/QC)

Throughout the review process, you will need to ensure that responsiveness determinations, FOIA exemption determinations, and redactions are made consistently. This is called quality assurance/quality control (QA/QC). Below are some Adobe and Relativity Practice Tips for smoother, more efficient QA/QC process.

Reviewing QA/QC in Adobe Pro DC

By using the "Create Comment Summary" option in the Comment tool, you can more easily spot redaction issues such as redactions with improper or missing exemption or overlay text.

You can also use the search tool to conduct searches using relevant search terms to locate pages in responsive documents that may require review by other EPA offices or other agencies. You can even export the results to PDF or CSV. Some examples of search terms are below:

- White House equities
  - "WH" or "POTUS" or "White House" or "EOP" or "CEQ" or "OMB"
- Congressional Relations Equities
  - "Senate" or "Senator" or "Congress" or "Representative" or "Congressional" or "Hill"
- Union Equities
  - "Union" or "NTEU" or "AFGE" or "280", or any union officials or topic words that may be relevant.
- OEX Equities
  - Include current administrator's name and email domains and any other relevant people in the Administrator's office.

Note that these search terms can also be used for "batch-tagging" in Relativity, as discussed above.

Reviewing QA/QC in Relativity

Saved Searches: In Relativity, saved searches can be set up to capture common coding inconsistencies and/or missed equities. The documents can be batched for review and errors corrected. See above for help with setting up saved searches.

When setting up a search to catch coding inconsistencies, the search should capture documents in the following categories:

- Release with redaction and no exemption selected
- Release with redaction and no redactions applied

- Release in full and exemption selected
- Release in full and redactions applied
- No disposition and exemption selected
- Withhold in full and no exemption selected
- Responsive and no disposition selected
- Not responsive and exemption selected
- Not responsive and has disposition selected
- Anything marked "additional review required" or similar

Batch Tagging: Additionally, you can "batch tag" items in Relativity for easy retrieval when handling equities. Batch tagging, or "mass coding," allows you to apply a specific coding choice to an entire set of documents that share a common term. Examples of terms that should be batch tagged are the same as those that should be searched for in Adobe, as mentioned above.

Awareness Reviews

For many FOIA requests, the last step in the document review process prior to final approval for production is an "awareness review" for upper Agency management. This final step is for upper management, including public affairs and congressional relations staff, to have a "heads up" as to what is being released to the public. This allows the public affairs staff to be prepared for any media inquiries that may be received following the release of documents. It also ensures coordination between productions of documents under FOIA and congressional oversight requests received by the Agency. You should always discuss with your management as to the appropriate awareness reviews for a particular FOIA request.

PRODUCTION OF RESPONSIVE RECORDS

Interim Release

Importance of Interim Releases

Requesters are less likely to seek litigation to get the records they want if they know you are actively working on their FOIA request. In addition to regular contact and a relationship with your requester, interim or partial releases demonstrate progress to the requesters because actions (disclosing records) speak louder than words ("We are actively working on your request.").

Interim responses can also be a valuable tool for narrowing requests. When requesters receive a partial release of records, they will have an opportunity to review them and identify the records or types of records in which they are not interested. You can then narrow the request to exclude those records going forward. In some cases, you may produce the record or records in an interim production, and the requester may determine, after review of the documents, that it needs nothing further from the Agency and that the request can be closed. It is sometimes helpful to ask the requester if there are particular records or custodians in which he/she is most interested to increase the possibility that the requester may be satisfied with an interim production as a conclusion to the request.

Required Elements of Interim Release Letter

When making an interim production, it is important to accompany the records you are producing with correspondence that clearly explains to the requester what is being delivered and the status of the request. Below are five key elements to include in an email or letter to the requester when making an interim production.

- ***Information about the Request***
  - Make sure to reference the request by number and provide a brief summary of what is sought. If the requester has clarified the request or you have had other significant communication, note it in the summary of the request.
- ***Description of the Records***
  - Provide information about the records themselves. This will vary depending on the records, it may make sense to provider the total number of documents, the total number of pages, the total file size, or some other description.
- ***Schedule Going Forward***

    - Include the anticipated date that the request will be closed out, and if you will be making additional interim productions, inform the requester as to when it can expect the next interim production(s).
- ***Appeal Information***
    - Make clear that the request is not being closed now. Inform the requester that when the request is closed, information will be provided about appeal rights for any part of EPA's response, including all interim productions. The goal is to make sure the requester understands that this is an initial release and that the clock does not start on the appeal period until after the request is closed.
- ***Contact Information***
    - In addition to the FOIA Public Liaison, make sure the requester has the direct contact information for someone who knows substantively about the request, such as the project lead or the FOIA Coordinator or FOIA Officer. The requester may be confused or have questions about the interim production or the status of the request going forward and should be provided with an Agency point of contact.

Final Release and Response to Requester

When all responsive records have been uploaded to FOIAonline, you will be ready to close out your request. It is important to follow your office's FOIA procedures which can be found on the intranet here.

Required Elements of Final Release Letter

The closeout letter for a request should clearly inform the requester of the Agency's response and the requester's appeal rights. There is no one way to write a closeout letter. The best letters should be tailored to the particular request. You can access an Agency letter template here. Each letter should contain the following elements:

- ***Information about the Request***
    - Make sure to reference the request by number and provide a brief summary of what is sought. If the requester has clarified the request or you have had other significant communication, describe it. It is particularly important to describe any agreed-upon modification or other narrowing of the FOIA request. The closeout letter memorializes the Agency's actions and serves as an important piece of the FOIA record if an administrative appeal or litigation is filed.
- ***Disposition***
    - There are four possible responses the Agency may provide. Inform the requester which applies to the request.
        - *Full Grant.* The records, in their entirety, are released to the requester.
        - *Partial Grant/Partial Denial.* Portions of the record are withheld from the requester if covered by one or more FOIA exemptions. The portions of the record that are not redacted are released to the requester.

- *Denial.* The records, in their entirety, are withheld from the requester if covered by one or more FOIA exemptions.
- *No Records.* If, after a reasonable search likely to uncover all responsive documents, no records are located that are responsive to the request, the requester must be informed in writing to that effect.

- ***Identification of Withheld Records***
  - If any records are being withheld in whole or in part, provide the requester with (1) an index or description of the records being withheld and (2) a summary of the FOIA exemptions that are being applied.
- ***Final Appeal Rights***
  - The following paragraph includes the information required to be conveyed to the requester regarding its appeal rights:

    This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90 calendar day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

- ***Contact Information***
  - The requester should be informed of a contact who can help if there are questions about the request. Additionally, consistent with the 2016 Amendments to FOIA, the requester should be provided contact information for the FOIA Public Liaison and the Office of Government Information Services. See the sample language below:

    Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or call (202) 566-1667. You may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information

Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

- ***Final Bill***
  - Inform the requester what fees are being assessed and how they should be paid.
- ***Signature***
  - Final closeout letters must be signed by the Action Office at the Division Director level or higher.

Disclosure through FOIAonline

FOIAonline is more than a convenient way to disclose records to a requester. Disclosure of records through FOIAonline is required under EPA policy and procedures. See EPA FOIA Policy, CIA 2157.1, and EPA FOIA Procedures, CIO 2157-P-01.1.

Recordkeeping Requirements for FOIA Requests

FOIAonline is used to maintain records related to a FOIA request in accordance with records management requirements and as a record of how a request was processed should it be appealed or litigated. Before closing a request, upload (1) all key correspondence and (2) all responsive records.

Uploading key correspondence is vital to preserving the record of how a FOIA request was processed. Any interactions with the requester that did not occur through FOIAonline should be documented and uploaded. For email correspondence, create a PDF of the email and upload it as "other" correspondence. Key internal correspondence such as communications requesting electronic searches or describing document collection should be uploaded as "other" correspondence as well.

It is important to upload all responsive records to FOIAonline, including those that are not releasable. Uploading records that will be withheld preserves the entire record so that it can be reviewed in full on appeal or during litigation. Be sure when uploading records to designate the proper release type for each record.

ADMINISTRATIVE APPEALS

What is an administrative appeal?

The FOIA and EPA's implementing regulations provide FOIA requesters the right to appeal any "adverse determination" that the Agency makes regarding a FOIA request. EPA's FOIA regulations, at 40 C.F.R. § 2.104(g), include the following list of "adverse determinations" that are subject to appeal:

- a determination to withhold any requested record in whole or in part;
- a determination that a requested record does not exist or cannot be located;
- a determination that what has been requested is not a record subject to the FOIA;
- a determination on any disputed fee matter, including a denial of a request for a fee waiver; and
- a denial of a request for expedited treatment.

Within 90 days of an adverse determination by the Agency, requesters may submit appeals, in writing, either through FOIAonline, by email to hq.foia@epa.gov, or by U.S. Mail to EPA Headquarters, National FOIA Program Office. An appeal should identify the Agency determinations being appealed and include the assigned FOIA request number.

What happens if the Agency's final FOIA response is appealed?

Administrative appeals are routed, via FOIAonline, to EPA's Information Law Practice Group, General Law Office, Office of General Counsel. Shortly after receipt, the requester is sent an acknowledgement letter and the appeal is assigned to an OGC attorney for processing. The OGC attorney will then contact the relevant program or regional staff to address any questions concerning the record.

EPA has 20 working days by statute to process an appeal, but this deadline can be extended for "unusual circumstances" pursuant to the same rules applicable to extension of FOIA request deadlines. Once the appeal determination is completed, the OGC attorney contacts the relevant office(s) that processed the request, notifies the office(s) of the decision, and issues the decision to the requester through FOIAonline.

What is your role in the administrative appeal process?

You may be notified by your FOIA Officer that an appeal relating to the FOIA request you handled has been received. As noted above, you will be contacted by the OGC attorney handling the appeal, as the attorney will likely have questions relating to the file and/or need additional information. Your FOIA Coordinator or Officer should also be able to review in FOIAonline who in OGC is assigned to an appeal so you can always reach out to the attorney to provide any context or other information that may be helpful for processing the appeal.

Please follow the instructions provided by the attorney concerning what action or information is needed. When contacted by OGC, please be sure to have the following information available:

- A complete set of the documents withheld in full, in unredacted form;
- A complete set of documents withheld in part (redacted documents) (ideally a markup copy of the redactions not yet applied, to review what material was redacted);
- The complete organized file relevant to the FOIA, including communications with the requester;
- Points of contact for staff in the Contributing Offices who worked on the request; and
- All communication regarding the processing of the FOIA, as well as all documents responsive to the FOIA (released, withheld in full and withheld in part), should be included in FOIAonline.

Pursuant to the 2016 Amendments to FOIA, the period to appeal an adverse determination is 90 days from the date of issuance of the adverse determination. As such, it is important to keep the above-noted information readily accessible in case an appeal is filed.

- For large volume responses, keep an organized electronic copy of the relevant materials to provide to OGC in the event of an appeal. FOIAonline currently does not permit bulk downloads of large volumes of documents, which complicates an expeditious review of a file.

Common issues on appeal relate to the adequacy of the Agency's search, the propriety of the Agency's withholdings, the propriety of denying a fee waiver, and the adequacy of the Agency's description of withholdings.

What are the potential outcomes in resolving an administrative appeal?

- **Appeal is Denied in Full:** OGC determines that all challenged actions were performed in compliance with statutory and regulatory requirements. No further action is needed.
- **Appeal is Granted in Full or In Part:** OGC determines that one or more challenged actions were not performed in full compliance with statutory and regulatory requirements in all aspects of the response.
    - *Without Remand:* OGC determination will complete the corrective action by attaching the releasable records or portions of records, or otherwise complete the corrective action for the Agency.
    - *With Remand:* Pursuant to 40 C.F.R. § 2.104(k), OGC determination will provide instructions for completing corrective action by remanding the request to the Action Office (the program office assigned to the request). That office should then address the instructions on remand.
        - Timing on remand: the instructions will either include a) a timeframe for completing the corrective action(s), or b) a timeframe for the program office to communicate a schedule for completion to the requester.
        - If you are instructed to release additional information to the requester, OGC advises that you re-open the FOIAonline case file for the request and upload the new responsive information to that case file.
        - In most cases, you should issue a new determination letter. OGC recommends that you do not include appeal rights if you were directed to

re-review withholdings or to conduct a new search and no additional material was withheld. Please contact OGC if you have questions about whether to include appeal rights after a remand. Be sure to upload any correspondence to the requester to FOIAonline before closing the request again.

LITIGATION

FOIA requesters can initiate litigation if the Agency denies their administrative appeal, or if the Agency fails to respond to their FOIA request within the statutory time frame. The attorneys in OGC's General Law Office handle all FOIA litigation filed against EPA. These attorneys work directly with Department of Justice (DOJ) attorneys to litigate the cases.

For a court to have jurisdiction to hear a case, the FOIA requester must allege that the agency has improperly withheld records. Allegations that an agency "improperly withheld records" may include:

- Failing to respond to a FOIA request within the statutory timeframe;
- Improperly withholding records, or portions of records, under a FOIA exemption;
- Not conducting a reasonable search for records;
- Denying a fee waiver or expedited processing; or
- Challenging a fee category designation.

General Overview of the Litigation Process

If the Agency is sued over a FOIA request, an attorney from OGC's General Law Office will reach out to the lead contact for the Action Office to discuss the administrative record supporting the FOIA action. If EPA has not provided a response to the FOIA requester, the OGC attorney will discuss with the lead contact for the Action Office where the Action Office is in the search and collection process and develop a production schedule.

The following provides a general overview of the primary steps in litigation:

1. **The Complaint:** A FOIA requester initiates litigation by filing a Complaint. In the Complaint, the plaintiff (FOIA requester) will identify the FOIA request(s) at issue and the bases for filing suit (e.g., agency's failure to respond to the FOIA, or a challenge to the agency's search and/or withholdings).
2. **The Answer:** EPA has 30 days (from the date the plaintiff serves the United States Attorney's Office) to respond to the Complaint in the form of an Answer. An Answer is generally EPA's first pleading and it responds, point by point, to the allegations in the Complaint. The Answer also includes any affirmative defenses or counterclaims EPA may have.
3. **Schedule for the Production of Documents (failure to respond cases):** If the case concerns EPA's failure to respond to a FOIA request, OGC and DOJ will initiate discussions with the plaintiff regarding a production schedule for any documents remaining to be produced. Once documents are produced, the plaintiff has an opportunity to review the documents to determine if the case can be resolved without further briefing. If the plaintiff reviews the documents and seeks to litigate any issue, such as the Agency's withholdings, the case proceeds to substantive briefing.
4. **Substantive Briefing:** If the plaintiff challenges the Agency's search or withholdings or raises any other issues, the case will proceed to briefing. Generally, FOIA cases are resolved when one or both parties file Motions for Summary Judgment. A Motion for Summary Judgment is a motion whereby the party filing the motion (the movant) asks the court to rule in its favor and dismiss all, or part, of the litigation. A Motion for Summary Judgment includes a motion asking the court

to rule in the moving party's favor and a brief called a Memorandum in Support of the Motion for Summary Judgment. The Memorandum in Support of the Motion for Summary Judgment is the Agency's opportunity to make its case and explain why the Agency met the relevant requirements in processing the FOIA request in dispute. In support of a Motion for Summary Judgment, EPA will file a declaration and *Vaughn* Index.

a. ***Declaration:*** The content of the declaration depends on the issues plaintiff has raised. A declaration contains factual statements and the declarant attests to the facts in the declaration under penalty of perjury. For example, in a case challenging the Agency's search, the declaration would address how the Agency searched for responsive records. The Agency's brief would, in turn, cite to the declaration and explain why the Agency's search was reasonable. In a case challenging the application of the FOIA exemptions to certain documents, the declaration would explain the nature of the documents at issue and the basis for the claimed exemption(s). The declaration assists the court in resolving the case without the need to review the documents in question in the underlying FOIA. (See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)).

    Who can be a declarant? The declarant must have "personal knowledge" of the facts presented. (See Fed. R. Civ. P. 56(e)(1)). Personal knowledge includes information provided to the declarant by co-workers or subordinates. Generally, the declarant is an individual in management who has personal knowledge of the processing of the FOIA request at issue.

    Briefing in a FOIA case may occur several months after the case is filed, especially in cases alleging a failure by EPA to respond to the FOIA request. It is important to maintain a well-documented case file, as that file will be useful in preparing the declaration.

b. ***Vaugh Index:*** Generally, the declaration references the Agency's *Vaughn* Index. A *Vaughn* Index is an index that describes the records withheld and the basis for the withholdings. There are different formats for a *Vaughn* Index, including, for example, an itemized description of each document, and a categorical approach, where similar documents are described together (as opposed to the itemized document-by-document approach).

Below is an example of an excerpt from a *Vaughn* Index.

545OneDrive2_00013175	ED_000454	Withheld in Entirety				Ex. 5 - Deliberative Process

Document 545OneDrive2_00013175 is a draft contract document for a statement of work between EPA and an unidentified contractor. This draft contract document was withheld in full under FOIA Exemption 5.

Exemption 5, Deliberative Process Privilege
The withheld information is protected under Exemption 5's deliberative process privilege because it is a draft of a statement of work between to SwRI and EPA. The document was circulated for review within OTAQ/ASD. The draft statement of work reflects pre-decisional deliberations between EPA employees about the work required under an EPA contract with SwRI who conducting testing for the EPAct Study/V2/E-89 Tier 2 Gasoline Fuel Effects Study. At the time the document was created, EPA had not finalized the statement of work, and EPA was still deliberating on the best approach to the contract. The withheld draft statement of work does not reflect an official Agency decision. The withheld information is deliberative because EPA employees and managers were still internally discussing issues related to contract requirements and testing parameters. This draft statement of work was circulated for review and comment, and it was not the final document. The document reflects recommendations and opinions that are considered as part of the EPA's decision-making process for finalizing contract documents. The draft statement of work does not represent a final agency action. Release of this information would discourage open and frank discussions among its staff and would also have a chilling effect on agency decision-making processes, and on the EPA's ability to have internal discussions and consultations concerning EPA's contracts. Furthermore, release would cause public confusion by disclosing rationales and reasons that were not in fact ultimately incorporated into the final statement of work and the final contract.

Segregability
There is no reasonably segregable information in this draft contract document, no meaningful portion could reasonably be released. To the extent there are facts in this document, the selection of those facts are an integral part of the deliberations in developing the final contract document and the facts selected may have varied between the draft and the final document, and the factual information contained therein is inextricably intertwined with the deliberative discussion concerning this document.

What is the role of the Action Office and Contributing Offices in Litigation?

The Action Office and Contributing Offices are responsible for:

- Ensuring that the OGC attorney assigned to the case has a copy of the entire FOIA file, including information about the search (*e.g.,* dates, terms, custodians, repositories, scope etc.); information related to the Agency's collection efforts; emails and other correspondence with the FOIA requester; and copies of the responsive records (both with and without redactions applied);
- Responding to any questions OGC has regarding the record;
- Completing the document production, which is relevant in cases involving a failure to produce records; and
- Reviewing all draft pleadings in the case and preparing the declaration in support of the Motion for Summary Judgment.

Litigation is time-consuming. EPA is also under court-ordered deadlines to submit briefs. As such, it is important that the FOIA team works together closely to ensure the deadlines are met.

Potential Outcomes

Courts generally dispose of FOIA cases based on Motions for Summary Judgment. If a court rules for EPA by granting the Agency's Motion for Summary Judgment, in full, the case will be dismissed. If the Court rules against EPA, in whole, or in part, there are different potential outcomes. For example, the court could ask EPA to submit the documents withheld under FOIA for *in camera* inspection so the court can assess the Agency's withholdings.

EPA would then submit the documents at issue for the court to review. *In camera* inspection is not common. During *in camera* inspection, plaintiff and plaintiff's counsel are not allowed to view the records; only the court views the records. If the court rules against EPA, another potential outcome is for the court to order the Agency to release some or all of the withheld records. If the court finds that the Agency failed to conduct a reasonable search, it could order the Agency to conduct a new search.

Attorney's Fees – What You Need to Know

A party seeking attorney's fees and costs in a FOIA action must show that it is both eligible for, and entitled to, such fees. The plaintiff also bears the burden of demonstrating the reasonableness of its fees. In assessing whether a plaintiff is eligible for attorney fees, the evaluates whether the plaintiff "substantially prevailed." If a plaintiff is eligible for attorney's fees, the court must then determine if the plaintiff is entitled to fees by evaluating four factors:

1. The public benefit derived from the case;
2. The commercial benefit to the plaintiff
3. The nature of the plaintiff's interest in the records sought; and
4. Whether the government's withholding had a reasonable basis in law.

Under FOIA, if payment of attorney's fees is required, those fees are paid by EPA. OCFO's Procedure 3 provides that payment of FOIA attorney's fees is made from funds appropriated to the Responsible Planning and Implementation Office (RPIO) involved in the FOIA judgment. The RPIO is generally the regional or program office designated by the FOIA Coordinator or FOIA Officer as the lead office (Action Office) for the FOIA request.

Message

From: Newton, Jonathan [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8A0F1A1699564041BD74C49A526C0FE5-JNEWTON1]
Sent: 3/20/2018 3:48:52 PM
To: Harris, Monisha [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=33b7915d699a4b12954bc27d67760a8f-Harris, Mon]
Subject: RE: URGENT -- In coming FOIA for you attention FW: Earth Justice FOIA (EPA-HQ-2018-004958)
Attachments: _Not Reasonably Specific Draft Response (Letterhead) (Updated).docx

Jonathan V. Newton, Attorney-Advisor
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 564-6164

From: Harris, Monisha
Sent: Monday, March 19, 2018 3:54 PM
To: Newton, Jonathan <Newton.Jonathan@epa.gov>
Subject: FW: URGENT -- In coming FOIA for you attention FW: Earth Justice FOIA (EPA-HQ-2018-004958)
Importance: High

Hi Jonathan, I would like to know if I could call to speak with you regarding the below FOIA request?

Monisha Harris
Director, Federal Advisory Committee Management Division
Room 1102C WJC East Building - MC: 1601M
Work: 202-564-0563

From: Brennan, Thomas
Sent: Wednesday, March 14, 2018 2:03 PM
To: Harris, Monisha <harris.monisha@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>
Subject: URGENT -- In coming FOIA for you attention FW: Earth Justice FOIA (EPA-HQ-2018-004958)
Importance: High

Hello Monisha and Brittany,

The attached FOIA request was assigned to the SAB Staff Office. I understand why as we appear in the first part. However, after reading it over it seems to me that this is better suited for either FACMD or OP. Ex. 5 - Deliberative Process | Attorney-Client

Ex. 5 - Deliberative Process | Attorney-Client

Please reach out if you have any questions/concerns.

Regards,

Tom Brennan
Acting Director, Science Advisory Board Staff Office
US Environmental Protection Agency

Desk # 202 564 6953
Mobile Personal Phone / Ex. 6

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Date

OFFICE OF THE
EXECUTIVE SECRETARIAT

Name
Company
Address
City/State/Zip

Subject: Freedom of Information Act Request EPA-HQ-2017-

Dear Name:

This responds to your FOIA request dated _____, which seeks emails, "_____" Your request was designated EPA-HQ-2017-_____ and assigned to the Office of the Administrator for response.

The EPA unfortunately is unable to process your request because it fails to adequately describe the records sought. EPA regulations state that, "whenever possible requesters should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter." 40 C.F.R. § 2.102(c). Your request _____.

Federal courts have held that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors" and that agencies are not required to spend "countless numbers of personnel hours seeking needles in bureaucratic haystacks." *United States Department of Justice Guide to the Freedom of Information Act, 2009 Edition at 47-48.* Even when an agency can identify documents with sufficient precision a request can still be so broad as to impose an unreasonable burden on an agency. This occurs when the request if it requires the agency to locate, review, redact, and arrange for inspection of a vast quantity of material that is largely unnecessary to the requestor's purpose. *AFGE v. Department of Commerce*, 907 F.2d 203, 208-209 (D.C.Cir.1990).

Should you desire to revise your request you may contact me at (202) 564-6164 or Newton.Jonathan@epa.gov to discuss clarification. Please include the tracking number in any communications regarding this request. You may also withdraw and resubmit your request with additional specificity. Please note that if we have not heard from you within two weeks of the date of this letter we will assume you are no longer interested in pursuing this request and the file will be administratively closed.

If you have any concerns, you may appeal this response with an email to hq.foia@epa.gov or by writing to the National Freedom of Information Act officer at:

U.S. Environmental Protection Agency
William Jefferson Clinton Federal Building
Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, D.C. 20460

Please note that only the U.S. Postal Service delivers to the address above. If you would like to deliver your appeal in person, via courier service, or via an overnight-delivery service, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, D.C. 20001.

Your written appeal must be received no later than 90 calendar days from the date of this letter and should include the request number listed above. The EPA will not consider appeals received after the 90 calendar-day limit. In addition, appeals received after 5 p.m. Eastern time are considered as having been received the next business day. For the quickest possible handling, the subject line of your email or the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

If warranted you may seek dispute-resolution services from the EPA's FOIA public liaison at hq.foia@epa.gov, (202) 566-1667, or from the National Archives and Records Administration's Office of Government Information Services. You may contact the Office of Government Information Services with an email to ogis@nara.gov; by calling toll free (877) 684-6448 or (301) 837-1996; with a fax to (301) 837-0348; or by mail to National Archives and Records Administration, Office of Government Information Services, 8610 Adelphi Road, Room 2510, College Park, Maryland 20740-6001.

Sincerely,

Jonathan V. Newton
Attorney-Advisor

Appointment

From: Rementer, Nicole [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8584CAFFEF2B4418B4E6430198C6355B-REMENTER, N]
Sent: 4/3/2018 9:13:11 PM
To: Rementer, Nicole [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8584caffef2b4418b4e6430198c6355b-Rementer, N]; Yaeger, Ryan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c4d2fdd93ebf4d43996316a333c80985-Yaeger, Rya]

Subject: Adobe with Ryan
Attachments: FOIA Toolkit Appendix (2).docx
Location: Nicole's Office (7426NN)

Start: 4/4/2018 1:00:00 PM
End: 4/4/2018 1:30:00 PM
Show Time As: Busy

Feel free to reschedule for a time that fits better with your schedule. I'm usually in by 8:30.

See also beginning at p. 90 of the FOIA Toolkit Appendix, attached.

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*There are no materials for this step.

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Initial Short FOIA Response Template

This template is a short initial note that you can send via FOIAonline, letting the requester know your contact information, that you are reviewing the request and that you will be back in touch promptly once you have had a chance to review fully the request. This can be accomplished by clicking the "Create Correspondence" tab in FOIAonline or by sending via e-mail and then uploading into FOIAonline.

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Dear [FOIA Requester]:
Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*,

My office has received your FOIA request. I will contact you again after we have had the opportunity to fully review your request. I will be your point of contact. Please feel free to contact me directly with questions or concerns.

Additionally, at any time, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS).

You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[Your Name]
[Your Phone Number]

Initial Detailed Response Template

This template provides optional sections and language to fit the circumstances of any particular request. If the requester provides telephone contact information, it is always a ***best practice*** *to accompany the initial response letter with a telephone call to the requester. When using this template, read the sections below carefully and edit the bracketed portions consistent with the request at issue. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.*

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*, Initial Response

Dear Mr./Ms. *[Last name]*:

Thank you for your Freedom of Information Act request. This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on *[MONTH DAY, YEAR]*, in which you requested

> *[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].*

Opportunity to Discuss and Modify *(if needed)*

> *[Edit as appropriate]*

Your request is *[too broad to be completed within 20 days and/or does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them.]*

For example, we would like to discuss the types of records you are interested in, and the possible locations of these records. We would like to further understand the specific subject matter of the records so that we are able to craft a search and provide you with the records you seek. *[TO MAKE THIS STATEMENT DEFENSIBLE IT IS ESSENTIAL TO EXPLAIN WHY YOU CANNOT IDENTIFY AND LOCATE THE RECORDS].*

In addition, requests phrased as legal discovery, e.g., for all records "including but not limited to" and "pertaining to" a subject with no further limitation, do not provide adequate information to allow a professional employee to determine which records you wish EPA to provide.

EPA's FOIA regulations state:

> "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." 40 C.F.R. § 2.102(c).

We would like to provide you the opportunity to discuss the request with us and clarify the records that you are seeking so that EPA can process your request. As indicated in 40 C.F.R. § 2.102(c), please include or be prepared to discuss any specific information about the records you seek, including time period, authors, or a more detailed description of the records' subject matter.

Unusual Circumstances and Extension of Time *(if needed)*

[Edit as appropriate]

Pursuant to 40 C.F.R. § 2.104(d), an extension of time to respond to your request is necessary. Given the scope of the request, EPA anticipates that

[…the response will require significant amount of EPA's resources and time to search for, and appropriately examine the voluminous amount of records to complete this request and/or

…to search for and collect the requested records from multiple EPA offices that are separate from the office processing the request" and/or

…the need for consultation with another agency having a substantial interest in the determination of the request."]

EPA has initiated the coordination of and search for responsive records in our files. Because of the circumstances described above, it is difficult to predict with certainty how many records may be involved. [Optional: *Nonetheless, at this time, EPA estimates the Agency will be able to complete this request by [DATE, MONTH, YEAR]. We appreciate your patience.*]

[*Only if Relevant: Since the time of your request and as of today's date, EPA has received additional FOIA requests about [Topic] including several requests that were approved for expedited processing. These expedited requests will be processed before your request. However, many of the documents that are responsive to those requests will also be responsive to your request. These documents will be made publicly available on a rolling basis as they are produced.]*

Processing Fees *(if needed)*

[Edit as appropriate]

[Option 1: On [DATE], the EPA's National Freedom of Information Office granted the fee waiver request that accompanied the FOIA request. Therefore, you will not be assessed fees.

Option 2: On [DATE], the EPA's National Freedom of Information Office denied the fee waiver request that accompanied the FOIA request. Therefore, we must receive an assurance of payment before processing the request.

Option 3: You were placed in the "other" fee category, which means you will be charged for search, and duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A. Therefore, we must receive an assurance of payment before processing the request.

Option 4: You were placed in the commercial fee category, which means you will be charged for search, review, and duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A. Therefore, we must receive an assurance of payment before processing the request.

Option 5: You were placed in the "media/educational" fee category, which means you may be charged for duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A.]

Publicly Available Information *(if needed)*

The following are sources of publicly available information that you can access immediately:
[Edit as appropriate to your request. You may include fire links to other relevant FOIA responses, your Program specific website, and any of the links below]:

- Our website: https://www.epa.gov/home/advanced-search
- FOIAonline for records previously released through FOIA requests: https://foiaonline.regulations.gov/foia/action/public/search/
- Frequently requested records: https://www.epa.gov/foia/national-online-foia-library#request
- Environmental Topics Information repositories: https://www.epa.gov/environmental-topics/z-index
- Technical/scientific/educational publications: https://www.epa.gov/nscep
- Administrative and Environmental Appeals Board cases: https://www.epa.gov/foia/national-online-foia-library#opinions
- Staff Manuals and Guidance: https://www.epa.gov/foia/national-online-foia-library#admin
- Policy Statements: https://www.epa.gov/foia/national-online-foia-library#statement
- Superfund sites and data: https://www.epa.gov/foia/national-online-foia-library#superfund

Next Steps

[Edit as appropriate]

The processing clock is stopped for your FOIA request until we receive *[your assurance of payment [and/or] your clarification or modification.]*

Please respond within ten calendar days from the date of this letter to arrange a time to discuss your [*request and fees]*.

You may contact *[Program Contact]* at (*email address)* or at *(telephone number)* with your response or if you have any further questions. If we do not receive a response from you *[By X Date (at least 20 days from date of letter)]*, we will consider your request to be voluntarily withdrawn. [*Edit as appropriate: Once the request is clarified and we receive a written assurance of payment, we will continue processing your FOIA request*] and provide you with an estimated timeframe for completion. If you wish to request information connected to this request in the future, please reference the FOIA request number.

Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[NAME]
[TITLE]

Closure for Failure to Modify FOIA Request Template

This template is for correspondence to a requester who has failed to modify an improper request. This should be used only after it is clear that the requester will not modify a request. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*, Closure For Failure to Modify

Dear Mr./Ms. *[Last name]*:

Thank you for your Freedom of Information Act request. This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on *[MONTH DAY, YEAR]*, in which you requested

[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].

Your request does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them. The EPA's FOIA regulations explain:

"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." 40 C.F.R. § 2.102(c).

We sent you a letter dated *[DATE]* providing you the opportunity to clarify the records that you are seeking so that EPA can process your request. We asked that you contact us by *[DATE]*, with your clarification, and we have not received additional information from you, so we are administratively closing your request.

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are

submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[NAME]
[TITLE]

Requests Seeking Only Information Publicly Available on EPA's Website Template

This template can be used for responding to requests that seek only information publicly available on EPA's website. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.

Subject: *[FOIA ID # XXX-XXXX]*

Dear *Mr./Ms. [Last Name]:*

This is in response to your Freedom of Information Act (FOIA) request, identified above, dated *[Month, Day, Year],* that you submitted to the U.S. Environmental Protection Agency (EPA). Your request seeks the following documents:

> *[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].*

The information that you are seeking is publicly available on EPA's website *[Describe where on EPA's website material can be found and insert link to that location].* Because this information is publicly available, your FOIA request for this information is being administratively closed, in accordance with EPA's FOIA regulations. See 40 C.F.R. Part 2, Subpart A.

If you consider this response to be a denial of your request, you may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, N.W. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

Thank you for your interest in this information.

Sincerely,

[NAME]
[TITLE]

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Checklist for Clarifying Requests

This checklist is a quick reference for things to consider when attempting to identify components of a request that may be missing or ambiguous and for which clarification is needed.
While EPA's regulations cite the categories below as items that should be included in a request, failure to include one or more of these categories ***does not*** *automatically make the request improper or not reasonably described.*

Categories of Information to Discuss with Requester for Clarification:

The more categories on which you and the requester can agree, the more straightforward processing the request will be.

- ☐ **Type(s) of Records**: Emails, Documents, Memoranda, Notes, Presentations, Text Messages, Schedule, Voicemail, Data, Logs, etc.
- ☐ **Subject Matter/Topic/Search Terms**
- ☐ **Date Range**
- ☐ **Specific Departments/Custodians/Positions**

New Complex FOIA Project: Initial Meeting with Team Checklist

This checklist may assist the Action Office in coordinating the initial meeting with the Contributing Offices and any other necessary parties and begin meaningful collaboration on the FOIA request. This checklist assumes the request has been clarified with the requester.

Participants for an initial discussion: Lead contact and Subject Matter Experts from Action Office and FOIA Coordinator and Subject Matter Experts from Contributing Office(s).

- ☐ Identify and Clarify the following roles:
  - FOIA Coordinator for each office; and
  - Lead contact in the Action Office and any other lead contact(s) from Contributing Office(s) to include on all internal correspondence.

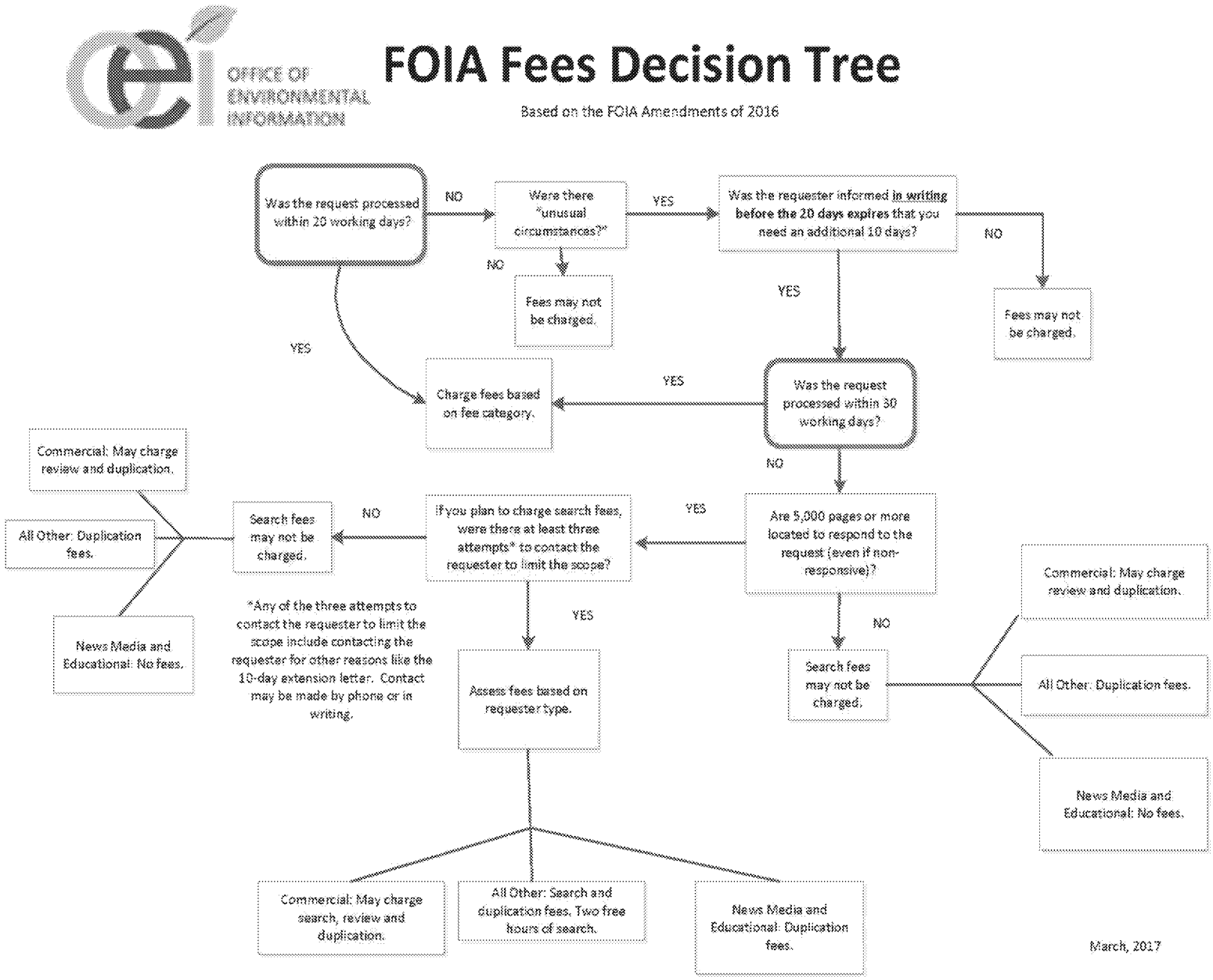
- ☐ Listen carefully and ask questions. Think through:
  - Scope;
  - Time Period;
  - Potential Custodians;
  - Record Types, Locations, and Systems; and
  - Potential Search Terms.

- ☐ Timing
  - FOIA Clock
    - How many days remain on the FOIA clock? and
    - Are there unusual circumstances permitting the Agency to extend the due date?

  - Potential Resource Concerns
    - What do the team's resources look like?
    - Any upcoming large projects?
    - Emergency Project or anticipated resource issues?
    - Familiarity with Relativity?

FOIA Fees Decision Tree

The following flow chart can assist with determining which fees should be charged to the requester.



Confirmation of Clarification Template

This template is to document any clarification that the requester has made regarding a pending FOIA request. It is a best practice to document any modification of the request in writing. Send via regular mail on Agency Letterhead and upload correspondence in FOIAonline or send as an email via FOIAonline.

[DATE STAMP]

[Name
Organization
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-*XX-XXXX-XXXXXX*, Confirmation of Clarification

Dear Mr./Ms. *[Last name]*:

Thank you for your Freedom of Information Act request. This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on *[MONTH DAY, YEAR]*, in which you requested

[INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].

Clarification

On *[DATE]* you spoke to *[CONTACT]* regarding the scope of your request. During the conversation you clarified your request as follows:

[*Edit as appropriate to reflect your conversation and the needs of the request… you may wish to include information about:*

Type(s) of Records: *Emails, Documents, Memoranda, Notes, Presentations, Text Messages, Schedule, Voicemail, Data, Logs, etc.*
Subject Matter/Topic/Search Terms:
Date Range:
Specific Departments/Custodians/Positions:

Estimated Date of Completion and Fee Estimate

*[Provide an estimated date of completion and appropriate information regarding fees]***Next Steps**

[Edit as appropriate]

EPA has initiated the coordination of and search for responsive records in our files. During the call, we agreed to set up regular check-in calls to keep you updated. **Our next call is scheduled for *[insert date]*.**

Please contact [Contact] if you have any questions about your request. Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (301) 837-1996 or (877) 684-6448; or fax, (301) 837-0348.

If you wish to request information connected to this request in the future, please reference the FOIA request number.

Sincerely,

[NAME]
[TITLE]

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Access to Absent and Separated Employee Records 37
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FOIA Search Guide: Best Practices 41

Search Instruction Template for Potential Custodians

These are model search instructions for the Action Office to provide to potential record custodians, both in the Action Office and Contributing Offices. These instructions should be customized to reflect the search plan that the Action Office and Contributing Office develop to search for and collect all non-Outlook records.

As part of the Search Plan, the Action Office should identify a Point of Contact (POC) who will collect all responsive and nonresponsive records and upload releasable, responsive records to FOIAonline. Each Contributing Office should also identify a POC who will collect records from Contributing Office custodians, propose redactions where appropriate, and transfer both unresponsive records and responsive records to the Action Office POC through an agreed-upon method of transfer.

Search Instructions

You have been identified as a potential custodian of responsive records to a Freedom of Information Act (FOIA) request. The request ***[FOIA Request Number]*** concerns ***[describe the request and any modification agreed upon with the requestor].*** A copy of the request and any relevant communication with the requester is attached for your reference.

Reminder: In accordance with EPA's FOIA Procedures, you should track and record the time spent searching for responsive records.

STEP 1: CONDUCT THE SEARCH

Please search the following locations for responsive records: [*The Action Office should select the appropriate locations from the list below.]*

- Lotus Notes mailboxes or calendars, other Lotus Notes databases*
- Enterprise Content Management System (ECMS)
- Local or shared computer drives (C:, F:, G:, etc.);
- SharePoint sites
- OneDrive
- Mobile devices (e.g., text messages and photographs)
- Voicemail
- External drives and discs
- Hard-copy files
- Other

* Please use the following key words in your Lotus Notes search or other non-Outlook electronic search:

- *[The Action Office should provide search terms here.]*

Attached for your reference are step-by-step instructions for conducting a search of *[Lotus Notes]/ [ECMS]/ [Other Electronic Files]. The Action Office should select and attach applicable instructions.*

STEP 2: CONFIRM THE SEARCH IS COMPLETE

When you have completed your search, please send an email, with the subject line: "Search Response for [FOIA Request Number]" to Action Office Point of Contact@epa.gov. In your email, including the following information:

- The number of records located each search location [If you did not locate any records, please note this in your email];
- The time spent searching for responsive records

STEP 3: TRANSFER SEARCH RESULTS FOR REVIEW

***[For Action Office Custodians]*:** Once you have completed your search of all non-Outlook records, in accordance with Step 1, above, and confirmed that your search is completed (Step 2), you will need to review those records for responsiveness. For both responsive and nonresponsive records, please collect the records in accordance with the instructions below. You may also be asked to review the responsive records for potential FOIA exemptions, once all responsive records are collected.

***[For Contributing Office Custodians]*:** Once you have completed your search of all non-Outlook records, in accordance with Step 1, above, and confirmed that your search is completed (Step 2), you will need to review those records for responsiveness. For both responsive and nonresponsive records, please collect the records in accordance with the instructions below. Contributing Office POC will review responsive records for potential redactions and may seek your input before providing both responsive records and nonresponsive records to the Action Office.

[For Lotus Notes]: As described in the attached Lotus Notes Search Instructions, all Lotus Notes records should be uploaded to the Lotus Notes Collection Database. You will receive an email with a hyperlink that allows you to access the database.

All other records: *[The Action Office Point of Contact (POC) should select from sample instructions provided below]*

For collection via Lotus Notes Collection Database: Please include all other electronic files in the Lotus Notes Collection Database as described in Step 6 of the Lotus Notes Search Instructions.

For collection via email: Consolidate all responsive records in a folder on your computer, labelled as "Your Name, FOIA Request Number, Folder # of #_Responsive" and all non-responsive records in a folder labelled "Your Name, FOIA Request Number, Folder # of #_Nonresponsive." You will send these folders via email to [For Action Office custodians: Action Office POC@epa.gov] or [For Contributing Office custodians: Contributing Office POC@epa.gov]. Due to limitations on file size, you may need to compress the folder(s) and/or send multiple emails. For each email, use the folder label as the subject line.

For collection via OneDrive: Action Office POC and/or Contributing Office POCs will need to create "responsive" and "unresponsive" folders for each custodian on OneDrive. Using the following link: [link to OneDrive folder], upload all responsive and unresponsive records into the corresponding folders.

For collection via thumb drive: Create a folder on the thumb drive titled "Your Name, FOIA Request Number" and separate subfolders for responsive and nonresponsive records. Upload all responsive records and nonresponsive records to corresponding subfolders and save on a thumb drive. Please deliver this drive to Action Office POC or Contributing Office POC.

Note: All hardcopy documents should be scanned into an electronic document and transferred to Action Office POC or Contributing Office POC in accordance with the instructions above.

Search Tracking Memo

This memo provides an example of how the Action Office may document the search plan and track the search process.

Action Office:
Point of Contact:

Contributing Offices or Regions:
Point(s) of Contact:

Requester:

FOIAonline Number(s):

Subject of Request:

Date Range:

Custodians:

Name	Office (If separated N/A)	Tasked (Date)	Completed (Date)

The following databases were searched:

Repository	Repository
□ Outlook	□ SharePoint Sites
□ Lotus Notes	□ OneDrive
□ ECMS	□ Mobile Devices
□ CMS	□ Voicemail
□ Local or shared computer drives	□ External Drives and Discs
□ Hard-copy files	□ Other:

Search Terms Used:

_____

_____

Total Number Responsive Records: _____

Instructions for Searching & Collecting Other Electronic Files

These instructions are for custodians who may be searching and collecting electronic files. If applicable, please include this as an attachment to your Search Instructions for custodians.

Using the search terms provided in the Search Instructions, search for responsive records located in the other computer drives to which you have access. This includes, but is not limited to, your C: drive and your F: drive on your EPA computer. Unless you are designated by the Action Office/ Contributing Office Point of Contact to search a shared drive, such as the G: drive, you should limit your search to those drives to which you have sole access.

Note: Computer drives cannot be collectively searched. For each search term, you will need to conduct a separate search within each drive that you have identified as containing potentially responsive records.

Below are detailed instructions that will guide you through the following steps:

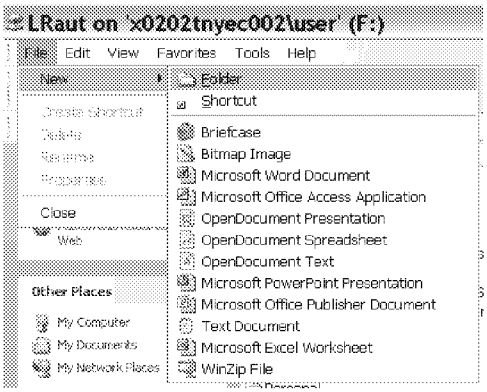
(1) Create search folders to collect search results and final collection folders for responsive and nonresponsive records
(2) Conduct term-specific searches of a single drive, and repeat for each drive
(3) Copy search results into a search folder
(4) Consolidate all search results into the final collection folders and search for duplicates
(5) Review files for responsiveness and sort into subfolders
(6) Optional: upload files to the Lotus Notes Collection Database.

Step 1. Create Search Folders

Before you begin your search for records, you will need to create folders to store the records from each search. You will then consolidate these folders into a "Final Collection" folders for responsive and nonresponsive records. To create and name the "Search Results" folders and "Final Collection" folder, do the following:

- ✓ Select the "**File Explorer**" located on your desktop or on the task bar at the bottom of your screen.

- ✓ Create a folder either by selecting *Home > New Folder* or *File > New > Folder* as shown below. [How to create the folder may vary depending on the computer system]



- ✓ Name the folder using a simple convention, such as "Search Results [insert # of search]." Do NOT use the case name or any search term in the folder name.

- ✓ Repeat this process for each search, and to create a "Final Collection" folder where you will copy all of the records from the search folders.

- ✓ In the "Final Collection" folder, create two subfolders, one for "responsive" records and the other for "nonresponsive" records.

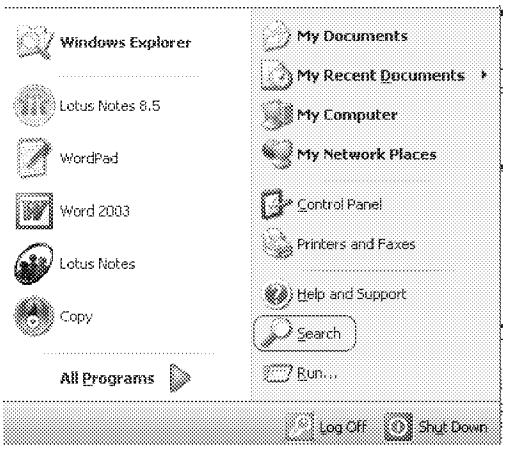
Step 2. Conduct the Search

Below are some tips to assist with your electronic document search. These tips would apply to searches for files located, for example, in Word, Excel, PowerPoint, WordPerfect, Adobe, and .tif documents, saved in your C:drive, F:drive, and G:drive (if applicable).

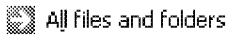
One place to start is with a Windows Search of an entire drive, such as the C:Drive. To perform such a search, follow the steps below.

Windows Explorer Search for Entire Drive

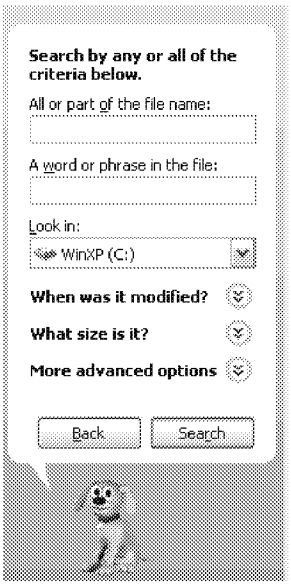
- ✓ From the "Start" menu, select "Search." *Start > Search*



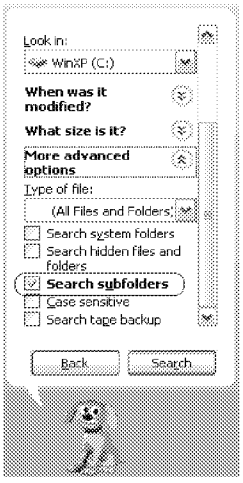
- ✓ Select "**Files and Folders**" (3rd option from the top) from the list at the left side of the screen.



- ✓ Identify the drive that you want to search (C:, F:, etc.).
- ✓ Type the search term in the box entitled "**A word or phrase in the file.**"



- ✓ Click on "**More Advanced Options**" at the bottom of the search menu. Make sure that only "**Search Subfolders**" is checked.
- ✓ Click "**Search**."



Depending upon the number of files, the search may take anywhere from 5 minutes to 40

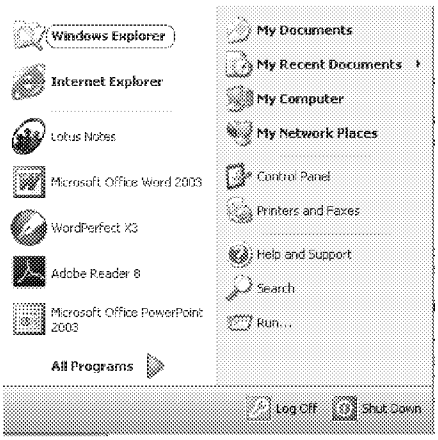
minutes. If the search completes successfully, the search companion will indicate that the search is done and that the search has found a specific number of documents.

- ✓ Record this number for later reference.

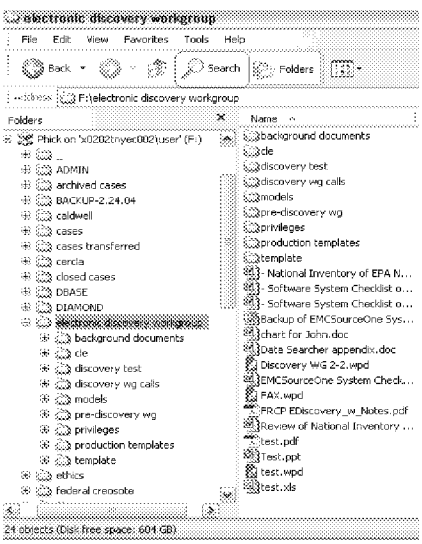
If when searching, the search unexpectedly stops running, the green "progress" bar stops moving, or the search gets stuck in one folder, consider searching each subfolder within a drive separately per the instructions below.

Windows Explorer Search for Subfolders within a Drive

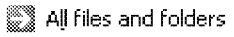
- ✓ Select *Start > Windows Explorer*



- ✓ Highlight the subfolder that you would like to search and click "Search."



- ✓ Select "**All Files and Folders**,"



- ✓ Type the search term into the box entitled "**A word or phrase in the file**"
- ✓ Select "**More Advanced Options**" and select *only* "**Search Subfolders**"
- ✓ Click "**Search**"

Depending upon the number of files, the search may take anywhere from 5 minutes to 40 minutes. If the search completes successfully, the search companion will indicate that the search is done and that the search has found a specific number of documents.

- ✓ Record this number for later reference.

If when searching, the search unexpectedly stops running, the green "progress" bar stops moving, or the search gets stuck in one folder, proceed with a manual search. The instructions below may assist you with performing that search.

Manual Search

In conducting a manual search, review those locations in the drive that are reasonably likely to contain responsive records.

Step 3. Copy Records to Search Folders

- ✓ As you complete each search, go to the Toolbar, click *Edit > Select All*. Right click and drop down to **Copy**.
- ✓ Go to the Search folder created to hold documents pulled from that specific search, open it, right click, and select "**Paste**" from the drop-down menu. The documents will appear in that folder.

Repeat Steps 1 through 3 for each of the drives to which you have sole access.

Step 4. Copy Records from the Search Results Folders to the "Final Collection" Folder

- ✓ Once you have completed your search, you should consolidate all documents collected in your Search Results folders into a Final Collection Folder. Open one Search Folder so that you can see all of the files inside the folder. Go to the Toolbar, click *Edit > Select All*. Right click and drop down to **Copy**.
- ✓ Go to the Final Collection folder created to hold all documents. Open the folder, right click, and select "**Paste**" from the drop-down menu.

- ✓ Repeat for all Search Folders until all files are located in the Final Collection Folder.

Because you will need to search each drive for every search term, it is likely that a file will respond to more than one search and that you will have the same file saved in more than one Search Folder. To eliminate duplicates in your Final Collection Folder, do the following:

- ✓ When you open the Final Collection folder and paste the highlighted documents into that folder, if the document is a duplicate of a document already in the folder you will get a dialog box "**Confirm File Replace**." Click "**No**" for each document for which such a box appears because it is a duplicate.

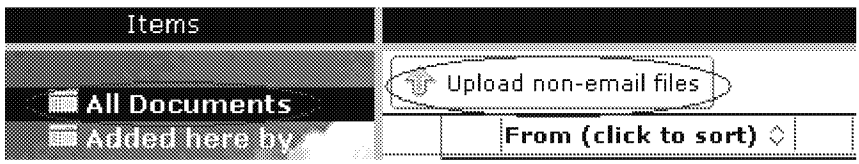
Step 5. Sort Responsive Records from Nonresponsive Records

Review documents in the Final Collection folder for each drive to make sure that they are actually responsive to the FOIA request and were not captured because of the presence of a search term used in another context. All responsive records should be separated into a "Responsive" Subfolder; all nonresponsive records should be separated into a "Nonresponsive" Subfolder.

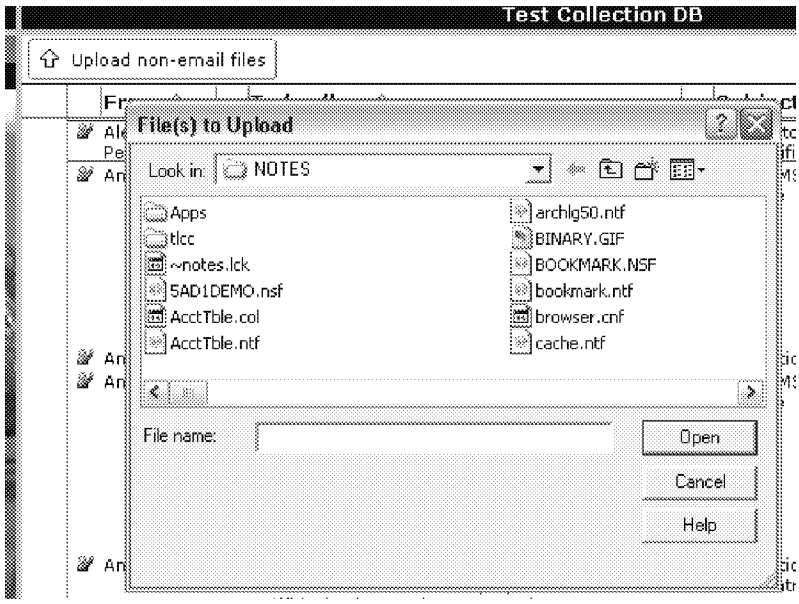
OPTIONAL: Step 6. Upload Documents to Collection Database

Please refer to the Search Instructions for guidance on how to transmit your files to the Action Office/Contributing Office Point of Contact. If the Search Instructions direct you to use the Lotus Collection Database to receive all electronic files, please follow the instructions below.

- ✓ Open the All Documents view of the Collection Database and click on the green button at the top of the view labeled "**Upload non-email files**".



A new box will appear from which you must select your file.



- ✓ Go to the location where you have saved the search results and open that folder.
- ✓ To select more than one file, simply hold down the <Shift> key and click on the first desired filename and then click on the last one. All the files between those will automatically be chosen.
- ✓ If the desired files are not sequential, press <Ctrl> and click on each filename that you wish to include.

<u>If you receive an execution security alert, click on the third option under the "What to Do" heading that says: Start Trusting the Signer to execute this action.</u>

After the files are uploaded you will get the following notice:

Please make note of the confirmed number of items since default setup for a collection database is a "ballot box" style collection where you cannot see any items in the collection, including your own. Refer to Step 3 of the Search Instructions for details on how to transfer your results to the appropriate Point of Contact.

Instructions for Searching & Collecting Lotus Notes Email

These are instructions for custodians who may be searching and collecting electronic Lotus Notes files. If applicable, please include this as an attachment to your Search Instructions for custodians. Note that any request seeking emails sent/received prior to February 2013 require a Lotus Notes search.

Note: These instructions are subject to change as of January 2018. OEI will provide additional guidance on searching Lotus Notes at that time.

To fulfill your responsibility under the FOIA, you will need to manually search your Lotus Notes Email for any potentially responsive records and collect these records in the Collection Database(s). Search terms have been provided to you in the Search Instructions, and you have received an email with the link(s) to the Collection Database(s). If you have not received the link(s) or misplaced the email that includes the link(s), please contact the Action Office/Contributing Office Point of Contact responsible for overseeing this FOIA request in your office.

Below are detailed instructions to guide you through the following steps:

(1) Index your Inbox emails
(2) Access the Collection Database(s)
(3) Create a folder to organize your search results by responsiveness
(4) Perform the search for emails
(5) Review the search for responsiveness and sort into subfolders
(6) Upload records to the Collection Database(s)
(7) Repeat Search, Review, and Collection for Archived emails
(8) Search and print ECMS (EZ Record) emails
(9) Delete indexes

Step 1. Index Your E-mail

Before you search for and collect emails, you *must* index your emails. Indexing your emails ensures that e-mail attachments are included in the search.

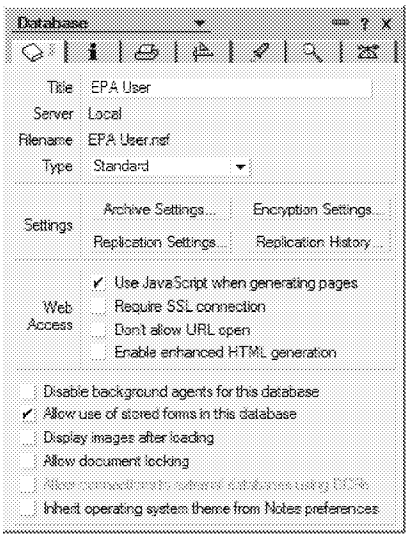
Indexing a large mail file will take several hours. (Most e-mail files are large!)

However, you can continue to use your email normally while the indexing process is running. You may also close your email and/or turn off your computer. This will not interrupt the indexing. Here's how it works:

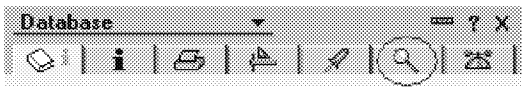
- ✓ Open your Lotus Notes Email Inbox

✓ On the menu bar in the upper left corner of your Notes screen select:

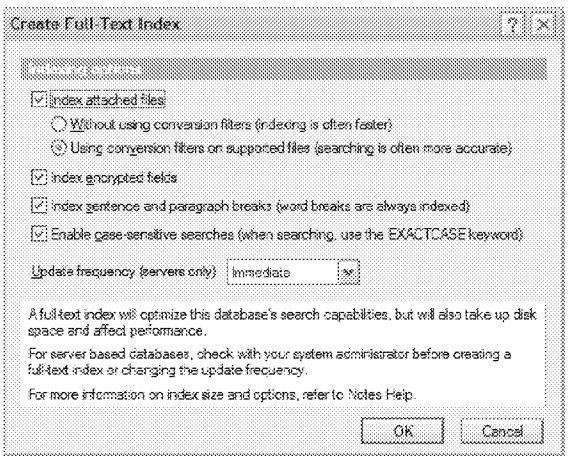
File > Application > Properties in Notes 8



✓ Select the tab with the magnifying glass icon.



✓ Click the **Create Index** button, make the selections below (or follow local instructions), and click **OK.**



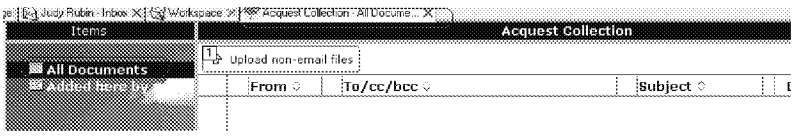
✓ Close the Database Properties box

Step 2. Open the Collection Database(s)

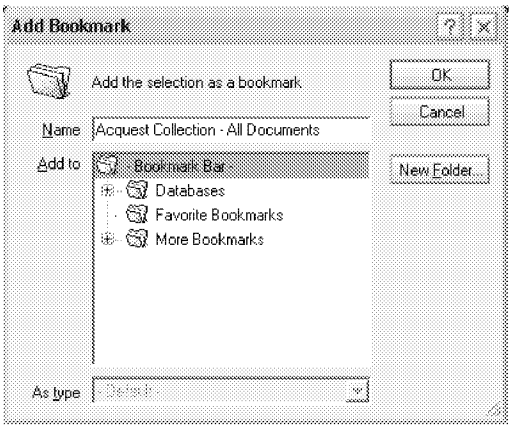
By this point, you should have received an email containing a link to the Collection Database. Follow the instructions below:

- ✓ Click on the link to open the database. For easy access to the database, you will create a bookmark by following the steps below.

- ✓ Right click on the database tab at the top of your screen



- ✓ Select **Create Bookmark.** The following screen will appear:



- ✓ Make sure that "Bookmark Bar" is highlighted and press **OK**. The "Tree" icon will now appear at the bottom of your bookmark bar on the left side of your email Inbox screen.

Both your Email Inbox and the Collection Database(s) are now open, so you can easily switch between your mailbox and the database(s) by selecting the desired tab.

Step 3. Create a "Search Results" Folder and Final Collection Folder

Before you upload emails to the Collection Database, you will transfer the emails from your inbox into a separate "search results" folder and into "responsive" and "nonresponsive" subfolders. To create these folders, do the following:

- ✓ In your Inbox select *Actions > Folder > Create Folder*

- ✓ Name the Folder "Search Results," and click **OK**

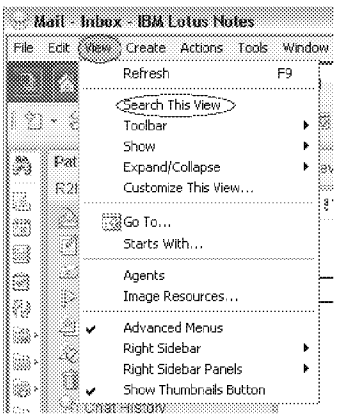
- ✓ Within the "Search Results" Folder, select *Actions > Folder > Create Folder* to create "Responsive" and "Nonresponsive" subfolders.

Step 4. Perform Search for Emails

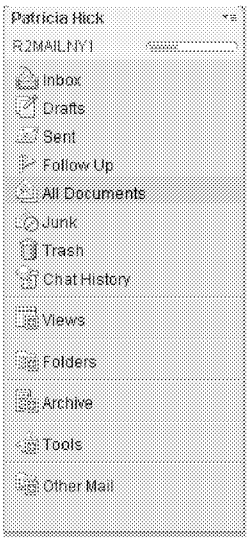
NOTE: Make sure that your e-mail is indexed prior to conducting the search. When indexing has completed, you should see a green ball ● and "Indexed" to the right of the search function.

If you do not see the search box:

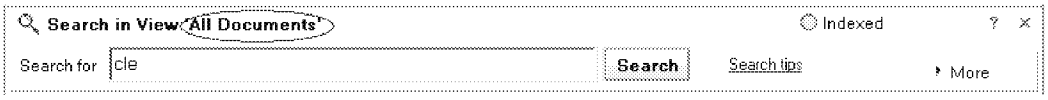
- ✓ Click *View > Search this View* from the menu bar at the top of your Notes screen.



- ✓ On the listings at the left side of your Inbox select *All Documents*. This will capture all potentially responsive documents, even if emails are stored in folders.

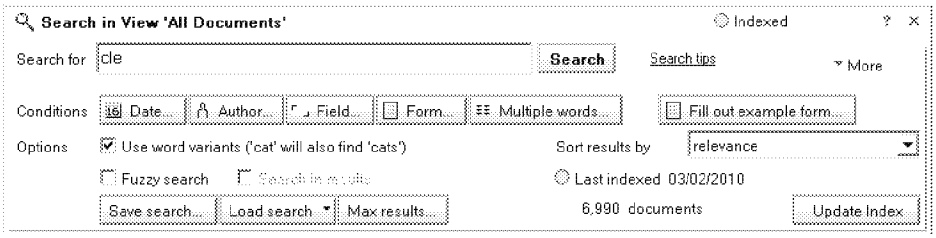


The "Search in View" will now indicate that the search will consider "All Documents."



✓ Click on **More** at the right side of the screen to reveal additional options.

The screen should now look like the snapshot below:



Clicking on the **Multiple words** box will allow you to choose up to eight words for your search.

✓ Enter the search terms provided in the Search Instructions and click **Search**. Your search results will appear below the Search window.

> Note: Lotus Notes has a search limit of 5,000 documents. If your search returns "5,000" documents, there are probably more potentially responsive emails that were not captured. You will need to do one of the following to address this issue:
>
> - Refine your research terms (talk with your POC prior to doing this)
> - Conduct multiple searches using fewer terms
> - Contact your local help desk to request removal of the search limit.

✓ Select *Edit > Select All*, then click *Actions > Folder > Move to Folder* and select the "Search Results" Folder and click the **Add** button.

Do NOT copy and paste search results into the folder. This creates duplicates and will overwhelm future searches.

Repeat these steps above until you have searched for all relevant search terms and have deposited potentially responsive emails in the "Search Results" folder.

✓ Click <Ctrl A> to reveal the number of documents collected in the "Search Results" folder in the lower left of the Notes screen. Tip: Record this number so that you can later verify that you have transferred all documents from your Notes to the Collection Database.

Note: The "Search Results" folder will only contain an unduplicated collection of documents. Even if an email responded to multiple searches, it will only appear once in the folder.

Step 5. Review Search Results for Responsiveness

Once you have completed the search, you should review emails and attachments to make sure that they are actually responsive to the FOIA request. It is possible for a search to collect documents that use a search term in context that is outside the scope of the request and are therefore not responsive.

- ✓ On the left side of your in-box in Notes select *Folders > Search Results*
- ✓ If an item is clearly not responsive, select the document and sort into "Nonresponsive" subfolder. Sort responsive records into the "Responsive" subfolder. You will upload all search results into the collection database, but indicate to the document reviewer which records are nonresponsive.

  Do NOT delete any items from folders. Either follow the instruction above or drag and drop documents between folders.

Step 6. Upload Responsive Search Results into Collection Database(s)

After you have reviewed the records in Lotus Notes, you will need to copy them into the Collection Database(s). Depending on the number of records, you may need to copy them in several batches (of no more than 100); copying and pasting a large batch may also take several minutes.

- ✓ Open the "Responsive" and "Nonresponsive" subfolders in the "Search Results" folder and select *Edit > Select All* from the menu bar (at the very top left of your Notes screen)
- ✓ Select *Edit > Copy* from the menu bar
- ✓ Select *Edit > Deselect All* from the menu bar. Do NOT skip this step.
- ✓ Open the Collection Database by selecting the bookmark that you created in Step 2.
- ✓ Open the "**All Documents**" folder
- ✓ Select *Edit > Paste* from the menu bar at the very top left of your Notes screen

Repeat these steps until you have copied all of your search results from your e-mail to the Collection Database.

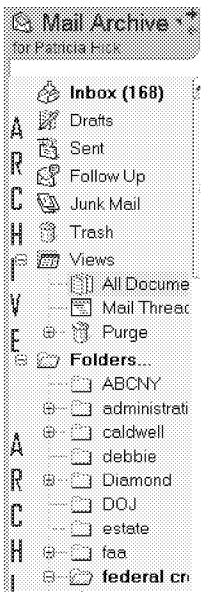
You will receive a dialog box confirming the number of items you pasted. This number should match the number of search results recorded in Step 4.

Step 7. Repeat Search, Review, and Collection for Archived Emails

The search described above will not capture emails that were archived and deleted from the inbox. You will need to repeat Steps 1-5 for emails that you have saved in your Lotus Notes Archive.

- ✓ Access your Archive from your Notes inbox by clicking *Archive > R2 etc. Archive*.
- ✓ Repeat Step 1 to index your Archive.
- ✓ Repeat Step 2 to open the Collection Database.
- ✓ Repeat Step 3 to create a "Search Results" folder.

Before you begin the search, make sure that you are in the All Documents view in Archive, as shown below:



- ✓ Follow the directions in Step 4 to conduct the search(es) using the search terms provided.
- ✓ Repeat Step 5 to review the search results, if applicable.
- ✓ Repeat Step 6 to upload records to the Collection Database(s)

Step 8. Search and Print EZ Record Emails

You will need to manually search ECMS for responsive emails that are not already captured in your Inbox and Archive search. Please visit the following site for further instructions: http://intranet.epa.gov/ecms/guides/search/

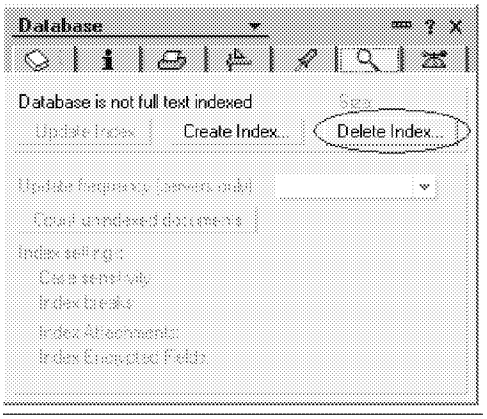
Any responsive emails should be printed and either provided to your FOIA coordinator in hard-copy form or scanned and uploaded/emailed in accordance with Search Instructions.

Step 9. Delete Indexes

Mailboxes that are indexed use substantially more space than an un-indexed mailbox, so you should remove the index once you have completed your search for records.

- ✓ Open your Lotus Notes Email Inbox
- ✓ On the menu bar in the upper left corner of your Notes screen select:

File > Application > Properties in Notes 8 > *Delete Index*



Your Lotus Notes Email Collection is now complete. Please notify the Action Office/Contributing Office Point of Contact.

Access to Absent and Separated Employee Records

This document provides additional guidance for the Action Office for custodians who have departed the agency or who are otherwise unable to conduct their own search.

Access to an Absent or Separated Employee's Email and Data

If a potential custodian of responsive records is on scheduled leave from the Action Office or a Contributing Office during the time of the search, the Action Office must ensure that the employee's records are searched in their absence. The Office of Environmental Information has a procedure on accessing the email and electronic records of separated or absent employees.

To request access, the Action Office processing the request must send an email, requesting access, to the custodian's manager (or former manager, in the case of separated personnel). If the manager approves the request, they then forward the request, via email, to their Information Resources Management Branch Chief (IRM BC) or Information Management Official (IMO). If the IRM BC or IMO approves the request, they forward the request to OEI FILE ACCESS REQUEST@epa.gov.

The email requesting access should include the information in the table below. The email subject line should include the nature of the request (i.e. Access to email). Please note that access to the OEI File Access Request mailbox includes federal and contractor email staff necessary to support the request.

Table must be completed by the Approver (IRM BC or IMO) and submitted in the Email to OEI FILE ACCESS. Email Subject must include the nature of the request (i.e. email access)	
Role	Name
Approver	John Doe (IMO, IRM BCs or their designee whose name has been provided as authorized approvers)
Mail Box Name Employee's full name Employee's LAN ID Telephone number	Doe.Jane@epa.gov Jane Any Doe Jdoe 111-222-3333
Person Receiving Access (Include email address)	Steven Jones (Jones.StevenT@epa.gov)

Access Needed for the Following Applications (as applicable):	o Legacy Notes o Office 365 (Including OneDrive) o Data Files (network drives, (F: and/or G:)(EZ Tech) o HQ Voice mail files o HQ VoIP Call logs o Mobile device data o Login Events (EZ Tech)

Managers may request access to an absent or separated employee's email files (Legacy Notes and Office 365), data files contained on OneDrive or network drives, voice mail files, call logs, and mobile devices by contacting the Office of Environmental Information (OEI). Once the manager has received access to these files, the manager is responsible for manually searching these files. OEI will not perform searches, nor is OEI responsible for data contents of any files. Moreover, OEI will not sign affidavits pertaining to the search or acquisition of files.

The table below depicts the type of information available and the time limit for requesting access to the related data.

Electronic Activities	**Content**	**Request Time Limit**
Legacy Notes	Emails, Calendars	Unlimited
Office 365	Email, Calendar, OneDrive	2/29/2013 - Forward
Data Files (network drives, (F: and/or G:) – EZ Tech Users	File and Folders	Unlimited
HQ Voice mail files	Voice mails	20 days
HQ VoIP Call logs	Outbound call/inbound calls	01/01/2014 - Forward
Mobile device data	Call Detail Reports (including text messages logs)	7 years
Login Events – EZ Tech Users	Login activities	30 days

As each access request is completed, the Action Office requesting the information will be notified and any instructions, if necessary, provided through the IRM BC or IMO. A list of IRM BCs and IMOs, by office, is available at the "SIO Corner" Sharepoint site, accessible through the EPA Intranet.

Quick Reference Guide: How to Save Text Messages

This document offers guidance on how to forward text messages from a mobile device to the EPA email system. These instructions are originally located at: http://intranet.epa.gov/mobiledevices/pdf/Instructions-Saving-Text-Messages.pdf.

EPA discourages the use of text messages for transmitting substantive (or non- transitory) federal records. (Wait, what is a "non- transitory" or "substantive" record?) If a substantive (or non-transitory) text message is sent or received on your government-issued mobile device, it must be saved into an EPA-approved records management system. If you follow the steps below, you can forward the text message into the EPA email system and then later save it as a record using EZ Email Records or another approved recordkeeping system. When forwarding the text message from the mobile device to the EPA email system, you must include contextual information such as the time, date, subject, and sender/recipient of the message. Please follow the instructions below to manage text messages that are substantive (or non- transitory) records.

How to Forward Text Messages to Email from an iPhone

1. Tap the "***Messages***" icon on the device.
2. Find the text message conversation that you need to save as a record.
3. Tap and hold one of the text messages in the conversation.
4. Tap the "***More***" option that appears above the text message.
5. Put a check mark in the circle beside any or all of the text messages that you want to save as records.
6. Tap the blue arrow icon in the lower right corner of the screen.
7. Type your EPA email address in the "***To***" field.
8. After the text message, enter contextual information about the message including: to, from, date, time, and a relevant subject, then tap "Send." For example, add "(To: Susan Employee, From John Worker, Date: 01.01.15, Time: 6:35 PM, Subject: Project Y)." Press ***"Send".***
9. After receiving the email containing the text message, follow the EZ Email Records process in Outlook to save the email as a record. After following these instructions, you may also notice that a copy of the message containing the contextual information created in step 8, appears in your list of messages in the Messages app on your phone.

Note: If you have problems forwarding text messages to email using the above instructions, please try the below options, starting with Option 1, below.

Option 1:

1. Tap the Settings App > Messages > Send & Receive
2. If your email address is listed with a checkmark next to it, tap on it to uncheck.
3. Exit out of Settings and try to forward a text message to your email. If you don't have an email listed or it still doesn't work, try Option 2.
   **Be sure to check your Junk Email folder to ensure it did not route there.*

Option 2:

1. Tap the Settings App > iTunes & App Store > Apple ID > Sign Out
2. Re-enter your Apple ID (work email address) and Apple ID password.
3. Exit out of Settings and try to forward a text message to your email.

How to Forward Text Messages to Email from a Windows Phone

1. On ***Start***, tap "***Messaging***", then tap the thread that contains the text message you want to save as a record.
2. Open the text message, press and hold the message to be forwarded, then click "***Forward***".
3. Type your EPA email address in the "***To***" field.
4. After the text message, enter contextual information about the message including: to, from, date, time, and a relevant subject, then tap . For example, add "(To: Susan Employee, From John Worker, Date: 01.01.15, Time: 6:35 PM, Subject: Project Y)."
5. After receiving the email containing the text message, follow the EZ Email Records process in Outlook to save the email as a record.

Note: This approach for saving text messages on a Windows phone can only be used for forwarding individual text messages. If multiple messages need to be stored as records, forward each message and the related contextual information to EPA's email system individually.

Technical Assistance

If you have questions about managing records on your mobile or portable devices, contact the Records Help Desk, and refer to the Frequent Questions about Mobile and Portable Devices, and Records for more information.

FOIA Search Guide: Best Practices

This document offers simple, take-away tips for conducting a search.

As you oversee the search for records responsive to a FOIA request, keep in mind the following recommended best practices:

- ✓ Do NOT conduct a search for an improper request.
  Before you plan your search, make sure that the request "reasonably describes the records sought." If the request is overly broad, poses questions, or seeks records not yet in existence, contact the requester to modify the request.
- ✓ Document the process from start to finish.
  Any external communications that you have with the requester, as well as any notable intra-agency communication pertaining to the request, should be memorialized in writing. Documented changes to the request and any correspondence that you have with the requester should be uploaded to FOIAonline.
- ✓ Keep an eye on the clock.
  Unless you can identify "unusual circumstances," you will have 20 working-days to conduct a reasonable search and provide the requester with responsive records. Remember, you can stop the clock ***once*** to seek clarification from the requester, but remember to re-start the clock once the request is clarified and keep track of the amended due date on FOIAonline.
- ✓ Planning your search is essential.
  Before you begin your search, you should compile a search plan that identifies the relevant offices, repositories, and custodians. Do not forget about absent or former employees!
- ✓ Maximize the Centralized Search.
  OEI's Centralized Search will only capture records in EPA's Microsoft Office 365 system, including Outlook email/calendar and Skype/Lync Chats. As soon as you distribute the Search Instructions, remind custodians to transfer any potentially responsive records from, for example, mobile devices (e.g. text messages and photos) to Outlook Email so that they will be captured in the centralized search.
- ✓ Remember to Conduct a Defensible Search.
  Remind Custodians to search all locations where they are reasonably likely to find responsive records. This may include lesser-used locations, including CMS and external drives.
- ✓ Prepare for Collection.
  Once custodians complete their search, you will need to collect and review records. Consider using a cloud-based collection option, such as OneDrive, for the collection of documents that are not sourced from Lotus Notes and not captured in OEI's centralized search.

✓ When in Doubt, Ask.

The General Law Office's Information Law Practice Group, the FOIA Expert Assistance Team within the Office of General Counsel, the Office of Regional Counsel, if the matter concerns a Regional FOIA, and the National FOIA Program Office are available to assist you.

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Proprietary Business Information (PBI) Case Tracking Standard Operating Procedures (SOP)

PROPRIETARY BUSINESS INFORMATION CASE TRACKING

A. Purpose:

a. Ensure proper tracking in FOIA Online of all Freedom of Information Act (FOIA) requests for records containing PBI.

B. Procedures:

Headquarters Request where program withholds information under FOIA Ex. 4:

1. Include the following language in the initial denial letter:

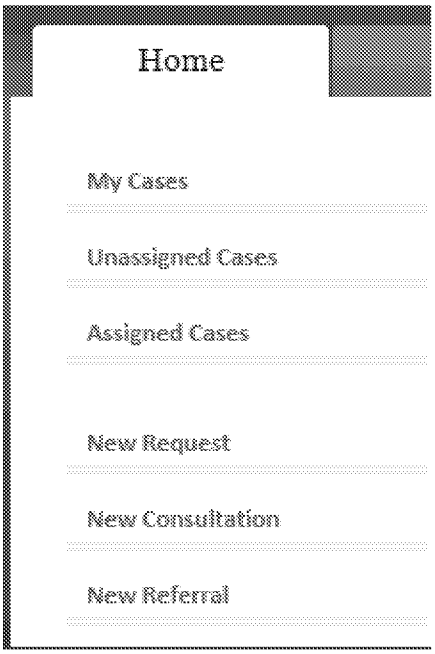
> The information withheld under Exemption 4 will be sent to the appropriate legal office to issue a final confidentiality determination. The appropriate legal office will contact you to confirm your continued interest in receiving a final confidentiality determination and provide you with a fee estimate, where appropriate. Therefore, you do not need to appeal the information withheld pursuant to Exemption 4. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholding, you may appeal this response… [FOLLOWED BY APPEAL LANGUAGE]

2. Notify the National FOIA Office to create a PBI tracking number in FOIAonline:

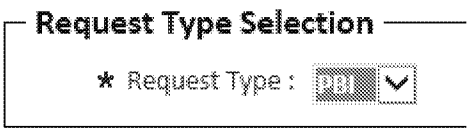
a. Email FOIA_HQ@epa.gov
b. Email Template:
Subject: PBI Case Tracking number for **[EPA-HQ-20XX-XXXXXX]**
Please create a PBI case tracking number for the following initial FOIA request:
Initial Request Number: **[EPA-HQ-20XX-XXXXXX]**
Requester Name: **[NAME]**
Requester Address: **[ADDRESS]**
Requester Email Address: **[EMAIL]**

3. National FOIA Office creates PBI case and assigns to OGC/GLO:

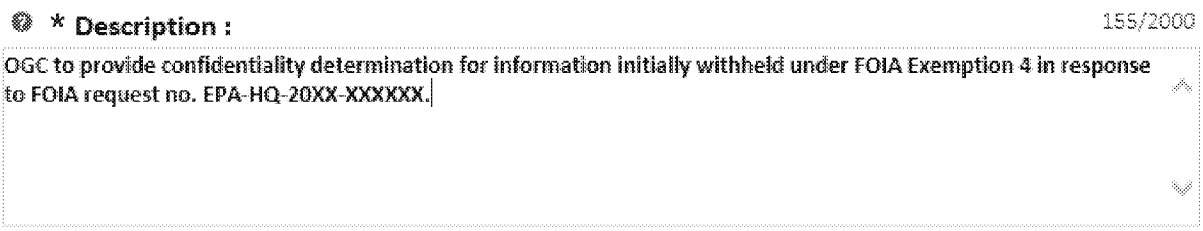
a. Select "New Request"



b. Agency and Submitted Date is pre-populated -> Select "Headquarters" as Sub-Agency
c. Select "PBI" as Request Type:



d. Fill in contact information as provided by program
e. Processing Fees information pre-populated
f. Fill in Description (OGC to provide confidentiality determination for information initially withheld under FOIA Exemption 4 in response to FOIA request no. EPA-HQ-20XX-XXXXXX.):



g. Select Preview -> Submit

4. National FOIA Office assigns PBI Case to OGC

5. ILPG Appeal Team Leader or Assistant General Counsel will assign PBI Case to ILPG Attorney

6. ILPG Attorney is responsible for:

a. Contacting requester to:

1. Confirm continued interest in receiving a final confidentiality determination;
2. Closing out PBI request if requester fails to confirm interest or is not interested in receiving a final confidentiality determination;
3. Providing an estimate of fees where appropriate;
4. Closing our PBI request if requester fails to assure payment of fees;
5. Notifying program office of need to request substantiation from affected business(es) and provide program recommendation where appropriate;
6. Issue final confidentiality determination;
7. Provide updated response/records to requester;
8. Close our PBI appeal.

Regional Request where regional program withholds information under FOIA Ex. 4:

1. Include Initial Denial language in decision:

   The information withheld under Exemption 4 will be sent to the appropriate legal office to issue a final confidentiality determination. The appropriate legal office will contact you to confirm your continued interest in receiving a final confidentiality determination and provide you with a fee estimate, where appropriate. Therefore, you do not need to appeal the information withheld pursuant to Exemption 4. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholding, you may appeal this response… [FOLLOWED BY APPEAL LANGUAGE]

2. Notify the Region FOIA Coordinator to create a PBI tracking number in FOIAonline:

   a. Email FOIA_HQ@epa.gov

   b. Email Template:

   Subject: PBI Case Tracking number for **[EPA-RX-20XX-XXXXXX]**

   Please create a PBI case tracking number for the following initial FOIA request:

   Initial Request Number: **[EPA-RX-20XX-XXXXXX]**

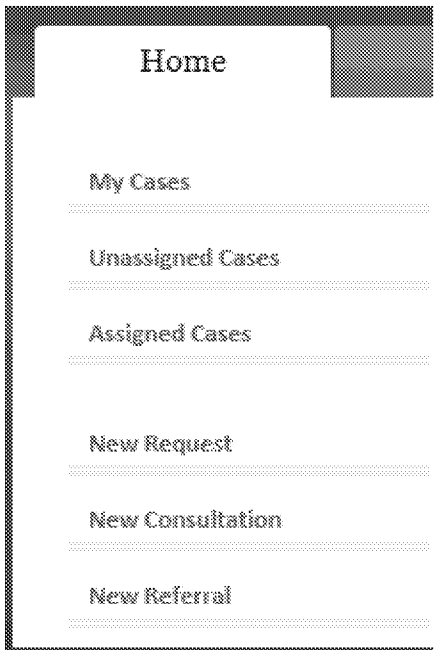
   Requester Name: **[NAME]**

   Requester Address: **[ADDRESS]**

Requester Email Address: **[EMAIL]**

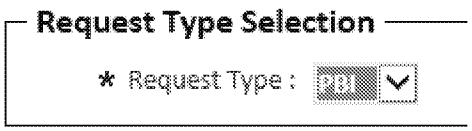
3. Region FOIA Coordinator creates PBI case and assigns to appropriate ORC contact

   a. Select "New Request"



   b. Agency and Submitted Date is pre-populated -> Select appropriate Region as Sub-Agency

   c. Select "PBI" as Request Type



   d. Fill in contact information as provided by program

   e. Processing Fees information pre-populated

f. Fill in Description (ORC to provide confidentiality determination for information initially withheld under FOIA Exemption 4 in response to FOIA request no. EPA-RX-20XX-XXXXXX.)

*** Description :** 155/2000

OGC to provide confidentiality determination for information initially withheld under FOIA Exemption 4 in response to FOIA request no. EPA-HQ-20XX-XXXXXX.

g. Select Preview -> Submit

Substantiation Request Letter Sample A- Generic CBI Substantiation, FOIA

Approved OMB 2020-0003
Approval expires 05-31-2020

Request for Substantiation in Response to a Request Under the Freedom of Information Act

By Certified U.S. Mail; Return Receipt Requested

(*Name, title, and address of the [designated] representative of the affected business*)

Re: Freedom of Information Act (FOIA) Request [INSERT FOIA #]

Dear [*Addressee*]:

The U.S. Environmental Protection Agency ("EPA" or "Agency") has received a request under the FOIA for certain records [*if submitted by the business whose information it is:* that you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* in EPA's possession] pertaining to [*a detailed description of the information or specific list of documents that is/are the subject of the advance or final confidentiality determination*]. [*If information has been claimed as CBI:* You have claimed (all *or* part) of this information as confidential business information ("CBI").] [*If no claim has been made:* In accordance with applicable EPA regulations, 40 C.F.R. Part 2, Subpart B, the EPA has determined that you might be expected to assert a claim that some or all of [*if submitted by the business whose information it is:* the information you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* this information in EPA's possession] is confidential business information ("CBI").] Under the EPA regulations at 40 C.F.R. Part 2, Subpart B, the FOIA request has been initially denied to afford you an opportunity to provide comments to [*If no claim has been made:* claim this information as CBI and] substantiate your claim(s) as described below.

The purpose of this letter is to notify you that the EPA (*appropriate legal office*) will be making a(n) (*advance* or *final*) confidentiality determination concerning the information you have claimed as CBI. If you feel that some or all of the information is entitled to confidential treatment, you must make the showings below with specific reference to those portions of the information you consider confidential.

Please be specific by page (including Bates Stamp, if applicable), paragraph, and sentence when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that

you claim to be CBI. Please note that if a page, document, group, or class of documents claimed by you to be CBI contains a significant amount of information which (*appropriate legal office*) determines is not CBI, your CBI claim regarding that page, document, group, or class of documents may be denied. Any information not specifically identified as subject to a confidentiality claim and substantiated as such in your response to this letter may be disclosed to the requester without further notice to you.

For each item or class of information that you continue to claim as CBI, please answer the following questions, giving as much detail as possible. Your comments in response to these questions will be used by the EPA to determine whether the information has been shown to be entitled to confidential treatment:

1. For what period of time do you request that the information be maintained as confidential, e.g., until a certain date, until the occurrence of a specified event, or permanently? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

2. Information submitted to the EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question #1?

3. What measures have you taken to protect the information claimed as confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information be considered confidential?

4. Is the information contained in any publicly available material such as the Internet, publicly available databases, promotional publications, annual reports, or articles? If so, specify which.

5. Is there any means by which a member of the public could obtain access to the information? Is the information of a kind that you would customarily not release to the public?

6. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

7. For each item or category of information claimed as confidential, *explain with specificity* why release of the information is likely to cause substantial harm to your competitive position. Explain the specific nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

8. Do you assert that the information is submitted on a voluntary or a mandatory basis? Please explain the reason for your assertion. If you assert that the information is

voluntarily submitted information, please explain whether the information is the kind that would customarily not be released to the public.

9. Whether you assert the information as voluntary or involuntary, please address why disclosure of the information would tend to lessen the availability to the EPA of similar information in the future.

10. If you believe any information to be (a) trade secret (s), please so state and explain the reason for your belief. Please attach copies of those pages containing such information with brackets around the text that you claim to be (a) trade secret (s).

11. Explain any other issue you deem relevant (including, if pertinent, reasons why you believe that the information you claim to be CBI is not emission data or effluent data).

[*For contract-related CBI:* Enclosed is the EPA Class Determination 1-95 entitled, Confidentiality *of Certain Business Information Submitted by Contractors and Prospective Contractors,* which addresses the treatment of different types of information related to contracts. You may consider reviewing Class Determination 1-95 as you develop your response.]

[*If applicable to another EPA class determination*: Enclosed is the EPA Class Determination [*class determination number*] entitled, [*name of the class determination*], which addresses the treatment of [*description of class determination*]. You may consider reviewing Class Determination [#] as you develop your response.]

Please note that *you bear the burden of substantiating your confidentiality and trade secret claim(s).* Generalized or conclusory statements will be given little or no weight in EPA's determination on the confidentiality of the information you claim to be CBI.

Your comments must be postmarked or hand delivered to this office, or emailed to [*email address*], by the 15th working day after your receipt of this letter. You may seek an extension of time to submit your comments to this office, but the request must be made before the end of the 15-day period. Except in extraordinary circumstances, no extension will be approved without the consent of the FOIA requester. Failure to submit your comments within that time will be regarded as a waiver of your confidentiality claim or claims, and the EPA may release the information.

If you wish to claim any information that you provide in your response to this letter to itself be confidential, you must mark the response "**CONFIDENTIAL**" or with a similar designation, and must bracket all text in the response that you so claim. Information so designated will be disclosed by the EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2, Subpart B. If you fail to claim the information provided in your response as confidential, it may be made available to the public without further notice to you.

Should you have any questions concerning this matter, please call me at [*telephone number*].

Sincerely,

[NAME]
[Title]
[Office Name and Address]

[Enclosure]

Substantiation Request Letter Sample B-Generic CBI Substantiation, Non-FOIA

Approved OMB 2020-0003
Approval expires 05-31-2020

Request for Substantiation from an Affected Business

By Certified U.S. Mail; Return Receipt Requested

[*Name, title, and address of the [designated] representative of the affected business*]

Re: _____

Dear [*Addressee*]:

The U.S. Environmental Protection Agency ("EPA" or "Agency") is seeking to determine the entitlement to confidentiality of [*description of the information that is the subject of the advance or final confidentiality determination*] [*if submitted by the business whose information it is:* that you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* in EPA's possession.] [*If information has been claimed as CBI:* You have claimed (all *or* part) of this information as confidential business information ("CBI").] [*If no claim has been made:* In accordance with applicable EPA regulations, 40 C.F.R. Part 2, Subpart B, the EPA has determined that you might be expected to assert a claim that some or all of [*if submitted by the business whose information it is:* the information you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* this information in EPA's possession] is confidential business information ("CBI").]

The purpose of this letter is to notify you that the EPA [*appropriate legal office*] will be making a(n) [advance *or* final] confidentiality determination concerning the information you have claimed as CBI. If you feel that some or all of the information is entitled to confidential treatment, you must make the showings below with specific reference to those portions of the information you consider confidential.

Please be specific by page (including Bates Stamp, if applicable), paragraph, and sentence when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that you claim to be CBI. Please note that if a page, document, group or class of documents claimed by you to be CBI contains a significant amount of information which our [*appropriate legal office*] determines is not CBI, your CBI claim regarding that page, document, group, or class of documents may be denied. Any information not specifically identified as subject to a confidentiality claim and substantiated as such in your response to this letter may be disclosed without further notice to you.

For each item or class of information that you continue to claim as CBI, please answer the following questions, giving as much detail as possible. Your comments in response to these questions will be used by the EPA to determine whether the information has been shown to be entitled to confidential treatment:

1. For what period of time do you request that the information be maintained as confidential, e.g., until a certain date, until the occurrence of a specified event, or permanently? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

2. Information submitted to the EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question #1?

3. What measures have you taken to protect the information claimed as confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information be considered confidential?

4. Is the information contained in any publicly available material such as the Internet, publicly available databases, promotional publications, annual reports, or articles? If so, specify which.

5. Is there any means by which a member of the public could obtain access to the information? Is the information of a kind that you would customarily not release to the public?

6. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

7. For each item or category of information claimed as confidential, *explain with specificity* why release of the information is likely to cause substantial harm to your competitive position. Explain the specific nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

8. Do you assert that the information is submitted on a voluntary or a mandatory basis? Please explain the reason for your assertion. If you assert that the information is voluntarily submitted information, please explain whether the information is the kind that would customarily not be released to the public.

9. Whether you assert the information as voluntary or involuntary, please address why disclosure of the information would tend to lessen the availability to the EPA of similar information in the future.

10. If you believe any information to be (a) trade secret(s), please so state and explain the reason for your belief. Please attach copies of those pages containing such information with brackets around the text that you claim to be (a) trade secret(s).

11. Explain any other issue you deem relevant (including, if pertinent, reasons why you believe that the information you claim to be CBI is not emission data or effluent data).

[*For contract-related CBI:* Enclosed is the EPA Class Determination 1-95 entitled, Confidentiality *of Certain Business Information Submitted by Contractors and Prospective Contractors,* which addresses the treatment of different types of information related to contracts.

You may consider reviewing Class Determination 1-95 as you develop your response.]

[*If applicable to another EPA class determination*: Enclosed is the EPA Class Determination [*class determination number*] entitled, [*name of the class determination*], which addresses the treatment of [*description of class determination*]. You may consider reviewing Class Determination [#] as you develop your response.]

Please note that *you bear the burden of substantiating your confidentiality and trade secret claim(s).* Generalized or conclusory statements will be given little or no weight in EPA's determination on the confidentiality of the information you claim to be CBI.

Your comments must be postmarked or hand delivered to this office, or emailed to [*email address*], by the 15th working day after your receipt of this letter. You may seek an extension of time to submit your comments to this office, but the request must be made before the end of the 15-day period. Except in extraordinary circumstances, no extension will be approved. Failure to submit your comments within that time will be regarded as a waiver of your confidentiality claim or claims, and the EPA may release the information.

If you wish to claim any information that you provide in your response to this letter to itself be confidential, you must mark the response "**CONFIDENTIAL**" or with a similar designation, and must bracket all text in the response that you so claim. Information so designated will be disclosed by the EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2, Subpart B. If you fail to claim the information provided in your response as confidential, it may be made available to the public without further notice to you.

Should you have any questions concerning this matter, please call me at [*telephone number*].

Sincerely,

[NAME]
[TITLE]
[Office Name and Address]

[Enclosure]

CBI Substantiation Request Letter Sample C- FIFRA, FOIA

OMB 2020-0003
Expires: 05-31-2020
Inert Ingredients

Request for Substantiation from an Affected Business

By Certified U.S. Mail; Return Receipt Requested

[*Name, title, and address of the [designated] representative of the affected business*]

RE: Confidential Business Information Determination

Dear [*Addressee*]:

The U.S. Environmental Protection Agency ("EPA") Office of Pesticide Programs has received a request under the FOIA for certain records [*if submitted by the business whose information it is:* that you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* in EPA's possession] pertaining to [*a detailed description of the information or specific list of documents that is/are the subject of the advance or final confidentiality determination*]. [*If information has been claimed as CBI:* You have claimed (all *or* part) of this information as confidential business information ("CBI").] [*If no claim has been made:* In accordance with applicable EPA regulations, 40 C.F.R. Part 2, Subpart B, the EPA has determined that you might be expected to assert a claim that some or all of [*if submitted by the business whose information it is:* the information you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* this information in EPA's possession] is confidential business information ("CBI").] Under the EPA regulations at 40 C.F.R. Part 2, Subpart B, the FOIA request has been initially denied to afford you an opportunity to provide comments to [*If no claim has been made:* claim this information as CBI and] substantiate your claim(s) as described below.

The purpose of this letter is to notify you that the EPA Office of General Counsel will be making a(n) [advance *or* final] confidentiality determination concerning the information you have claimed as CBI. If you feel that some or all of the information is entitled to confidential treatment, you must make the showings below with specific reference to those portions of the information you consider confidential.

Please be specific by page (including Bates Stamp, if applicable), paragraph, and sentence when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that

you claim to be CBI. Please note that if a page, document, group, or class of documents claimed by you to be CBI contains a significant amount of information which the Office of General Counsel determines is not CBI, your CBI claim regarding that page, document, group, or class of documents may be denied. Any information not specifically identified as subject to a confidentiality claim and substantiated as such in your response to this letter may be disclosed to the requester without further notice to you.

1. For what period of time do you request that the information be maintained as confidential? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

2. Information submitted to EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question #1?

3. What measures have you taken to protect the information claimed as confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information still be considered confidential?

4. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

5. Is the information contained in any publicly available material such as promotional publications, annual reports, articles, etc.? Is there any means by which a member of the public could obtain access to the information?

6. For each category of information claimed as confidential, discuss with specificity why release of the information is likely to cause substantial harm to your competitive position. Explain the nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

7. Do you assert that the information is "voluntarily submitted" as defined at 40 C.F.R. § 2.201(i)? If so, explain why and how disclosure would tend to lessen EP A's ability to obtain similar information in the future.

8. Any other issue you deem relevant.

Please note that you bear the burden of substantiating your confidentiality and trade secret claim(s) pursuant to 40 CFR § 2.208(e). Generalize or conclusory allegations will be given little or no weight in EPA's determination on the confidentiality of information you claim to be CBI.

If you wish to claim any information that you provide in your response to this letter to itself be confidential, you must mark the response "**CONFIDENTIAL**" or with a similar

designation, and must bracket all text in the response that you so claim. Information so designated will be disclosed by the EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2, Subpart B. If you fail to claim the information provided in your response as confidential, it may be made available to the public without further notice to you.

Your reply can be mailed to the following address:

Or your reply can be delivered to the following address:

Your comments must be postmarked or hand-delivered by the 15th working day after your receipt of this letter. If you intend to submit timely comments, please notify by phone at [TELEPHONE NUMBER], by email at or by mail at the address above. Failure to submit timely comments will be regarded as a waiver of your confidentiality claim and EPA will release the information. You may request an extension of the 15-day deadline. Except in extraordinary circumstances, no extension will be granted without the permission of the requestor.

Should you have any questions in this matter, please contact [CONTACT NAME].

Sincerely,

[NAME]
[TITLE]

Enclosures

CBI Substantiation Request Letter Sample D- FIFRA, Non-FOIA

OMB 2020-0003
Expires 05-31-2020

Request for Substantiation from an Affected Business

By Certified U.S. Mail; Return Receipt Requested

[*Name, title, and address of the [designated] representative of the affected business*]

Re: Freedom of Information Act Request [INSERT NUMBER]

Dear [*Addressee*]:

The U.S. Environmental Protection Agency ("EPA") Office of Pesticide Programs is seeking to determine the entitlement to confidentiality of [*description of the information that is the subject of the advance or final confidentiality determination*] [*if submitted by the business whose information it is:* that you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* in EPA's possession.] [*If information has been claimed as CBI:* You have claimed (all *or* part) of this information as confidential business information ("CBI").] [*If no claim has been made:* In accordance with applicable EPA regulations, 40 C.F.R. Part 2, Subpart B, the EPA has determined that you might be expected to assert a claim that some or all of [*if submitted by the business whose information it is:* the information you submitted to the EPA] [*if submitted by an entity other than the business whose information it is:* this information in EPA's possession] is confidential business information ("CBI").]

The purpose of this letter is to notify you that the EPA Office of General Counsel will be making a(n) [advance *or* final] confidentiality determination concerning the information you have claimed as CBI. If you feel that some or all of the information is entitled to confidential treatment, you must make the showings below with specific reference to those portions of the information you consider confidential.

Please be specific by page (including Bates Stamp, if applicable), paragraph, and sentence when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that you claim to be CBI. Please note that if a page, document, group, or class of documents claimed by you to be CBI contains a significant amount of information which the Office of General Counsel determines is not CBI, your CBI claim regarding that page, document, group, or class of documents may be denied. Any information not specifically identified as subject to a

confidentiality claim and substantiated as such in your response to this letter may be disclosed to the requester without further notice to you.

Questions 1-7 must be answered with respect to any confidentiality claims pertaining to the enclosed product chemistry information.

1. What value can your competitors derive from knowing the identity, percent by weight, certified limits, or parent process of each impurity? Is this impurity unique to your manufacturing process? Why would your competitors find this impurity preferable over whatever impurity results from their equivalent process?

2. Does published analytical methodology exist that could identify and quantify this impurity? If so, why do you believe that your competitors have not already performed such analysis?

3. What value can your competitors derive from knowing the description of materials used to produce the product, the description of the production process, or the preliminary production analysis? Why would your competitors find these processes preferable over their equivalent processes?

Questions 4-7 must be answered with respect to any confidentiality claims pertaining to the inert ingredients. Each question must be answered separately with respect to each inert ingredient:

4. What is the value that this inert ingredient brings to the product formulation? What characteristics of this ingredient are unique such that competitors might prefer it over whatever ingredients perform the equivalent function in their formulations? Is the use of this ingredient limited to your product, or does it have broader applications?

5. Why is it unlikely that your competitors have not already discovered the value of this ingredient? Are you aware of the use of this ingredient as an inert by your competitors?

6. To your knowledge, has the use of this inert ingredient in a pesticide been disclosed in a patent? If so, how would disclosure of the identity of the ingredient assist your competitors beyond what is already available through a patent?
7. Can the identity of this inert ingredient be determined by product sample analysis? If so, why do you believe that your competitors have not already performed such analysis?

Question 8 must be answered with respect to any confidentiality claims pertaining to the enclosed records:

8. For each category of information claimed as confidential, discuss with specificity why release of the information is likely to cause substantial harm to your competitive position. Explain the nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

Questions 9 through 15 must be answered for each type of information that you claimed as confidential:

9. For what period of time do you request that the information be maintained as confidential? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

10. Information submitted to EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question number 9?

11. What measures have you taken to protect the information? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose it further? If so, why should it still be considered confidential?

12. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

13. Is the presence of this information disclosed in any publicly available material such as Material Safety Data Sheets, promotional publications, annual reports, articles, etc.? Is there any means by which a member of the public could obtain access to the information?

14. Do you assert that the information is "voluntarily submitted" as defined at 40 CFR § 2.201(i)? If so, explain why, and how disclosure would tend to lessen EPA's ability to obtain similar information in the future.

15. Any other issue you deem relevant.

Please note that you bear the burden of substantiating your confidentiality and trade secret claim(s) pursuant to 40 CFR § 2.208(e). Generalize or conclusory allegations will be given little or no weight in EPA's determination on the confidentiality of information you claim to be CBI.

If you wish to claim any information that you provide in your response to this letter to itself be confidential, you must mark the response "**CONFIDENTIAL**" or with a similar designation, and must bracket all text in the response that you so claim. Information so designated will be disclosed by the EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2, Subpart B. If you fail to claim the information provided in your response as confidential, it may be made available to the public without further notice to you.

Be advised that information described by Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") section 10(d)(l)(A), (B), and (C) is not automatically entitled to confidential treatment. Disclosure of such information would only be prohibited, by FIFRA section (b), if the information is eligible for confidential treatment as described by 40 CFR 2.208.

Your reply can be mailed to the following address:

Or your reply can be delivered to my attention at the following address:

Your comments must be postmarked or hand-delivered by the 15th working day after your receipt of this letter. If you intend to submit timely comments, please notify by phone: [TELEPHONE], by email: [EMAIL ADDRESS], or by mail at the address above. Failure to submit timely comments will be regarded as a waiver of your confidentiality claim and EPA will release the information. You may request an extension of the 15-day deadline. Except in extraordinary circumstances, no extension will be granted without the permission of the requester.

Should you have any questions in this matter, please contact [CONTACT PERSON].

Sincerely,

[NAME]
[TITLE]

Enclosures

CBI Substantiation Request Letter Sample E- TSCA

OMB 2020-0003
Approval expires 05-31-2020

By Certified U.S. Mail; Return Receipt Requested

MAY CONTAIN CONFIDENTIAL BUSINESS INFORMATION

[*Technical Contact Name, title, Company, and Address*]

Re: Notice of Review and Request for Substantiation of Confidential Business Information Claim(s)

Document Type:
Document Identifying Number:
Date of Submission:
Type of claim(s) to be reviewed: ☐ specific chemical identity
☐ all other CBI claims

Dear [*Addressee*]:

Under the Toxic Substance Control Act (TSCA) most confidential business information (CBI) claims for chemical identity and at least 25% of other CBI claims are subject to a review and final determination. TSCA section 14(g). 15 U.S.C. § 2613(g).

This letter is to notify you that the U.S. Environmental Protection Agency (EPA) Office of General Counsel will be making a final confidentiality determination concerning information you have claimed as CBI, as identified above. All non-exempt CBI claims must be substantiated.

If you feel that some or all of the information checked above is entitled to confidential treatment, you must substantiate as described below with specific reference to those portions of the information you consider confidential.

Note that TSCA section 14(c)(2) generally exempts certain information types from the requirement to substantiate. 15 U.S.C. § 2613(c)(2). *See* EPA webpage [INSERT WEBPAGE] for more guidance on information exempt from substantiation. To the extent that you believe the information that you have claimed as CBI is one of these exempt information types, you may make this assertion in your response by identifying the specific section 14(c)(2) exemption, in lieu of substantiating the CBI claim for that information. If the Agency disagrees with this assertion, you may be asked to provide additional information to support your claim.

Substantiating a CBI Claim.

There are two different sets of substantiation questions for CBI claims: (I) questions for all CBI claims in the submission; and (II) questions for chemical identity CBI claims. Please use the appropriate question set. In some instances, your TSCA submission may contain both types of CBI claims or a CBI claim may require completing both sets of substantiation questions. For example, if you assert a CBI claim to protect a chemical substance's identity, then you must answer both question sets. EPA has identified the appropriate question set(s) via the checkboxes at the top of this letter. In some instances, for example TSCA section 8(a) Chemical Data Reporting (CDR) Rule submissions, you may have already provided up-front substantiations for some of the CBI claims. If you have already substantiated your CBI claim at the time of submission, please refer to or preferably physically attach your substantiation to your response to this letter.

Note also that the providing of incorrect information in this substantiation request may be a failure to comply with TSCA, specifically 15 U.S.C. § 2614.

I. REQUIRED FOR ALL CBI CLAIMS.

If you are asserting ANY information in the submission as CBI, please answer the following questions.

In supporting your CBI claim(s), please be specific by page, paragraph, sentence, or by data element when identifying and substantiating the information subject to your claim. Where your claim, as originally made or as modified by your response to this letter, does not include all information on a page, please attach a copy of each such page with brackets around the text that you claim to be CBI.

In some cases, it may be appropriate to group the information into a class of information rather than responding to each item claimed as CBI. *See* EPA webpage [INSERT WEBPAGE] for suggested approaches to providing substantiations of materials grouped. For any information that is not specifically identified as subject to a confidentiality claim and substantiated as such in your response to this letter, it shall be determined that you have waived your CBI claim, pursuant to 40 C.F.R. § 2.205(d).

For each item or class of information that you continue to claim as CBI, please answer the following questions, giving as much detail as possible. Your substantiation response to these questions will be used by the EPA to determine whether the information has been shown to be entitled to confidential treatment:

A. Do you believe that any of the information claimed as CBI is exempt from substantiation pursuant to TSCA section 14(c)(2)[1]? Yes/No.

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[1] TSCA Section 14(c)(2) states:

If you answered yes, please identify the information, provide the specific exemption and answer no further questions related to that information.

If you answered no, please respond to the questions below.

B. Will disclosure of the information likely result in substantial harm to your business competitive position? Yes/No.

If you answered yes, please describe with specificity the substantial harmful effects that would result to your competitive position if the CBI information is made available to the public. In your answer, explain the causal relationship between disclosure and any resulting substantial harmful effects. Consider in your answer such constraints as capital and marketing cost, specialized technical expertise, or unusual processes and your competitor's access to your customers.

C. To the extent you have disclosed information to others (both internally and externally), what precautions has your business taken? Please identify any measures or internal controls your business has taken to protect the information claimed as confidential.

1. Non-disclosure agreement required prior to access. Yes/No
2. Access is limited to individuals with a need-to-know. Yes/No
3. Information is physically secured (e.g. locked in room or cabinet) or electronically secured (encrypted, password protected, etc.). Yes/No
4. Other internal control measure(s). If so, please explain.

D. Does the information claimed as confidential appear in any public documents, including (but not limited to) safety data sheet, advertising or promotional material, professional or

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(2) Information generally not subject to substantiation requirements

Subject to subsection (f), the following information shall not be subject to substantiation requirements under paragraph (3):

(A) Specific information describing the processes used in manufacture or processing of a chemical substance, mixture, or article.

(B) Marketing and sales information.

(C) Information identifying a supplier or customer.

(D) In the case of a mixture, details of the full composition of the mixture and the respective percentages of constituents.

(E) Specific information regarding the use, function, or application of a chemical substance or mixture in a process, mixture, or article.

(F) Specific production or import volumes of the manufacturer or processor.

(G) Prior to the date on which a chemical substance is first offered for commercial distribution, the specific chemical identity of the chemical substance, including the chemical name, molecular formula, Chemical Abstracts Service number, and other information that would identify the specific chemical substance, if the specific chemical identity was claimed as confidential at the time it was submitted in a notice under section 2604 of this title.

trade publication, or any other media or publications available to the general public? Yes/No.

If you answered yes, please explain why the information should nonetheless be treated as confidential.

E. Does the information claimed to be CBI contain (a) trade secret(s)[2] ? Yes/No

If yes, please explain the reason for your belief. Please attach copies of those pages containing such information with brackets around the text that you claim to be (a) trade secret(s).

F. If you assert a claim of confidentiality that is less than 10 years (see TSCA section 14(e)(1)(B)), then please indicate the number of years (between 1-10 years) or specific date of which the claim is withdrawn.[3]

G. Has EPA, another federal agency, or court made any confidentiality determination regarding information associated with this substance? Yes/No.

If yes, please explain the outcome of that determination and provide EPA with a copy of the previous confidentiality determination or any information that will assist the Agency in identifying the prior determination.

II. REQUIRED FOR ONLY CHEMICAL IDENTITY CBI CLAIMS.

If you are claiming a specific chemical identity as CBI, please answer the additional following questions. If you are not substantiating a chemical identity CBI claim, then you do not need to respond to the questions below.

A. Is the chemical substance on the confidential portion of the TSCA Inventory? Yes/No.

B. Commerce:
   1. Has the chemical substance (or mixture) been offered for commercial distribution? Yes/No.

   2. Is the chemical substance known to be in U.S. commerce? Yes/No.

   If you answered yes, please explain why the information should nonetheless be treated as confidential.

C. Disclosure of the specific chemical name would release:

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[2] "Trade secret" is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[3] Information with withdrawn CBI claims will be made available to the public without further notice.

1. Confidential process information. Yes/No.
2. Confidential portion of a mixture information. Yes/No.

If you answered yes to either question, please explain

Asserting a CBI claim in your substantiation response.

Businesses may claim their substantiation response as CBI. Information claimed as confidential should be clearly marked by bracketing, circling, or underlining. All pages containing such information must also be stamped "CONFIDENTIAL BUSINESS INFORMATION" or with similar designation in order to assert a confidentiality claim. Care should be taken to ensure that these markings do not obscure the text.

If you claim your substantiation response as CBI, you must include the following statement in the submission.

> I hereby certify to the best of my knowledge and belief that all information entered on this form is complete and accurate.
> I further certify that, pursuant to 15 U.S.C. § 2613(c), for all claims for confidentiality made with this submission, all information submitted to substantiate such claims is true and correct, and that it is true and correct that
> (i) My company has taken reasonable measures to protect the confidentiality of the information;
> (ii) I have determined that the information is not required to be disclosed or otherwise made available to the public under any other Federal law;
> (iii) I have a reasonable basis to conclude that disclosure of the information is likely to cause substantial harm to the competitive position of my company; and
> (iv) I have a reasonable basis to believe that the information is not readily discoverable through reverse engineering.
>
> Any knowing and willful misrepresentation is subject to criminal penalty pursuant to 18 U.S.C. § 1001.

Timely Responses and Postal Requirements

Your substantiation response must be postmarked or hand delivered to this office **by the 15th working day after your receipt of this letter**. While it is anticipated that there will be a means for sending these to the Agency electronically in the future, at this point substantiations should be sent via US Mail or courier.

Filings should be directed to the below address.

TSCA Confidential Business Information Center (7407M)
WJC East; Room 6428; Attn: TSCA CBI Substantiations
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0001

Courier Deliveries:

U.S. EPA
Office of Pollution Prevention and Toxics
Confidential Business Information Center (CBIC)
Attn: TSCA CBI Substantiations
1201 Constitution Avenue, NW
WJC East; Room 6428
Washington, DC 20004-3302
(202) 564-8930

You may seek an extension of time to submit your substantiation response to this office, but the request must be made before the end of the 15-day period. Requests for an extension may be directed to Ms. Quoc Nguyen, Office of General Counsel, Nguyen.Quoc@epa.gov.

Failure to timely submit your substantiation response will be regarded as a waiver of your confidentiality claim or claims, and the EPA may release the information.

Should you have any questions concerning this matter, please contact Mr. Scott Sherlock at (202) 564-8257 or Sherlock.Scott@epa.gov; or Ms. Jessica Barkas at (202) 250-8880 or Barkas.Jessica@epa.gov.

Sincerely,

[NAME]
[TITLE]
[OfficeName and Address]

OGC Relativity Guidance

Use this guidance to familiarize yourself with the Relativity platform, including how to redact documents. Remember that before you can use Relativity for the first time, you need to contact EZ-tech (or technical support for your office) to install the Relativity Web Viewer Plugin.

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ONLINE RESOURCES

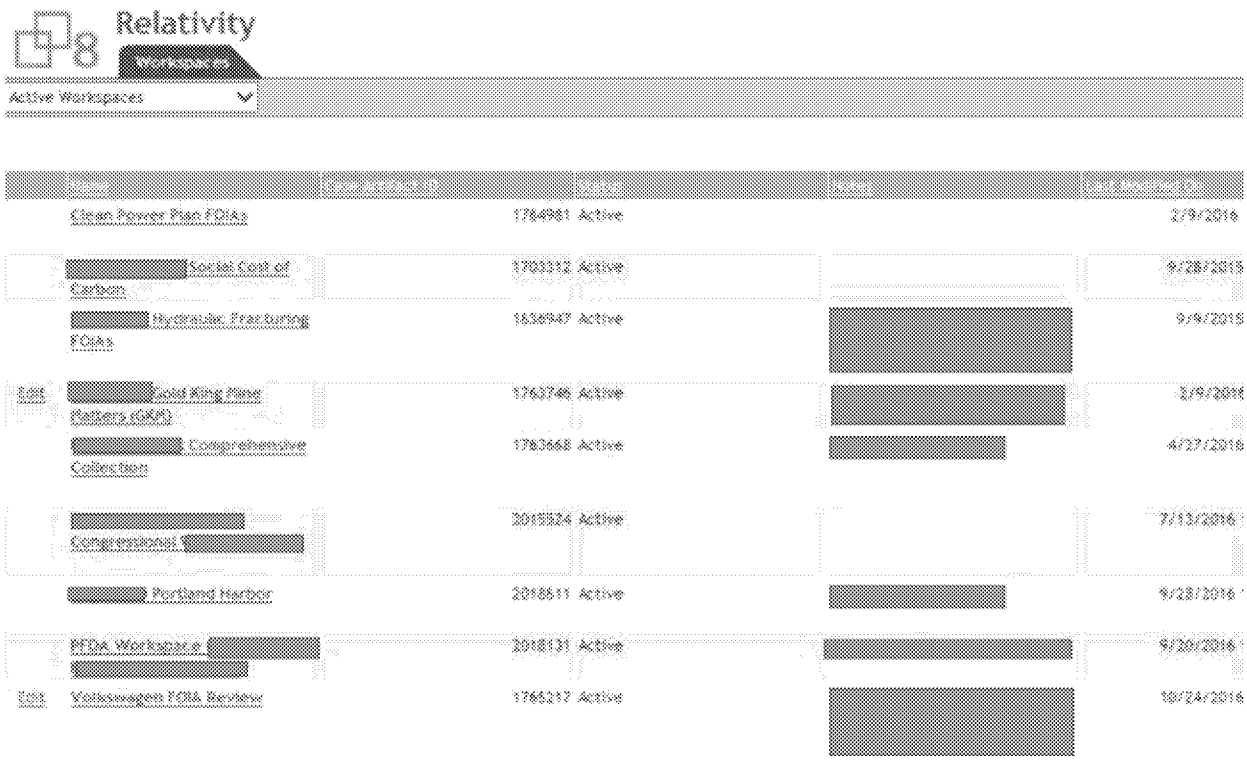
EPA uses Relativity version 8.2. There are a number of video trainings and other resources available here: https://www.kcura.com/relativity/ediscovery-resources/training/. Below are some tutorials that you may find useful.

1. Getting Started (3:41): https://www.kcura.com/relativity/ediscovery-resources/training/on- demand/getting-started/
2. Redactions and Annotations (6:46): https://www.kcura.com/relativity/ediscovery- resources/training/on-demand/adding-redactions-and-annotations-8-2/
3. Coding and Tagging Documents (5:15): https://www.kcura.com/relativity/ediscovery- resources/training/on-demand/coding-and-tagging-documents/

4. Reviewer Training (36:33): https://www.kcura.com/relativity/ediscovery-resources/training/on- demand/reviewer-training/

SIGNING IN, FINDING YOUR WORKSPACE

If you are a first-time user, your sign in credentials will be emailed to you along with a link to EPA's Relativity viewer. It is a good idea to save or bookmark this link. If you have password issues or cannot find the link, email your case manager. Once you sign in, you will see the workspace list. Click on the name of your case to enter your workspace.



(sample screenshot of a Workspace List, some information removed)

BATCHES

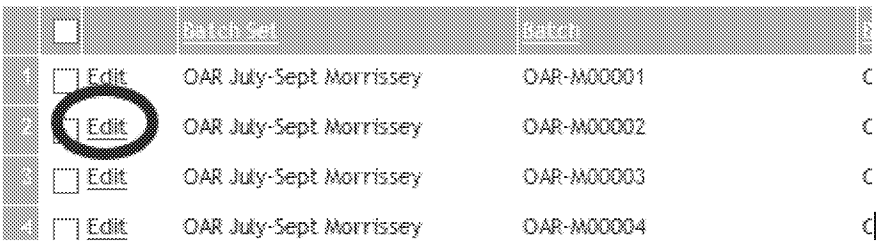
Documents are organized into groups called batches. To review documents, you must have a batch assigned to you. No one else will work on documents in your batch while they are assigned to you. To check out a batch, follow the instructions below. If you are done working, your batch will remain assigned to you unless you check it back in, even if you sign out of Relativity and sign back in later.

1. At the top of your screen, you will see tabs. Every database is different, but you will likely have a *Documents* tab and a *Review Batches* tab. Click the *Review Batches* tab.

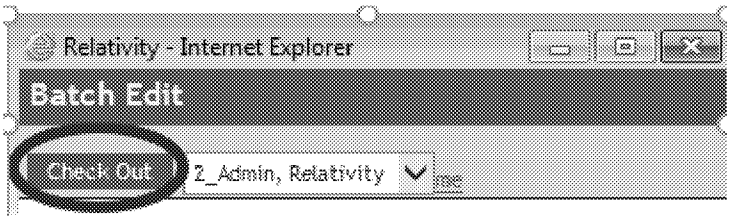
2. This will bring you to a list of batches. There will be several fields of information displayed in the columns.

    a. The *Batch Status* column will tell you whether a batch has been completed, is in progress, or if the field is blank, the batch is open and may be checked out.
    b. If a batch is assigned to a reviewer, their name will be displayed in the *Assigned To* column.
    c. The columns should display how many documents have been reviewed in a batch as well as the total size of the batch.

3. To check a batch out, look to the left of the screen. Next to the batch names, there will be a blue hyperlink *Edit* button. Once you have selected your batch, click this edit button to begin the checkout process.

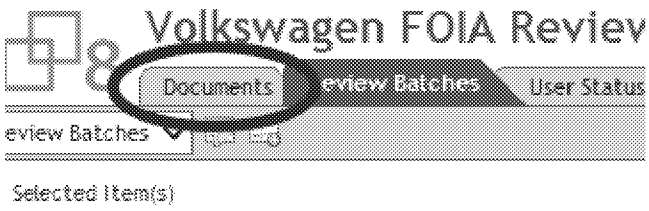


4. Click the "Check Out" button to check the batch out to yourself.

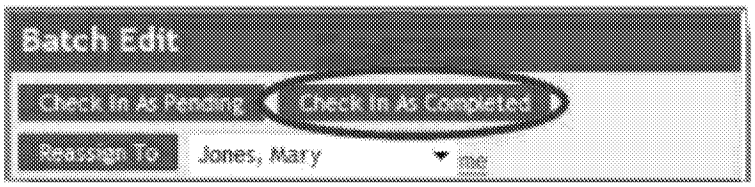


5. Once a batch is checked out, you will notice that it is assigned to you in the *Assigned To* column.

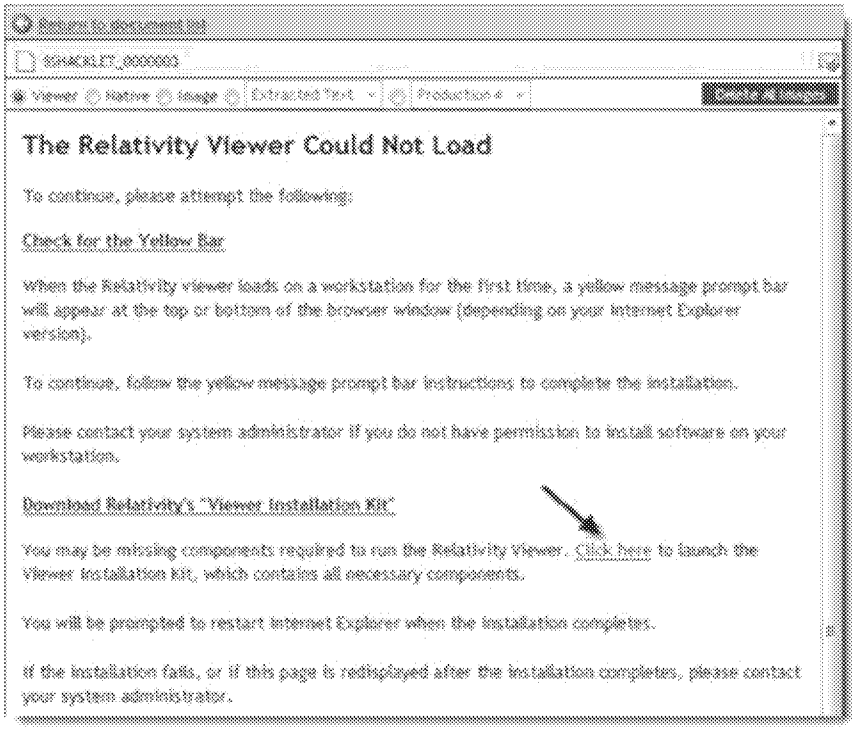
6. To view the documents in the batch you have checked out, you must look again to the tabs at the upper left of your screen. Click back to the documents tab to view the documents.



7. Follow the same steps to check a batch back in. (Go to the batches tab, find your batch, press the *Edit* button). You may check the batch back in as *Pending* if it is not complete. But if all documents have been reviewed, check it back in as *Completed.*



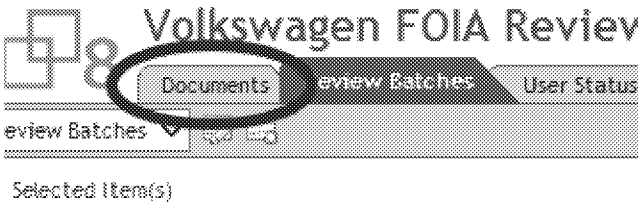
INSTALLING THE WEB VIEWER



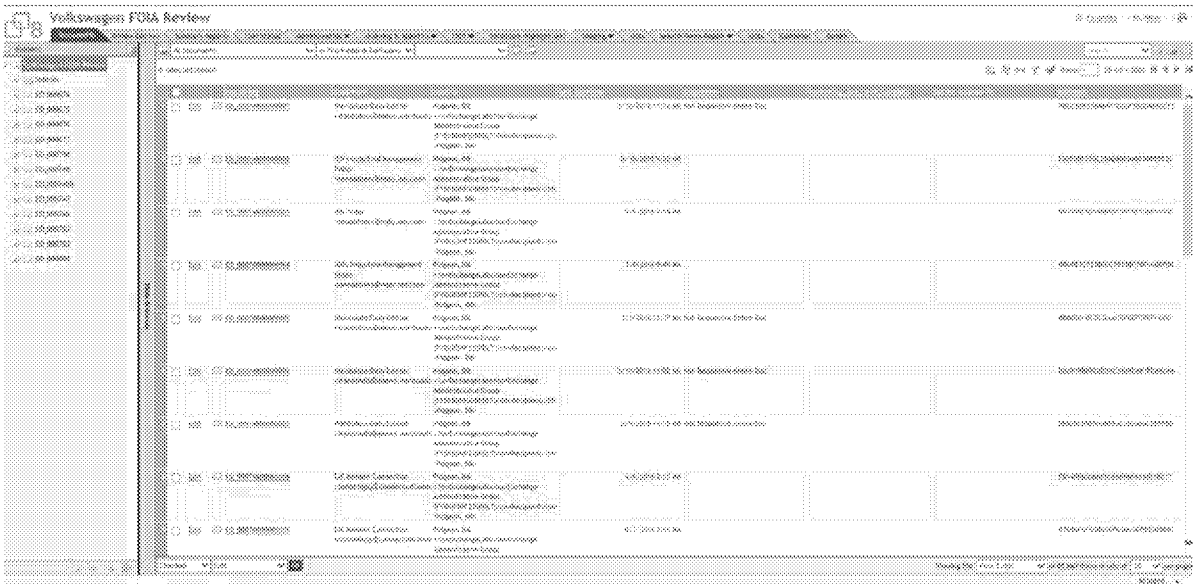
If this is the first time you are using Relativity on your machine, you will likely need to install a plugin before being able to view documents. If you are prompted with the below error or a similar message when you try to open a document, then you will need someone with administrator rights to download the Relativity Viewer and install it. Call your technical support line and ask for assistance installing the Relativity Viewer plugin. Your technician will be able to remotely download and install the plugin, usually in a matter of minutes. This should only need to be done once.

OPENING AND VIEWING A DOCUMENT

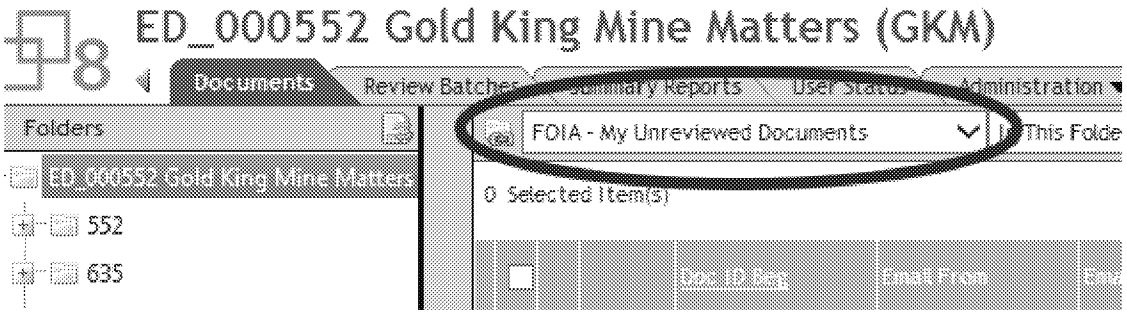
1. Make sure you are in the *Documents* tab.



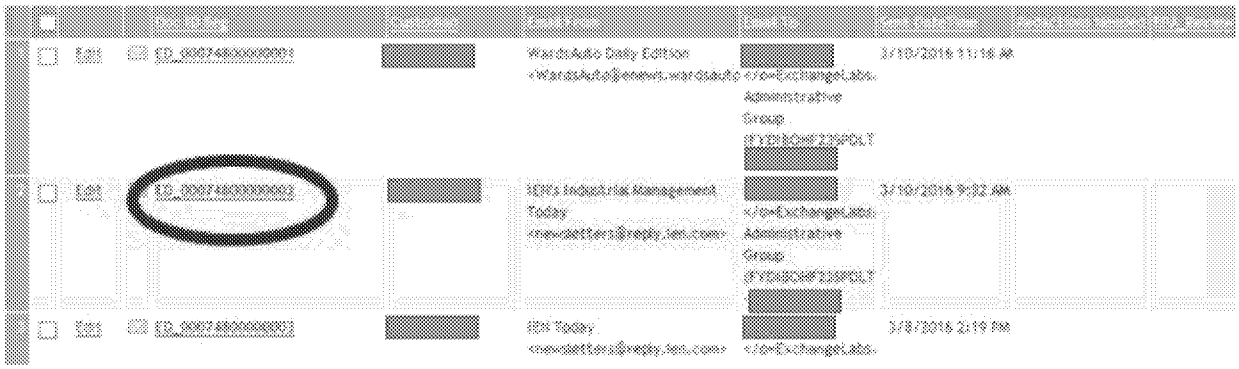
2. Your screen should look something like this:



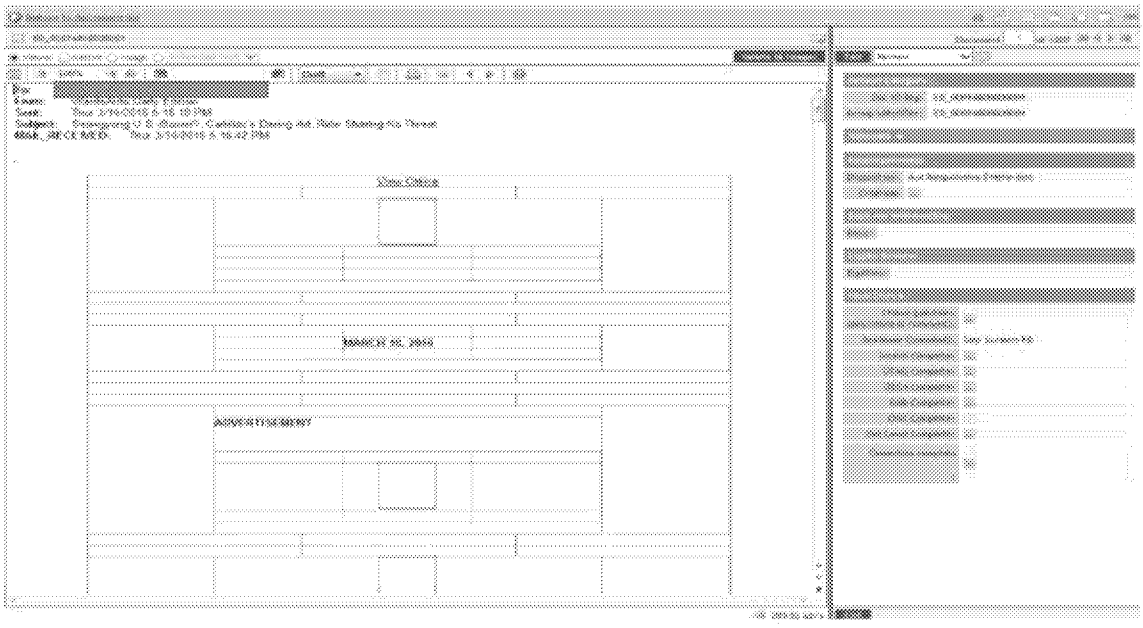
3. Look at the drop down menu towards the upper left of your screen. It will likely say "All Documents" or "unreviewed documents" or have similar choices. Your case manager should give you guidance as to what view to use, or they may limit your access to a single useful view.



4. You will see a list of documents with columns of information. One of the leftmost columns will contain links to the documents themselves. Click the blue hyperlink Doc ID number of the document you would like to open.



5. Opening a document will take you to the reviewer interface, it should look like this:



6. You should have access to three views depending on the type of document you are looking at and how it has been processed. To change to a different view, click the radial button.

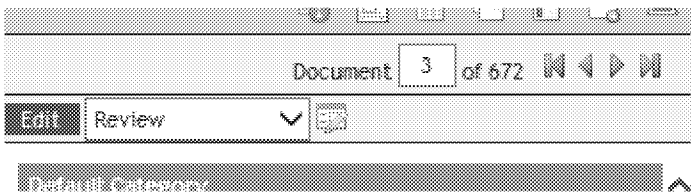
   a. Viewer Mode: Default view which contains the rendered version of the native file. This view will display the entire content of the document in one continuous view. If persistent highlighting is used, certain terms may be

highlighted to aid in your review.

b. Native Mode: Clicking on the native viewer will open the file in a separate window in its native form. If you are looking at an email, it will open the file in outlook, if you are looking at a spreadsheet, excel will open. This can be useful for certain file types, but should generally be avoided.

c. Image Mode: This view will only be available if the document set you are working with has been processed to be "imaged." If you need to use image mode but your documents are not imaged, talk to your case manager. Image mode shows you the document as it will be produced to the requester. The document may contain several pages that you will need to click through. This is the view you will use to make redactions.

7. To move on to the next document in your list automatically, or back to a previous document, use the navigation arrows in the upper right corner of your screen.

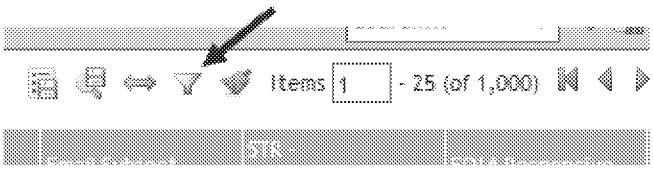


8. To return to your document list from a document view, look to the upper left of your screen and select *Return to document list*.

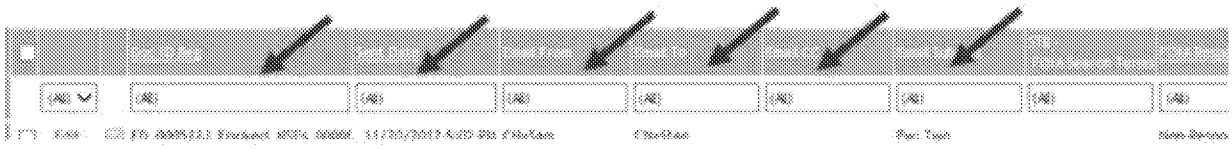
SORTING AND FILTERING DOCUMENTS

1. Your document list should have several columns. If a column title is underlined, like *Sent Date* is in the image below, you can slick on the title and your documents will be sorted by that column.

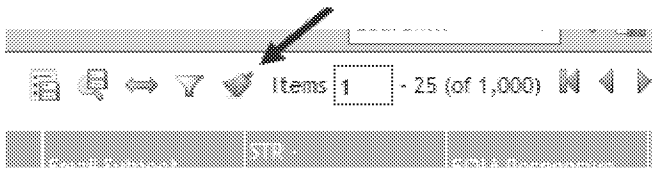
2. Clicking on the filter icon above your document list will allow you to filter the documents you are viewing. For example, you could limit your view to only documents from a particular sender.



3. Text boxes will appear below the headings of each column. Type the terms you want to use to filter in the text box of the relevant column.

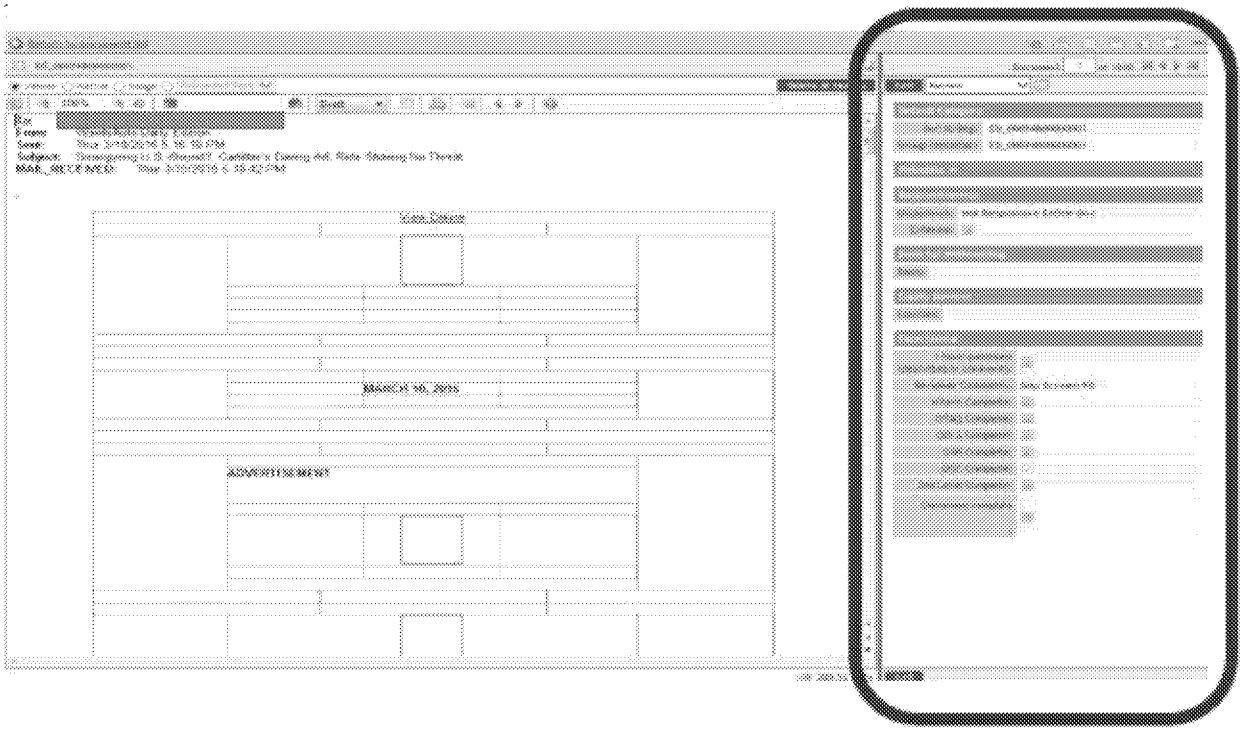


4. To clear your filters, click the sweep icon next to the filter icon.

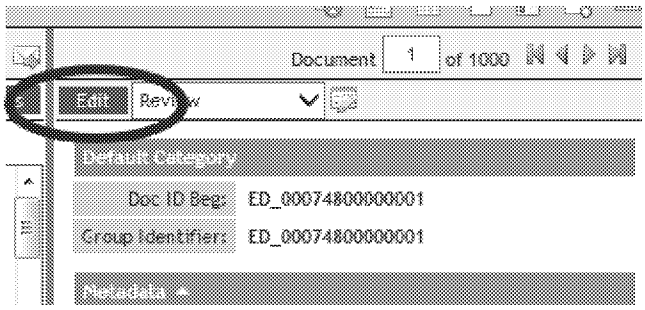


CODING A DOCUMENT

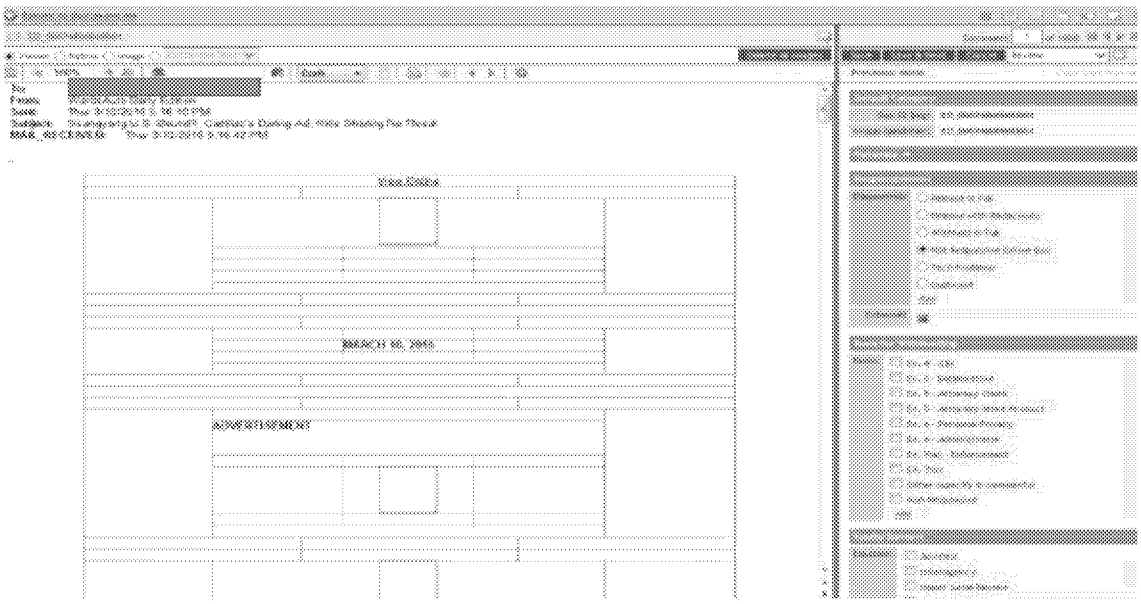
"Coding" is a term we use to describe the process of adding information to the documents that you review. To do this, when viewing a document, use the coding pane on the right side of your reviewer interface.



1. To begin coding, you must select the edit button in the upper left of your coding pane.

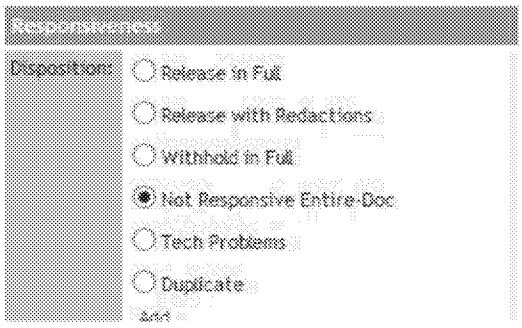


2. This will bring your coding pane to life and allow you to make edits. Your reviewer interface should now look like this:



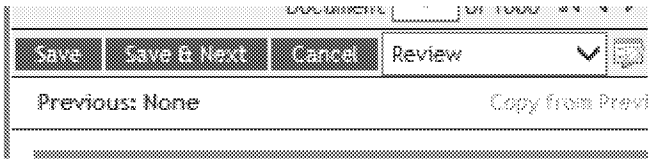
3. Follow the instructions provided by your case manager for coding your documents. You will find that some fields of information use radial buttons that only allow you to make one choice, and other fields use check boxes which allow you to select more than one item.

Radial Buttons:



Check Boxes:

4. After you have finished coding a document, remember to save. If you plan to move on to the next document in your set, clicking "Save and Next" will save and take you there automatically. The save buttons are located above and below your coding pane.

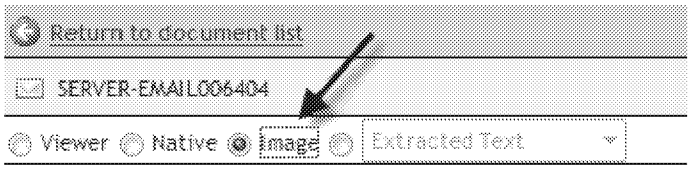


5. When you move onto another document, your coding pane will remain in edit mode, and you should be able to begin coding right away.

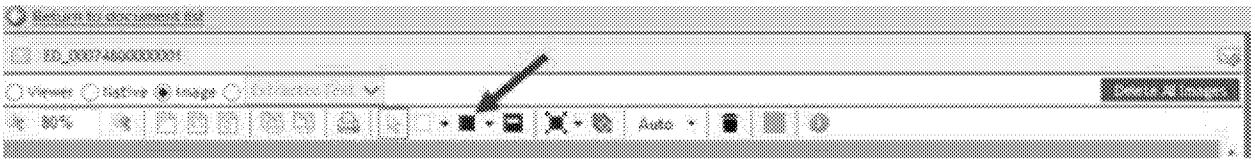
REDACTING

In general, when a FOIA exemption applies to part of a document, we have an obligation to release reasonably segregable material within that document. This is accomplished by redacting the exempt part of the document. You should redact as needed according to the instructions below. Redactions are automatically saved.

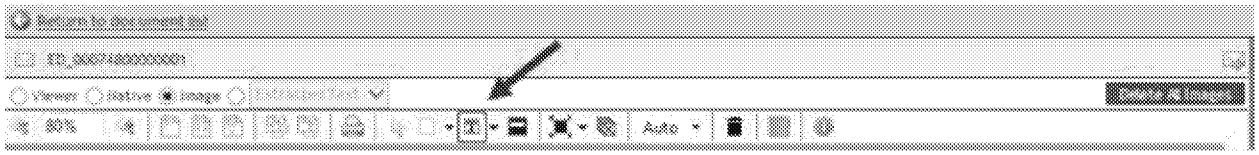
1. To create a redaction, make sure you are in Image mode in the Document viewer.



2. Look to the toolbar at the top of your screen. See the solid black square with the drop down menu. If you hover your cursor over it, it will display "*Redact*".



3. The drop down options when you click on the down arrow will be *Black, Cross, Text, or White*. Always select *Text*. When you have *Text* selected, the icon will look like below. Once this is selected, it will remain in *Text* mode unless you change it or sign out.



4. To make a redaction, click on your document and drag to create a square text

box. You will be able to resize or move this text box so that it conceals the information that is exempt from disclosure.

5. To change the text that is displayed in the box, right click on the box. This will allow you to select the appropriate basis for withholding from a series of drop down choices.

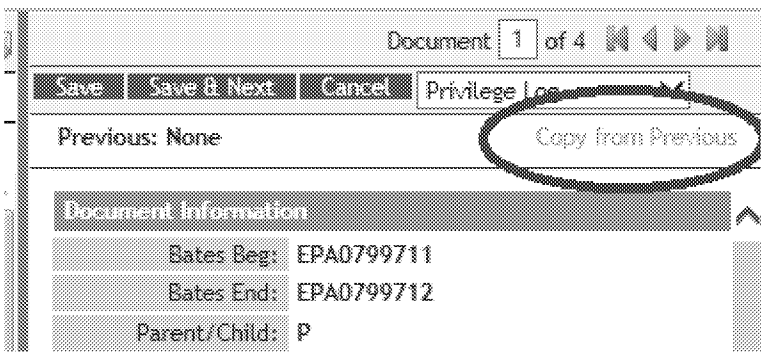
6. To delete a redaction, right click on the redaction and select delete.

7. Remember that the coding pane will not be automatically updated when you make a redaction. Be sure to code which exemptions you are asserting.

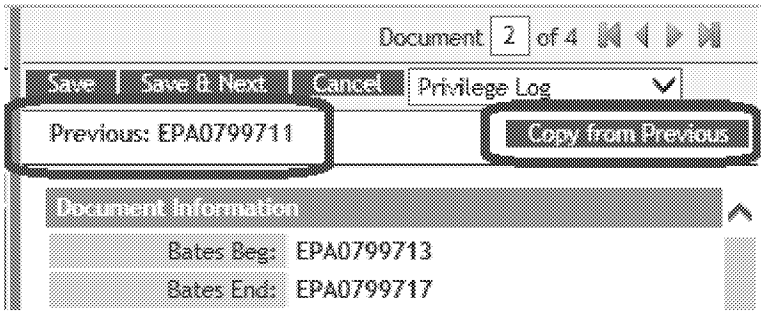
COPY FROM PREVIOUS

At the top right-hand side of the coding pane, there is a "Copy from Previous" button on the Relativity review screen, which will allow you to copy the coding from the most recently coded document in your current review session. This button may save time if you are working in a sequence of similar documents.

1. To use Copy from Previous, you must first code at least one document. If you have not yet coded a document in your current session, or if you click Save (as opposed to Save & Next) or Cancel after reviewing a document, the layout is displayed as read-only and the Copy from Previous button is disabled:



2. Once you have coded a document in the current session and hit Save & Next, the Previous field will show the document identifier of the document that you last coded, and the Copy from Previous button will be enabled:



3. Relativity will also display a gray arrow icon next to the fields with values that will be copied from the previous document when you use Copy from Previous (Document Status, Privilege Basis, and Reviewer Comments). After you click Copy from Previous, the gray arrow icon will be replaced with a green arrow icon. The icon redisplays next to a copied field that you have modified. You must still click Save or Save & Next to apply the changes that you have copied into the document.

How to effectively use Copy from Previous

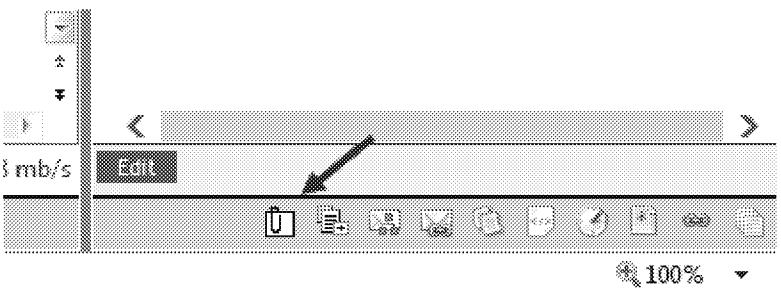
Use the Copy from Previous function when you want to copy the coding values of the designated fields from the last-saved document to the current one, like in cases where you have a series of similar documents one after another. After Relativity populates the layout with these coding values, you can still modify them (as you might need to, for instance, when copying a Privilege Basis description from an email into one of its attachments). After making any necessary changes, click the Save & Next button to save your changes and review a new document.

REVIEWING FAMILY MEMBERS AND DUPLICATES

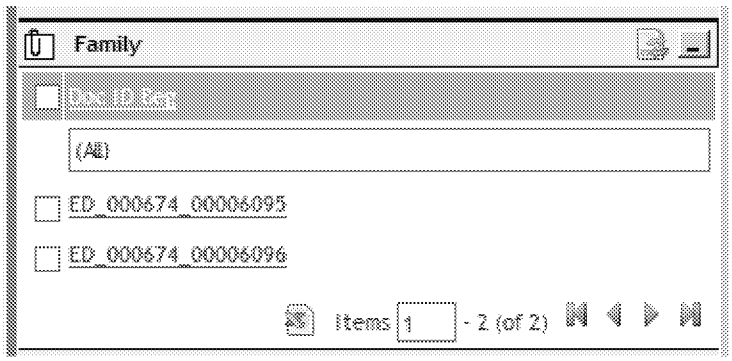
When looking at an attachment, it can be helpful to view the parent email to gain important context. When looking at an email communication, it may be helpful to view the attachments that are referenced. To view a document's family, follow the steps below.

1. FAMILY MEMBERS

    a. Find the paperclip icon in the bottom right corner of your screen. Click it.



b. This will provide you with a small viewing pane that contains list of documents, likely titled with a series of Doc ID numbers. Each number is a hyperlink to a document.

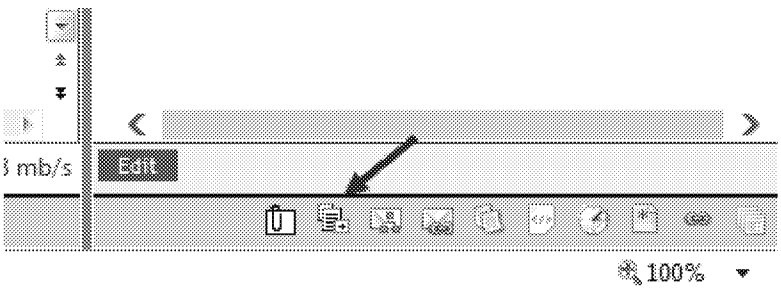


c. The uppermost document will be the parent email. The descending documents are attachments.

d. After clicking through the family and making coding changes or gathering information, to return to your original document, look to the upper left of your screen and click *Return to review queue*.

2. DUPLICATES

a. The Duplicates Icon should be located next to the paperclip icon,



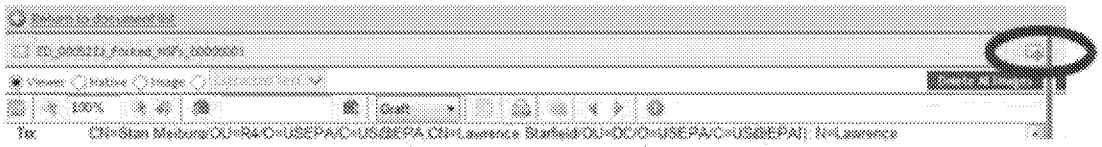
b. Just like with family members, you will see a small viewing pane that will display any duplicates. It can be navigated similarly, and when you are finished coding any duplicates, you can return to your initial document by selecting return to review queue.

EMAILING A DOCUMENT TO YOUR CASE MANAGER

If you have a question about a document, it is often easiest to send a link to the case manager.

Relativity has an easy tool to help with this.

1. Locate the email icon with the green arrow in the upper right of your viewing pane



2. Click the icon, this will open up an outlook message with a direct link to the document. Send the document to your case manager with a note about your question and they will be able to open up the document themselves to help with your issue.

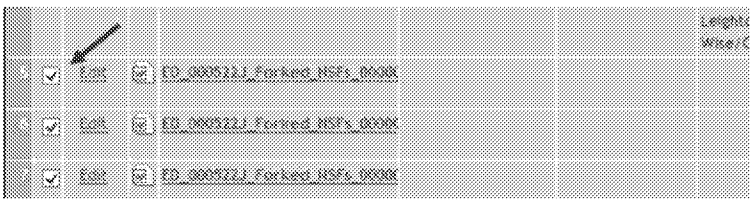
GETTING DOCUMENTS OUT OF RELATIVITY

If you are a first line reviewer, there is likely no reason for you to print or produce documents from Relativity. If you are helping with case management, you may need to get documents out of the database for a number of reasons.

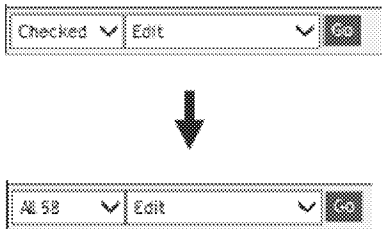
1. *Running a Production*: You may be at the end of your review and ready to deliver your final product to a requester. This will require the help of the e-discovery team in OEI. When you are ready to run a production, send an email to ediscovery@epa.gov. You should describe which documents need to be produced, if you would like them to be produced as images or in native format, and how you would like the documents to be stamped. The E-discovery team may follow up to clarify those and other details. If you know that you are going to request a large production, it can be helpful to reach out in advance.

2. *Printing Images*: If you are not running a final production, but rather need copies of one or more documents for some internal review, you can print images of your documents with or without redactions. Follow the steps below.

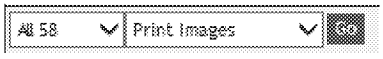
    a. Check the boxes of the documents that you would like to produce.



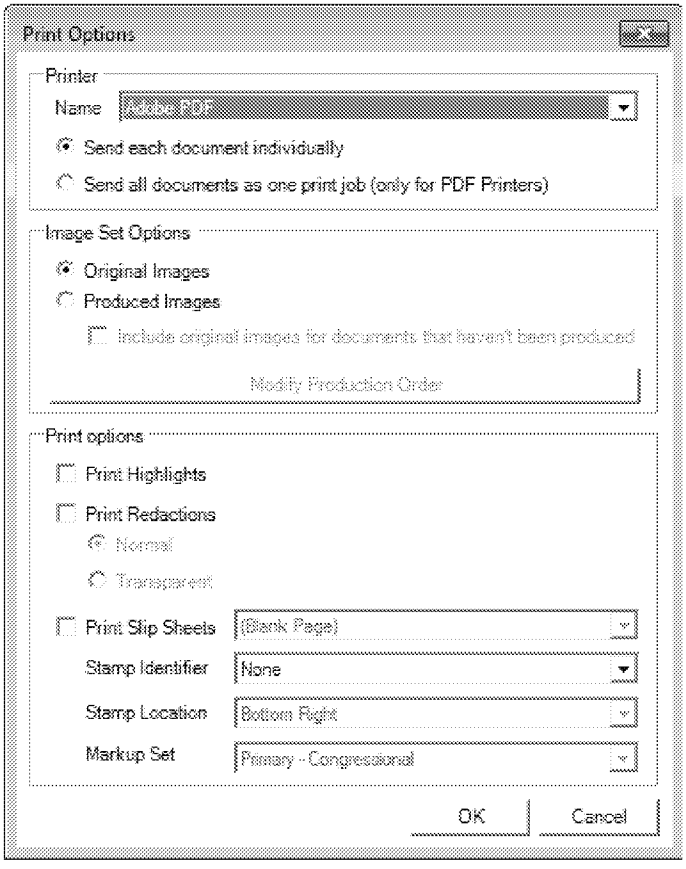
b. Alternatively, if you would like to print all of the documents in a particular saved search or folder, you can select "All" documents from the drop down in the lower left of your screen.



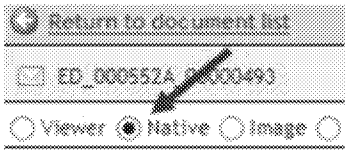
c. Using the second drop down menu, select "Print Images" and then press "Go".



d. You will be prompted with a number of choices. If you are trying to create a PDF, select a PDF printer. You have the options to send multiple documents as a group, print highlights or redactions, and select markup sets. Once you have set up your print job, press "OK" and Relativity will print your images. If you are printing to PDF, you wil be prompted to save the PDF.



3. *Opening in Native*: If you need to view or circulate a native file, open it using the native viewer and proceed from there.



Redacting in Adobe Acrobat Pro DC

Use these instructions to redact content in Adobe Acrobat Pro DC

(1) Choose **Tools** > **Redact**. The Redact toolset is displayed in the secondary toolbar.

(2) In the secondary toolbar, choose **Mark for Redaction** > **Text & Images**.

(3) (Optional) To set the appearance of redaction marks, click **Properties** in the secondary toolbar. (See Change the look of redaction markers.)

Note: The FOIA requires that the Agency provide an estimate of the volume of redacted information to the requester. This includes redaction marks within documents. Therefore, you must always use redaction marks or borders that are visible. In other words, never place a white redaction mark on a white background.

(4) Mark items you want to remove by doing any of the following:

- Double-click to select a word or image.
- Drag to select a line, block of text, object, or area.
- Press Ctrl as you drag to select areas of a page in a scanned document.

Note: To preview how your redaction marks appear, hold the pointer over the marked area.

(5) To apply multiple code entries to a single redaction, right-click a redaction mark and select an option. For more information, see Apply multiple code entries to a redaction. Tip: Use the **Find Text** tool to find and remove words or phrases in one or more PDFs that contain searchable text. (see below)

(6) (Optional) To repeat a redaction mark, right-click it and choose **Repeat Mark Across Pages**. This feature is convenient if a particular header, footer, or watermark appears in the same location on many pages.

(7) When you have finished marking the items you want to redact, click **Apply** in the secondary toolbar to remove the items, then click **OK**. The items aren't permanently removed from the document until you save it.

(8) If you want to search for and remove hidden information in the document by using the **Remove Hidden Information** feature, click **Yes** in the dialog box. Otherwise, click **No**.

(9) Choose **File** > **Save**, and specify a filename and location. The suffix **"_Redacted"** is appended to the filename. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both.

Tip: Use the **Find Text** tool to find and remove words or phrases in one or more PDFs that contain searchable text. (see below)

Search and Remove Text

Note: The **Find Text** tool doesn't search secured (encrypted) PDFs.

(1) Choose **Tools** > **Redact**.
The Redact toolset is displayed in the secondary toolbar.

(2) In the secondary toolbar, choose **Mark For Redaction** > **Find Text**.

(3) In the **Search** dialog box, specify if you want to search the current PDF or all PDFs in another location.

(4) Do one of the following:

- To search for only one word or phrase, choose **Single Word Or Phrase** and type the word or phrase in the text field.
- To search for multiple words, select **Multiple Words Or Phrase**, and then click **Select Words**. Type each word in the **New Word Or Phrase** text field and click **Add**. You can also import a text file with the list of words or phrases to search for.
- To search for a pattern (for example, phone numbers, credit card numbers, email addresses, social security numbers, or dates), click **Patterns**. Choose one of the available patterns. You can change the language version of the patterns. (See Select a different language version for patterns.)

(5) Click **Search & Remove Text**.

(6) In the search results, click the plus sign (+) next to the document name to see all occurrences of the word or phrase. Then, select the occurrences you want to mark for redaction:

- To select all occurrences in the list, click **Check All**.
- To select individual occurrences, click the check box for each one you want to redact. Click the text next to a check box to view the occurrence on the page.
- To mark none of the occurrences, close the **Search** dialog box or click **New Search** to start over.
- To mark whole words or partial words (characters) for redaction, select the option under **Redaction Mark Options**. For partial words, select **Mark Partial Word (s) For Redaction** the **Settings** dialog box appears. In the **Settings** dialog box, specify the number and location of the characters for redaction. Character redaction is useful if you're searching for a pattern, like credit card numbers, and want to leave part of the number visible for identification purposes.

(7) If you selected occurrences that you want to mark for redaction, click **Mark Checked Results For Redaction**. The items you selected in the list are shown marked for redaction.

Note: If you haven't saved the file, you can select redaction marks in the document and press **Delete** to remove the redaction mark. The redaction marks become permanent after you save the file.

(8) To remove the marked items, click **Apply** in the secondary toolbar, and then click **OK**. The items aren't permanently removed from the document until you save it.

(9) If you want to search for and remove hidden information in the document by using the **Remove Hidden Information** feature, click **Yes**. Otherwise, click **No**.

(10) Choose **File** > **Save**, and specify a filename and location. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both.

Find and remove hidden content

Tip: Use the **Remove Hidden Information** feature to find and remove content from a document that you don't want, such as hidden text, metadata, comments, and attachments. When you remove items, additional items are automatically removed from the document. Items that are removed include digital signatures, document information added by third-party plug-ins and applications, and special features that enable Adobe Reader users to review, sign, and fill PDF documents.

Note: To examine every PDF for hidden content before you close it or send it in email, specify that option in the **Documents** preferences using the **Preferences** dialog box.

(1) Choose **Tools** > **Redact**.
The Redact toolset is displayed in the secondary toolbar.

(2) In the secondary toolbar, click **Remove Hidden Information**.
If items are found, they are listed in the **Remove Hidden Information** panel with a selected check box beside each item.

(3) Make sure that the check boxes are selected only for the items that you want to remove from the document. (See Remove Hidden Information options.)

(4) Click **Remove** to delete selected items from the file, and click **OK**.

(5) Choose **File** > **Save**, and specify a filename and location. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both.
The selected content is permanently removed when you save the file. If you close the file without saving it, repeat this process, making sure to save the file.

Tip: Use this function to take file attachments you intend to withhold based on a FOIA exemption out of Adobe documents.

<u>Note: When marking documents for redactions in Adobe, always save 2 versions of the document</u>:

- One version with the redaction marks unapplied
  - This version will be the "review" version. The redaction marks will be visible along with the content you intend to apply the redaction mark to.
  - This version will also be uploaded to FOIAonline but not released to the requester.
- One version with the redaction marks applied
  - This will be your production version that will be released to the requester.

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Checklist: What to Include in a Final Response Letter

The checklist below details items to be included in a final response letter and provides sample language that may be useful. Draft your closeout letter to fit the particular needs of a request, but be sure it includes the key components below. Following signature of the letter, the letter should be scanned into FOIAonline even if it is not being delivered electronically.

Print on Agency Letterhead
[Date Stamp]

[Name
Organization
Street
City, State Zip Code]

Re: Freedom of Information Act Request No. EPA-***[XX-XXXX-XXXXXX]***, Final Response

Dear ***Mr./Ms. [Last name]:***

1. *SUMMARY OF REQUEST*
   - *Your letter should begin with the request number and summary of the request*
   - *Sample language:*

   This letter concerns the above-referenced FOIA request, received by the U.S. Environmental Protection Agency (EPA or Agency) on ***[Month, Day, Year]***, in which you requested, ***[INSERT a description of the FOIA request. If the request has been clarified, include the most recent clarification and note when it was clarified. Note key correspondence or communication with the requester, provide a timeline of EPA's response.]***.

2. DISPOSITION
   - *State which one of the following dispositions applies:*
     - *Granted. The records, in their entirety, may be released to the requester.*
     - *Partial Grant/Partial Denial. Portions of the record will be withheld from the requester if covered by either one or multiple FOIA exemptions. The portions of the record that are not redacted are released to the requester.*
     - *Denial. The record, in its entirety, will be withheld from the requester if covered by either one or multiple FOIA exemptions.*
     - *No Record. If, after a reasonable search likely to uncover all responsive documents, no records are located that are responsive to the request, the requester will be informed in writing.*

3. DESCRIPTION OF RECORDS

   - *Next, if the request is being granted in full, describe the records being provided*
   - *Sample language:*

The Agency has concluded its search for records responsive to your request and is providing the requested records in full. ***[INSERT a description of the records that are being provided]***.

   - *If records are being withheld in full or in part, describe the records. If there is a large volume of records that are being withheld, include an index of those records.*
   - *Sample language:*

The Agency has concluded its search for records responsive to your request and is ***[providing a portion of the requested records, [INSERT a description of the records that are being provided] / withholding all responsive records].*** The EPA is withholding # records in full and # records in part.

   - *If records are being withheld in whole or in part, you must note which FOIA exemptions are the basis for the withholding(s).*
   - *Sample language:*

Records are being withheld pursuant to: 5 U.S.C. § 552(b)***(#), [shorthand description of applicable exemption, such as: 552(b)(5), the Deliberative Process Privilege / 552(b)(5), the Attorney Client Privilege/552(b)(5), the Attorney Work Product Privilege / 552(b)(6) Personal Privacy].*** The records are exempt from disclosure because they ***[briefly describe reason for withholding such as: are predecisional and deliberative and would harm agency decision making if released (DPP)/ are confidential communications between an agency attorney and client concerning legal advice (ACP)/ are documents prepared by, or at the direction of, an attorney in contemplation of litigation(AWP)/ contain personal information which would be an unwarranted invasion of personal privacy if released (PP)].*** The attached index of withholdings provides further information concerning the withheld records ***[or if voluminous – "The attached appendix contains a categorical description of withholdings and a volume estimate."]***.

4. COST INFORMATION

   - *Inform the requester of the fees that are being assessed for the request and how to pay them.*
   - *Sample language:*

The cost to process your request was $***[#]***. Please see the attached invoice for billing and payment instructions.

5. FINAL APPEAL RIGHTS AND CONTACT INFORMATION

   - *Inform the requester that they may appeal the request, and provide them contact information for the appeal, the FOIA Public liaison, and OGIS. Also include the relevant staff person's contact information. The requester may want to simply seek clarification about something they don't understand rather than go through the appeals process.*
   - *Sample language (NOTE: THE FOLLOWING APPEAL LANGUAGE HAS BEEN RECENTLY UPDATED CONSISTENT WITH THE FOIA IMPROVEMENT ACT OF 2016):*

APPEAL LANGUAGE FOR ALL FINAL FOIA RESPONSES, EXCEPT AS NOTED BELOW:

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8610 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

If you have any questions concerning this response, please contact ***[Staff contact]*** of my staff at ***[###-###-####]***.

APPEAL LANGUAGE IF THERE IS AN INITIAL WITHHOLDING BASED ON EXEMPTION 4:

This letter concludes our response to your request. As noted above, the information withheld under Exemption 4 will be reviewed by the appropriate legal office, which will issue a final confidentiality determination. Therefore, you do not need to appeal the withholding of information under Exemption 4. Once the legal office issues a final confidentiality determination, EPA will notify you whether the information qualifies for confidential treatment or may be released. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholdings, you may appeal this response

by email at hq.foia@epa.gov or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service or overnight delivery you must address your correspondence to 1301 Constitution Avenue, N. W., Room 6416J, Washington, DC 20004. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. Appeals received after 5:00 pm EST will be considered received the next business day. The Agency will not consider appeals received after the 90-calendar-day limit. The appeal letter should clearly identify the determination being appealed, including the assigned FOIA tracking number shown above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail to the Office of Government Information Services, National Archives and Records Administration, 8610 Adelphi Road, College Park, MD, 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

If you have any questions concerning this response, please contact ***[Staff contact]*** of my staff at ***[###-###-####]***.

6. SIGNATURE

   - *Be sure your letter is signed at the Division Director level or above.*

Interim Response Letter Template

The below template is one way to correspond with a requester concerning an interim production. You may send an email, letter, or message through FOIA Online, and there are many different ways to communicate about an interim response. Just be clear that the production is interim and ensure that you are including the following components in your correspondence:

- Request information (number, date received, summary)
- Description of the interim production (number of records, general description)
- Anticipated closeout date/upcoming productions
- Notice that appeal information will be provided at close out
- Contact information

[Print on Agency Letterhead]

[Date Stamp]

[Name
Organization
Street
City, State Zip Code]

Re: Freedom of Information Act Request No. EPA-***[XX-XXXX-XXXXXX]***

Dear ***Mr./Ms. [Last Name]***:

This letter concerns the above-referenced FOIA request, received by the U.S. Environmental Protection Agency (EPA or Agency) on ***[Month, Day, Year]***, in which you requested, ***[INSERT a description of the FOIA request. If the request has been clarified, include the most recent clarification and note when it was clarified.]*** . The Agency is now releasing records in response to your request. Please note that this is an interim response, and the EPA continues to work on your request.

The records EPA is releasing include ***[INSERT a brief description of the records that are being produced]***.

The Agency expects to complete its response to your request by ***[Month, Day, Year]***. ***[OPTION: INSERT a description of a rolling production schedule or when the next interim production is expected if there will be additional interim productions.]***

Again, your request is not being closed at this time. When your request is closed, you will receive information concerning your appeal rights for any part of EPA's response. If you have

any questions about this interim production or your request generally, please contact ***[First Name Last Name]*** at [***xxxxxxx]***@epa.gov or by phone at [***XXX-XXX-XXXX]***. Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or call (202) 566-1667. Last, you may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8610 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

Sincerely,

[NAME]
[TITLE]