# FOIA Toolkit

The Life Cycle of a FOIA Request

The Key Steps to Processing FOIA Requests

**National FOIA Office**

Office of General Counsel

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# Introduction

The Freedom of Information Act (FOIA or statute), 5 U.S.C. § 552, provides that any person has a right 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. When responding to FOIA requests, EPA complies with the FOIA, EPA's FOIA Regulations, 40 C.F.R. § 2.100 *et seq.*, EPA's FOIA Policy, EPA's FOIA Procedures, and FOIA Program's local FOIA procedures, (b)(6) - Internal Web Address [redacted]

This Toolkit and the Toolkit Appendix detail the lifecycle of a FOIA request and contain tips to help you successfully process both complex and simple FOIA requests. The Toolkit is intended for the internal use of agency employees and contains best practice guidelines and suggestions only. While the Toolkit is intended to help Agency employees comply with EPA policies, this document is not an official EPA policy. Further, the Toolkit does not change, modify, or supersede applicable legal obligations, including obligations imposed by regulation or statute.

Your use of this Toolkit is voluntary. This Toolkit 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 Toolkit does not connote a requirement but rather indicates a strong recommendation in terms of a best practice.

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

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# Part 1. Centralized Intake

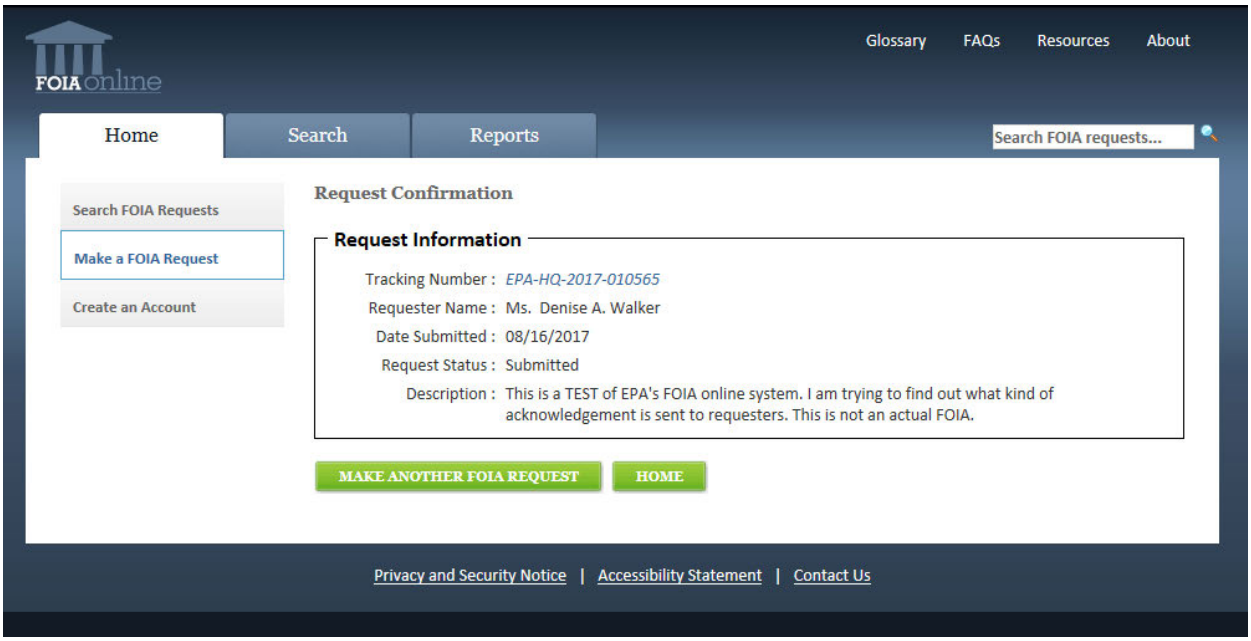
## Part 1.A. Receiving FOIA Requests

FOIA requesters can submit their written FOIA requests to EPA electronically via FOIAonline. FOIA requesters can also submit written requests via U.S. Mail or overnight delivery to the National FOIA Office, in which case the National FOIA Office will input the request into FOIAonline. FOIAonline is EPA's management and tracking system for FOIA responses; EPA processes all requests through FOIAonline. *See* EPA FOIA Policy § 6.B.

If a FOIA Program (i.e., EPA Region or Headquarters Program Office) receives a request directly from a requester, the FOIA Program should not process the request because the requester did not submit the request in accordance with EPA's FOIA Regulations. *See* 40 C.F.R. § 2.101(a). The FOIA Program should inform the requester that the Agency will not accept the request as a properly submitted FOIA request and inform the requester of the proper methods for submitting a FOIA request under EPA's FOIA Regulations. *See generally id.*

### Template A—Response to Request Submitted Directly to FOIA Program

Once a requester submits a request through FOIAonline, the requester immediately receives notification via the FOIAonline website. In this notification, FOIAonline confirms submission of the request and provides the requester with a tracking number, the date submitted, and a brief description of the request as provided by the requester in the submission. FOIAonline then automatically generates an acknowledgement email to the requester.



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, a system-generate email, will appear as the first correspondence entry under the correspondence tab in FOIAonline.

## Part 1.B. NFO and Lead FOIA Program Intake Coordination

This Part discusses the coordination between the NFO and the Lead FOIA Program for FOIA request intake processing. As noted in EPA's FOIA Procedures, if additional input from the Lead FOIA Program is necessary prior to the NFO acting during intake processing, the NFO may seek input from the FOIA Officer or Coordinator in the Lead FOIA Program, including but not limited to the following circumstances:

- The NFO believes the request does not seek Agency records;
- The NFO believes the request may not be reasonably described;
- The NFO believes that the processing of the request may benefit from clarification;
- The NFO requires more information to ensure proper assignment of the Lead FOIA Program; or
- The NFO believes the request may be fulfilled through publicly available or previously released records.

The NFO may take appropriate action, considering the response from the Lead FOIA Program. The NFO will coordinate with the Lead FOIA Program before stopping the clock; the clock may only be stopped once for clarification. *See* 40 C.F.R. § 2.104(d)(1). If the FOIA requester responds to the EPA's request for clarification, the NFO will coordinate with the Lead FOIA Program on that response.

The NFO will initially indicate in FOIAonline the processing track based on available information, and the Lead FOIA Program may adjust based on information available during review and processing. *See* FOIA Procedures § 10, Definitions, *Simple Request* ("A FOIA request that an agency anticipates may be processed without an increased amount of work, additional time, or both, including consideration of the number of pages involved."); FOIA Procedures § 10, Definitions, *Complex Request* ("A complex request typically requires an increased amount of work, additional time needed to process the request, or both, including limitations based on the number of pages involved.").

The NFO may also contact the FOIA Program with questions regarding a fee waiver request. The factors NFO considers when making a fee waiver determination, identified in 40 C.F.R. § 2.107(l)(2)–(3), are:

- Factor 1—*The subject of the request.* 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."

### Part 1.C. Assign the Request to the Lead FOIA Program.

The NFO will assign the Lead FOIA Program by evaluating which FOIA Program (i.e., EPA Region or Headquarters Program Office) is likely to have the most records responsive to the request. Following the initial review described above, the NFO will assign the request to the Lead FOIA Program in FOIAonline.

A FOIA Coordinator or FOIA Officer may request that NFO reassign the request to another FOIA Program by contacting the NFO staff member that assigned the request initially. The NFO will resolve any assignment disputes between the FOIA Programs and, if appropriate, will reassign the request to the new Lead FOIA Program. Additionally, a Lead FOIA Program may also request reassignment of a FOIA request once documents are collected and the search results demonstrate that it may be more appropriate that the NFO assign another FOIA Program as the Lead FOIA Program.

The NFO will notify the requester that the NFO assigned the request to the Lead FOIA Program and include information for the staff contact in the Lead FOIA Program.

## Part 2. FOIA Program Initial Review

The NFO will assign the request to your FOIA Program as perfected, and it is your FOIA Program's responsibility to ensure that the request is proper. A proper FOIA request is one that conforms to the requirements of the FOIA and the FOIA Regulations. Detailed below are the two core requirements, that the FOIA request reasonably describes the records sought and that the FOIA request seeks agency records. *See* Part 2.A, Reasonably Described Requests; Part 2.B, Agency Records. During your initial review, you should also consider whether the request could benefit from additional clarification. *See* Part 2.G, Clarifying FOIA Requests. Remember, the clock can only be tolled ("stopped") once to clarify the request.

### Part 2.A. Reasonably Described Requests

A proper request must reasonably describe the records sought (i.e., be "reasonably described") meaning it enables an Agency employee familiar with the subject area to locate the records with a reasonable amount of effort. *See generally* 40 C.F.R. § 2.102(c). If a request is not reasonably described, then it is not a proper FOIA request and can be closed only after the requester is given an opportunity to modify the request. *See* Part 2.A.iii, Applicable Legal Requirements.

The key inquiry is whether the request sufficiently describes the records sought such that you have enough information to begin a search. Congress intended the FOIA to provide the public with access to Agency records. The FOIA does not require the Agency to answer questions or create records to respond to a request. Keep in mind that requests can be exceptionally large—and benefit from clarification with the requester—yet still be proper.

#### Part 2.A.i. Applicable Legal Requirements

Section 2.102(c) of EPA's FOIA Regulations state, the "request should reasonably describe the records you are seeking in such a way that will permit EPA employees to identify and locate them." 40 C.F.R. § 2.102(c). Section 2.102(c) further provides that, "[w]henever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter." *Id.*

Requests do not need to have *all* these elements to be proper requests; however, requests that contain none or only one of these pieces of information likely require modification.

#### Part 2.A.ii. Evaluating Whether a Request is Reasonably Described

In evaluating whether a request is reasonably described, consider whether you can identify the records sought by the requester. It is also important to note that under the FOIA EPA does not have to answer questions, interrogatories, or perform research to answer FOIA requests. Examples of this type of improper request include:

- "What did the EPA consider or rely on to . . .";
- "How does EPA justify . . ."; and
- "Produce any documents that prove or disprove (statement or argument)."

Practice Tip: When reading the request, if you think, "I don't even know how we would begin to search for this," you may have an improper request. Do not guess what the requester might be looking for—contact the requester to modify the request! See Section 2B for more information on reaching out to the requester for modification.

### Part 2.A.iii. Asserting That a Request is Not Reasonably Described

First, prepare a letter to the requester, utilizing the "Opportunity to Discuss and Modify" optional language in the Detailed Initial Response template.

Template C—Detailed Initial Response

Second, send the letter through FOIAonline or regular mail to the requester, as appropriate. If you send the letter 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.

Third, stop the clock in FOIAonline.

1. In the FOIAonline case file, under Case File Details, click the "Clock Details" button on the Left Navigation.
2. Select "Clarification" in the Reason drop down menu.
3. 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.
4. Click the "Save" button on the page.
5. Wait for the requester to respond or the due date to pass. When the requester responds and modifies the request, click the "Start the Clock" button on the left side of the page in FOIAonline.
6. Once you are on the "Start the Clock" screen, press the "Start the Clock" button on the bottom of the page.

Fourth, if the requester does not respond by the due date—which should be at least 20 calendar days from the date the request for modification is sent—or fails to provide a modification that sufficiently describes the records sought, then begin the close-out process using the Closure for Failure to Modify FOIA request template. Be sure to document all communications in FOIAonline, including those to which the requester fails to respond. *See also* Part 6.E, Final Release and Response to Requester.

Template D—Closure for Failure to Modify FOIA Request

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

If the requester does respond and sufficiently modifies the request, then proceed to process the request. If the requester responded to your communication or you were able to modify over the phone, then confirm that modification in writing. Once confirmed, update FOIAonline using the following steps:

1. Go to the "Submission Details" tab in FOIAonline and click the box saying, "Has Description Been Modified?"
2. Type the modified description in the box.
3. Click "Save Changes" button at the bottom of the page.

Process the request according to the modified description.

Template F—Confirmation of Request Modification

Practice Tip: If you determine that the FOIA request constitutes an improper request because the request is not reasonably described, per EPA's regulations, you must contact the requester to give the requester the opportunity to discuss and modify the request. For more information on request parameters, see EPA regulations at 40 C.F.R. § 2.102(c) ("Procedures for making requests").

## Part 2.B. Agency Records

The Agency is only required to respond to requests for agency records. The FOIA does not require EPA to create new records by compiling or reformatting data, nor does it require the Agency to re-create records that were properly disposed of in accordance with the Agency's records policy. Please note, if the request seeks records in EPA's possession that originated with another federal agency then see Part 5.D.vi, External Consultations and Referrals.

**What is an Agency Record?**

An Agency Record is:
- Created or obtained by the Agency; and
- Under Agency control when the request is received.

The FOIA does **not** require the Agency to:
- Create a new record or re-create records that were properly disposed;
- Produce records over which it retains no control;
- Produce purely personal records; or
- Produce future records.

### Part 2.B.i. Requests Possibly Not for Agency Records

The FOIA does not require the Agency to create new records. An example of this type of improper request includes:

- "Make me a list of all Agency actions that . . .";
- "I want to know what the Agency is doing about . . .", and
- "Provide me with information about who is working on. . . ."

EPA also does not have to produce records over which it retains no control. Requests for records involving EPA contractors should be reviewed carefully as EPA does not have custody or control over many contractor-generated records.

EPA does not have to produce other entities' records that it does not control or possess.

- "Please provide me with the County's records on this issue unrelated to EPA."

EPA does not have to produce purely personal records. Recall that the FOIA only requires the release of "agency records," i.e., records under the Agency's control at the time of the request that the Agency created or obtained. In distinguishing between "personal" and "agency" records, one should examine the totality of the circumstances. Factors to consider when differentiating "personal records" from "Agency records" include:

- The purpose for which the record was created;
- The degree of integration of the record into the agency's filing systems; and
- The extent to which the record's author or other employees used the record to conduct agency business.

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Practice Tip: See Dep't of Justice, Office Info. Policy, *"Agency Records" vs. "Personal Records"* (Jan. 1, 1984), https://www.justice.gov/oip/blog/foia-update-oip-guidance-agency-records-vs-personal-records, for more information about distinguishing between agency and personal records.

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EPA does not have to create new or additional explanations regarding agency decisions. Examples of this type of improper request:

- "Provide the basis for the Agency's decision to . . ."; and
- "Provide any records supporting the statement that. . . ."

EPA does not have to "hold" a request open for records that EPA may create at some point in the future (i.e., records that do not exist at the time the Agency receives the request). Examples of this type of improper request:

- "Provide the final XYZ Report when it is finished next month"; and
- "This is a request for EPA to send me each quarterly report on topic X."

### Part 2.B.ii. Asserting that a Request Does Not Seek Agency Records

If the request does not seek Agency records, begin the close-out process using the Not an Agency Record Letter template. However, if part of the request is proper (i.e., seeks Agency records and is reasonably described), we are obligated to respond to that part of the request.

Template E—Not an Agency Record Letter

## Part 2.C. Publicly Available Information

If a request only seeks information that is already publicly available, your FOIA Program can close the request after you direct the requester, in writing, to the specific location where EPA has made the information publicly available. Locations may include:

- EPA's website;
- EnviroFacts;
- ECHO;
- MyProperty;
- FOIAonline; and
- ChemView.

Template G—All Records Publicly Available

## Part 2.D. Managing the FOIA Response Deadline

### Part 2.D.i. FOIA Response Deadlines

Under the FOIA, you have 20 working days to process a request unless unusual circumstances exist, the requester agrees to an alternative deadline, or you "toll the clock" (i.e., pause the response deadline). *See generally* 5 U.S.C. § 552(a)(6)(A)(i); Part 2.D.ii, Stopping the Clock; Part 2.D.iii, Extending the FOIA Response Deadline. In FOIAonline, the clock in the upper right-hand corner reflects the FOIA response deadline. You should use this clock to keep track of how many days remain until your deadline. Depending on the request, you may extend the deadline for processing the request, toll the clock, or both.

It is important to pay attention to statutory deadlines. Failing to respond to a FOIA request 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. *See* 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! Many complex FOIA requests cannot be processed in 20 working days, so take appropriate steps to notify the requester and arrange for additional time as soon as possible. *See* Part 2.D, Managing the FOIA Response Deadline.

### Part 2.D.ii. Stopping the Clock

Time limits can be tolled (i.e., stopped) for clarification or fee-related reasons. You can stop the clock once while you are waiting for clarification from a requester. *See* 5 U.S.C. § 552(a)(6)(A)(ii); Part 2.G, Clarifying FOIA Requests. The clock can be tolled as many times as necessary to resolve fee-related issues. *See* Part 3, Fees. Once the request is clarified or the fee-related issue is resolved, be sure to go back into FOIAonline and select "Start the Clock."

To toll the clock, inform the requester in writing that you are tolling the clock, upload that correspondence to FOIAonline, and toll the clock in FOIAonline. To toll the clock in FOIAonline, select "Stop the Clock" in FOIAonline and select the appropriate reason.

It is recommended that you discuss with your FOIA processing team the requester's request and what additional information could be helpful. *See* Part 2.E, Building a FOIA Processing Team.

### Part 2.D.iii. Extending the FOIA Response Deadline

The clock can be extended by negotiating a new due date with the requester or asserting unusual circumstances.

By maintaining an open line of communication with the requester, you can always discuss the anticipated completion date and ask the requester to agree to a new due date. The requester should expressly agree to any negotiated due date. If you can reach an agreement, memorialize that agreement in writing. If the requester agrees to the new negotiated due date orally, you should send a communication to the requester via FOIAonline summarizing the conversation and providing the agreed-upon due date. Remember to also update the due date in FOIAonline.

The clock can also be extended if unusual circumstances exist. It is recommended that you examine and, if applicable, assert unusual circumstances early in your process. The FOIA identifies three unusual circumstances:

1. The request requires EPA to collect responsive records from a field office or other entity separate from the office processing the request;
2. The request involves a "voluminous" amount of records that must be located, compiled, and reviewed; and
3. 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).

To assert unusual circumstances, you must send a notice to the requester that:

- Is in writing;
- States which of the three unusual circumstances outlined above apply (more than one could apply);
- Provides the requester with an opportunity to limit the scope of the request, modify the request, or agree to an alternative time period for processing the request;
- Provides contact information for its FOIA Public Liaison; and
- Notifies the requester of their right to seek dispute resolution services from the Office of Government Information Services within the National Archives and Records Administration.

The Lead FOIA Program will enter the new due date and the justification for the extension into FOIAonline. The justification should include whether an opportunity to clarify the request was provided to the requester. The Lead FOIA Program will communicate the new due date to the requester and document all communication in FOIAonline.

If you are unable to complete the agency's response to the request on or before the 20th working day, you may be able to seek an extension of time if unusual circumstances exist. If unusual circumstances exist, and you need an additional 10 or fewer days to complete the response to the request, you may assert unusual circumstances and extend the processing clock an additional ten working days. If unusual circumstances exist, and you need more than 10 additional working days to complete the response to the request, you may assert unusual circumstances and extend the processing clock for the necessary number of days, as long as you notify the requester and provide them with an opportunity to limit the scope of the request so that it may be processed within that time limit.

In both cases, it is a best practice to develop an estimated date of completion within the 20 working days so you can arrange for the appropriate extension request. However, if you are unable to provide a sufficiently accurate estimated date of completion within the 20 days because, for example, you are still identifying the number of potential custodians, the locations of records, or you cannot estimate the resources you will have to review the records, you may first extend the deadline 10 days to allow for adequate time to estimate the completion date within the 30 working days.

If your FOIA Program or the NFO has asserted unusual circumstances to extend the due date by 10 working days (for a total of 30 days), you may reassert unusual circumstances to extend the due date further if you need additional time beyond the 30 working days.

**Possible Due Dates**

- < 20 Days
- < 30 Days—Unusual Circumstances AND
  - The request can be completed within 30 days
    OR
  - The requester modified the request so that it can be completed within 30 days.
- > 30 Days—Unusual Circumstances AND
  - An estimated date of completion was provided to the requester, and the requester did not modify the request
    OR
  - The requester agreed to an alternative due date.

## Part 2.E. Building a FOIA Processing Team

Building your FOIA processing team requires you to assess which FOIA Programs may have responsive records, the types of records that may exist, and the complexity of the request. The Lead FOIA Program will coordinate with other FOIA Programs who may have responsive records—i.e., Contributing FOIA Programs.

The most important question you should keep asking as you identify the correct Contributing FOIA Programs: are there any other Contributing FOIA Programs or custodians that are likely to have responsive records? Identifying any Contributing FOIA Programs at the beginning of the request will save you time and hassle later! Coordinating with any Contributing FOIA Program at the outset is critical for efficient FOIA processing across the Agency.

### Part 2.E.i. FOIA Processing Team Members

Individuals from both the Lead and Contributing FOIA Program can make up your FOIA processing team. Those individuals may be subject matter experts—having knowledge of the issues and records. They may also be individuals tasked with assisting in the collection of records, the review of records, or both.

For example, your FOIA processing team may be made up of:

1. FOIA Coordinator or FOIA Officer from the Lead FOIA Program and Contributing FOIA Programs;
2. Relevant staff assigned to perform FOIA-related tasks in the Lead FOIA Program and Contributing FOIA Programs;
3. Subject Matter Experts from your FOIA Program and Contributing FOIA Programs;
4. The designated criminal enforcement contacts in the Lead FOIA Program and any Contributing FOIA Programs when the scope of the request includes collection from criminal enforcement custodians or records that involve criminal enforcement custodians are located during the review of records;
5. Staff assigned to assist in the search for records, review of records, or both;
6. Attorneys that have knowledge about the subject matter;
7. FOIA Attorneys; and
8. FOIA Management.

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

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### Part 2.E.ii. FOIA Processing Team Planning

Your FOIA processing team should come to a mutual understanding on a plan of action for communicating with the requester, any potential hurdles to processing the request in a timely manner, and a mutual understanding of the scope of the request. *See* Part 4.A, Develop and Implement a Search Strategy; Part 5.A, Develop your Review Strategy.

If applicable, your FOIA processing team should initially attempt to answer the following questions:

- Confirm that the request is proper? *See* Part 2, FOIA Program Initial Review.
- Are any potentially responsive records already publicly available through FOIAonline or the EPA website? *See* Part 2.C, Publicly Available Information.
- Could the request benefit from additional clarification? *See* Part 2.G, Clarifying FOIA Requests.
- How long will it take to fully process the request, considering the scope of the request, estimated number of responsive records, etc.?
- Are there any associated sensitive issues (e.g., litigation, parallel criminal enforcement proceeding)?
- Are there any resource concerns, such as a competing large project?

With these questions answered, your FOIA processing team should be able to create search and review strategies. *See* Part 4.A, Develop and Implement a Search Strategy; Part 5.A, Develop your Review Strategy. For instance, if you determined that the request could benefit from additional clarification, you should set up a call with the requester and any subject-matter experts to discuss clarifying the request. *See* Part 2.G, Clarifying FOIA Requests. Or, for example, if a Contributing FOIA Program has identified publicly available records on EPA's website, the Lead FOIA Program can send those records to the requester as soon as possible. *See* Part 6, Producing Records.

Upfront coordination helps to avoid multiple offices reaching out to the same requester and clarifying the request in different ways. Remember, the Lead FOIA Program is responsible for clarifying the FOIA request based on input from all Contributing FOIA Programs. *See* Part 2.G, Clarifying FOIA Requests.

For a large, complex FOIA request, it is a recommended practice for the Lead FOIA Program to convene meetings with assigned staff in the Lead FOIA Program and any Contributing FOIA Programs to clarify responsibilities, methods to be used for collection, and other issues. *See* Part 4.A, Develop and Implement a Search Strategy; Part 5.A, Develop your Review Strategy. Consider also using a checklist when seeking initial feedback or as an agenda for a meeting of your FOIA processing team.

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Resource A, FOIA Project Checklist.

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When multiple requesters are seeking the same or similar records, you can use a single FOIA request's FOIAonline case file as a repository for the records (the "lead" FOIA request) and direct other requesters to that lead FOIA request's public facing webpage. You can find this public facing webpage by logging out of FOIAonline and searching for the FOIA request's FOIA number. If you use this approach, please indicate the lead FOIA case's ID number in the comments section for each of the requests you direct to the lead FOIA case. When a particular topic is expected to generate many requests, make use of interim releases of previously processed records on that topic. *See* Part 6.D, Interim Responses.

When there is agreement on who will assist with collection and review, which may occur earlier or later in the process, those agreements and responsibilities should be memorialized in FOIAonline as tasks. It is the responsibility of the Lead FOIA Program to ensure that all FOIAonline tasks are completed and closed out before the request is closed out. If necessary, the FOIA Manager, FOIA Coordinator, or FOIA Officer in the Lead FOIA Program may obtain NFO assistance in coordinating the completion and closing of tasks.

## Part 2.F. Working with the Requester

After ensuring that the request is properly assigned to the Lead FOIA Program, as a best practice you should reach out to the requester by sending a short note through FOIAonline, providing the requester with your contact information and immediate next steps that you will take. This can be accomplished by clicking the "Create Correspondence" in FOIAonline.

Template B—Initial Letter

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

The Office of Government Information Services (OGIS) is a FOIA resource for the public and the government. *See* U.S. Nat'l Archives and Records Admin., *Office of Gov't Info. Servs.*, https://www.archives.gov/ogis (last visited Oct. 19, 2020). The FOIA Improvement Act of 2016 (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. *See* Dep't of Justice, Office of Policy, *OIP Summary of the FOIA Improvement Act of 2016 (updated Aug. 17, 2016), https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016*.

Practice Tip: Be sure to turn on the notification feature under the "My Account" tab in FOIAonline, as the system will then generate emails to your EPA 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.

***Call or email the requester*.** Most requesters are glad to hear from the Agency about the status of their FOIA requests. 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's 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.

***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 understand that the Agency staff wants to assist them in fulfilling their FOIA requests.

***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.

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

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.

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.

Template T—Interim Response

As a best practice, document your search strategy 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. *See* Resource I, FOIA Search Guide: Best Practices.

## Part 2.G. Clarifying FOIA Requests

The Lead FOIA Program may need to take actions to, among other things, better understand what records the request seeks or improve the Agency's ability to respond to the request. For example, the Lead FOIA Program may evaluate whether clarification by the requester would benefit the processing of the request and if so, contact the requester. It is a best practice to engage subject matter experts in the Lead FOIA Program and any Contributing FOIA Programs in discussions identifying what additional clarification is needed to process the FOIA request. The NFO is available to assist the Lead FOIA Program with seeking clarification from the requester.

**How many times may I stop the clock to clarify the request?**

The clock may only be stopped once to clarify the scope of the request—either by the FOIA Program or by the NFO as noted in Part 1.B, NFO and Lead FOIA Program Intake Coordination. Once the clock has been stopped, it should not be restarted until the information or clarification is provided by the requester. Nevertheless, a FOIA Program may contact a requester as many times as needed to clarify the scope of the request without stopping the clock.

FOIA Programs should document all communications, including a description of the modified scope of the request, for the official record in FOIAonline. Further, the Lead FOIA Programs should ensure that FOIAonline reflects any updated deadlines.

The more categories on which you and the requester can agree, the more straightforward processing the request will be. Consider using this checklist when considering how a request could be clarified:

- 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

### Part 2.G.i. Prepare for your communication with the requester

Upfront preparation is imperative regardless of whether you will make contact by email or telephone.

- If you seek clarification on the types 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 topics of records sought, gather information about the issues on which the relevant offices are focused. Consider any relevant/timely issues affecting the offices, 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?"
- If you seek clarification regarding custodians, consider who are the individuals in your FOIA Program 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.

Practice Tip: Want to know where to find information about EPA's record systems? A suitable place to start is EPA's Federal Information Systems that can be found here: https://www.epa.gov/privacy/epa-federal-information-systems.

### Part 2.G.ii. Office of Government Information Services

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.*

Practice Tip: 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 request if it reasonably describes the records sought, even if the request would benefit from further clarification.

## Part 3. Fees

The FOIA allows agencies to charge certain fees to requesters to process their FOIA requests. Requesters are placed into one of four fee categories. *See* Part 3.B, Categories of Requesters. Which types of fees (*see* Part 3.A, Types of Fees) an agency may charge is based on the requester's fee category. Further, in some circumstances, the FOIA allows for a waiver or reduction of fees. *See* Part 3.C, Fee Waivers. Remember, you can toll the clock as many times as needed for fee-related reasons, such as when you seek an assurance of payment from the requester. *See* Part 3.D, Advanced Payments and Assurances of Payment. Finally, certain restrictions apply to an agency's ability to charge fees, as discussed below. *See* Part 3.E, Charging Fees After Missing Deadline.

You should estimate request processing fees if the NFO has denied the requester's fee waiver, or the requester did not request a fee waiver. Contributing FOIA Programs must also provide you with their respective estimated fees. The Lead FOIA Program must provide written notice to requesters of anticipated fees that are more than $25 or, if applicable, a higher amount the requester agreed to pay. *See* 40 C.F.R. §§ 2.102(d), 2.107(e). EPA then requires a written assurance of payment from the FOIA requester, unless an advance payment was received. *See* 40 C.F.R. § 2.107(e); *see* Part 3.D, Advanced Payments and Assurances of Payment.

| Types of Fees that May be Charged by Fee Category | | | |
|---|---|---|---|
| **Type of Requester** | **Search** | **Review** | **Duplication** |
| Commercial | Yes* | Yes | Yes |
| Educational, 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 the response time period and the requirements of the FOIA Regulations, 40 C.F.R. § 2.107(d)(6). | | | |

### Part 3.A. Types of Fees

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

Search fees. Search fees may be charged for the time spent looking for documents that are responsive to a request. 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 (i.e. responsiveness review).

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

and applying redactions to documents. Review fees may *not* be charged for subsequent levels of review, including legal review.

Duplication fees. Duplication fees include the direct costs of making physical 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.

| Type of Personnel | Charges |
|---|---|
| Clerical | $4.00/quarter hour |
| Professional | $7.00/quarter hour |
| Managerial | $10.25/quarter hour |

Note: Some FOIA requesters may also ask that EPA certify the records are "true and correct copies" or certify the authenticity of the records. This is a special service for which the OMB Fee Guidelines allows agencies to charge fees. *See* 40 C.F.R. § 2.107(f). EPA charges $25 to certify records. To certify the authenticity of headquarters records, or questions on potential fees for certification, contact the Program Specialist in the General Law Office in the Office of General Counsel. To certify the authenticity of regional records, contact the appropriate Office of Regional Counsel.

## Part 3.B. 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 four fee categories: (1) commercial use requesters, (2) educational institutions and noncommercial scientific institutions; (3) representatives of the news media; and, (4) other (requesters who do not fall into the categories 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 request has been placed in a "commercial use" category in the past does not mean that a subsequent request submitted by the same 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 and noncommercial scientific institutions.** Educational Institutions include schools such as universities and vocational institutions. The OMB Fee Guidelines require the institution to operate a program of scholarly research. The OMB Fee Guidelines further 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 the professor's 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."

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—Representative of the News Media.** 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 3 fee category are only charged duplication fees but receive the first 100 pages of paper copies for free.

**Category 4—Other Requesters.** The "other" category is simply a catchall category for any requester that does not fall into any of the other three 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.

| Requester Category | 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.

Practice Tip: 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.

## Part 3.C. Fee Waivers

You should be aware of the requester's fee category and whether a fee waiver has been granted when evaluating the request. *See also* Part 1.B, NFO and Lead FOIA Program Intake Coordination. If a fee waiver has been granted, then no fees will be charged. Although the Agency will not bill the requester, you should track administrative costs in FOIAonline. Please note that the NFO may initially deny a fee waiver, the requester may appeal that determination, and the fee waiver may ultimately be granted.

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

**Request Handling**

| | |
|---|---|
| Requester Info Available to the Public : | Yes |
| Request Track : | Complex |
| Fee Category : | Media/Educational |
| Fee Waiver Requested: | Yes |
| Fee Waiver Status: | Full Grant |

## Part 3.D. 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.

Template H—Advanced Payment Assurance of 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. 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. EPA then requires a written assurance of payment from the FOIA requester unless an advance payment was received.

The Lead FOIA Program may stop the clock as many times as needed for fee-related reasons, including when the requester is required to provide a written assurance of payment and has failed to do so. The Lead FOIA Program should notify the requester when the Lead FOIA Program stops the clock for fee-related reasons.

Practice Tip: The main request page in FOIAonline indicates whether the requester set a fee limit.

Note that if a FOIA requester is delinquent in paying fees, it is placed on a "Do Not Serve" list. Ensure that you do not process requests for any requester included on the Do Not Serve list. Your FOIA Coordinator or FOIA Officer has access to the list, which is located here: *Do Not Serve List*, NFO SharePoint.

## Part 3.E. Charging Fees After Missing Deadline

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,
- "more than 5,000 pages are necessary to respond to the request,"[1]
- 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" or the Agency made 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.

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 the requester 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"

[1] 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.

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.

# Part 4. Searching for Responsive Records

It is important to understand the roles and responsibilities of each FOIA Program in processing a FOIA request. The Lead FOIA Program, which is the FOIA Program that the NFO has assigned the FOIA request to for processing, is responsible for taking the lead in developing and implementing the search strategy. The Lead FOIA Program needs to identify any Contributing FOIA Programs where responsive records may reasonably be located. If the Lead FOIA Program determines that another FOIA Program may have potentially responsive documents, the Lead FOIA Program needs to work with the FOIA Officer or Coordinator in those Contributing FOIA Programs, as discussed below, to develop and implement a search strategy.

Throughout this part, we will refer to the Lead FOIA Program and any Contributing FOIA Programs and discuss each programs' role in the search process. To ensure efficient processing and avoid duplication, the Lead FOIA Program should take the lead in developing the agreed-upon search strategy and disseminating clear and consistent direction to the Contributing FOIA Programs. You want to avoid situations where Contributing FOIA Programs 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.

## Part 4.A. Develop and Implement a Search Strategy

### Part 4.A.i. 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 Lead FOIA Program 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).

### Part 4.A.ii. Schedule Meeting and Develop the Search Strategy.

By the time you get to the tasks described in Part 4, you should have already confirmed that the FOIA request is a proper request and, if it is not, sought modification from the requester. *See* Part 2, FOIA Program Initial Review. Before you start to develop your search strategy, review the request again and remind yourself what the request seeks.

Regardless of whether your FOIA involves a request for records in a single office or multiple offices, you need to identify where to search, determine who should search, and determine how to conduct the search. These three items represent the core elements of your search strategy.

You might be thinking: where do I start? As always, start with the FOIA request, and any modifications. If the request seeks only Outlook emails, then you should focus your search on Outlook emails. Frequently, however, FOIA requests are broad and seek, for example, all documents regarding a topic during a particular time frame.

In formulating an effective search strategy, the Lead FOIA Program considers the following:

- What individuals and offices might have documents? *See* Part 4.B, Identifying Custodians.
- How much to search? *See* Part 4.C, Date Range.
- What terms to search? *See* Part 4.D, Search Terms.
- Where to search? *See* Part 4.E, Search Locations and Tools

The Lead FOIA Program should schedule a meeting to develop the search strategy. This meeting should include the necessary FOIA Officers, FOIA Coordinators and subject matter experts in the Lead FOIA Program and any Contributing FOIA Programs, the designated criminal enforcement contacts in the Lead FOIA Program and any Contributing FOIA Programs, if applicable, and the case attorney and FOIA attorney from the Lead FOIA Program.

Practice Tip: If multiple offices are involved, then the Lead FOIA Program takes the lead in developing the search strategy, in coordination with the Contributing FOIA Programs.

### Part 4.A.iii. Developing and Documenting the Search Strategy.

It is important to track and document the search that was conducted. It is recommended that the lead for the Lead FOIA Program develop a memorandum or checklist to track the search. Specifically, the lead for the Lead FOIA Program would note: the Contributing Office custodians searched; the Lead FOIA Program custodians searched; the locations searched; whether the search of custodian records has been completed; 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.

Resource D, Search Tracking Memo.

## Part 4.B. Identifying Custodians

Once the Lead FOIA Program identifies which offices potentially have responsive documents and where to search for those documents, the Lead FOIA Program next needs to identify individuals likely to have responsive records—often referred to as custodians. In identifying this list of individuals, include any custodians who the requester names in the FOIA request or whose positions at the Agency suggest that they are reasonably likely to possess responsive records. Also, consult with subject matter experts to determine which other custodians may have potentially responsive documents. Remember, you must identify custodians necessary to conduct a search reasonably calculated to uncover all relevant documents.

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 FOIA Programs:

- The Lead FOIA Program, via FOIAonline, tasks the FOIA Officer or Coordinator in each Contributing FOIA Program and asks the Contributing FOIA Programs: (a) to identify a subject matter expert that will serve as the point of contact for the Lead FOIA Program. (That individual should contact the lead for the Lead FOIA Program 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), including any criminal enforcement custodians if the scope of the request involves a criminal enforcement matter.
- In issuing the task, provide information on the FOIA, including any clarifications or modifications provided by the requester.

Once the Lead FOIA Program has coordinated with the Contributing FOIA Programs and has received the lists of potential custodians from Contributing FOIA Programs, the Lead FOIA Program should compile the complete list of custodians and document that list in the search memorandum.

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

In evaluating which custodians may have responsive documents, remember to consider former employees, employees who transferred to a different office, and contractors or grantees with EPA-issued email accounts, and assess whether any of these individuals would be potential custodians based on the information requested. The Lead FOIA Program and any Contributing FOIA Program should evaluate whether the scope of the request may involve a criminal enforcement matter and, if necessary, include relevant criminal enforcement staff in the list of custodians. The FOIA Officer or Coordinator in the Lead FOIA Program and any Contributing FOIA Programs should reach out to their designated criminal enforcement contact if they need to search for agency records from criminal enforcement custodians.

Practice Tip: If more than one office has potentially responsive documents to a FOIA request, the Lead FOIA Program and Contributing FOIA Programs should communicate regularly to ensure that the search strategy is complete before moving forward with implementation of that strategy.

### Part 4.C. Date Range

To determine which records are within the scope of a request, the Agency will ordinarily include only those records in its possession as of the date the request was received by one of the methods described in 40 C.F.R. § 2.103(a). The Lead FOIA Program will inform the requester if any other date is used, such as:

- An earlier date if it is reasonable to determine that all responsive records were created prior to the date that the FOIA request was received; or
- A later date, such as the date the search is initiated.

40 C.F.R. § 2.103(a).

### Part 4.D. Search Terms

The Lead FOIA Program should coordinate with their Search Point of Contact (SPOC) and subject matter experts to identify search terms that are likely to locate responsive records. Subject matter experts may be able to identify common terms, shorthand, abbreviations, or key phrases used by custodians working on the matter that can help you target exactly the right documents. Visit the SPOC Training & Resources section of EDD's SharePoint site, https://usepa.sharepoint.com/sites/oei_Work/ediscovery/SitePages/Home.aspx#!/home, to view advice on how to construct a search request with Boolean logic. The Lead FOIA Program and SPOC may seek assistance from the eDiscovery Division's eDiscovery Assistance Team (eDAT) to refine the search parameters, including the identification of keywords, date ranges, custodians, and the sources and locations of the electronically stored information (ESI) to be collected.

### Part 4.E. Search Locations and Tools

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 searches conducted by the eDiscovery Division (EDD). The second sections address how to conduct searches for other locations not included in the centralized search.

Once the Lead FOIA Program 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 to the FOIA request. If the FOIA request asks for documents in only one repository, e.g., Outlook emails, you can tailor the search accordingly. If the request is not limited to emails but rather seeks all documents on a topic in a particular time frame, be sure to evaluate the locations where responsive records are likely to be located. It is recommended that the Lead FOIA Program coordinate with the Contributing FOIA Programs to identify all locations likely to contain potentially responsive records.

Potential locations include, for example:

- Outlook email, calendars
- Skype/Lync/Teams Chats
- Microsoft Stream
- Lotus Notes mailboxes or calendars, other Lotus Notes databases
- Enterprise Content Management System (ECMS or EZ-records)
- Superfund Enterprise Management System (SEMS)
- Correspondence Management System (CMS)
- Local or shared computer drives (e.g., C:, F:, G:)
- SharePoint sites
- Microsoft Teams sites
- OneDrive
- Mobile devices (e.g., text messages and photographs)
- External drives and discs

- Hard-copy files (at EPA offices or stored at a Federal Records Center)
- And other locations reasonably likely to contain responsive records.

Resource E, Instructions for Searching & Collecting Other Electronic Files.

### Part 4.E.i. Centralized Searching

EDD provides electronic centralized search service to support the Agency's FOIA Programs. Visit the eDiscovery Division's SharePoint page for an updated list of sources that EDD will search by matter type. *See*, eDiscovery Division, *About EDD*, https://usepa.sharepoint.com/sites/oei_Work/ediscovery/SitePages/Home.aspx#!/about. For example, EDD will search, among other sources, Outlook email messages, Outlook calendar entries, and Skype Chats; OneDrive; SharePoint; network locations; and workstations.

Practice Tip: If there is pending litigation on a FOIA, or if the request has been referred to the National FOIA Office's FOIA Expert Assistance Team (FEAT), consult with OGC before initiating a centralized search for the FOIA.

The Lead FOIA Program should submit search requests to collect electronic documents from the identified record source locations covered by EDD's centralized search, unless a more targeted collection is more likely to locate all responsive documents, such as where all responsive records are located in a specific folder within an email account. For example, if a FOIA request seeks a specific document, the document could 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 Lead FOIA Program would pursue a centralized search request.

Each organization has at least one SPOC, and that SPOC works directly with EDD in submitting and processing centralized search requests. The Lead FOIA Program should consult with EDD about the estimated timeframes for beginning and completing a requested search/collection, so other steps in the process can be planned accordingly. For most FOIA requests, the Lead FOIA Program will submit the centralized search requests.

Practice Tip: Instructions on how to submit a centralized search request through your SPOC are located at: https://usepa.sharepoint.com/sites/oei_Work/ediscovery/SitePages/Home.aspx#!/spocs/training.

Wait! Before initiating the centralized search, the Lead FOIA Program should provide to the SPOC—who, in turn, will include in the search request to EDD:

1. Names and email addresses of all custodians being searched;
2. Electronic source locations/repositories; and
3. The search criteria reasonably likely to yield responsive records (date range; keywords).

It is important for the Lead FOIA Program to coordinate effectively with the Contributing FOIA Programs to ensure that the search terms capture the scope of records sought.

### Part 4.E.ii. Searching Non-EDD Document Repositories

The Lead FOIA Program's search strategy should include the process for collecting hard copy records and electronic records from any source locations or repositories that are not included in EDD's centralized search service.

Consistent with its search strategy, the Lead FOIA Program should develop an email to all custodians providing specific search instructions to be followed regarding all document repositories that were not included in the centralized search. The instructions to the custodians should explain that the Agency has received a FOIA request for which the custodian may have responsive documents and that a centralized search for the following records: [insert applicable source locations, such as Outlook, OneDrive, or network drives] is already being conducted. The instructions should further explain that the custodian should conduct a manual search for documents potentially responsive to the FOIA request in the following locations: [insert applicable list of locations, such as ECMS, SEMS, hardcopy files]. The search instructions should include:

- The FOIA request number;
- A clear description of the FOIA request (and any modification/clarification);
- A copy of the FOIA request and any relevant correspondence with the requester;
- Recommended search locations and instructions for each search location;
- Recommended search criteria including date range and search terms;
- Recommended document collection method (i.e., instructions for retrieving Lotus Notes emails or calendars); and

Date by which documents collected are to be transferred to the Lead FOIA Program

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Resource C, Sample Search Instructions for Potential Custodians.

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After distributing the search instructions, and before the collection period ends, the Lead FOIA Program should be in contact with the custodians to ensure that they understand their responsibilities and how to conduct the search.

Practice Tip: Also consider creating a SharePoint location to collect and temporarily store documents. Depending on your review strategy, Part 5.A, Develop your Review Strategy, you could provide a link to the eDiscovery Division to collect those documents in the SharePoint location as part of the centralized search, or you could provide limited access to the SharePoint location to allow multiple FOIA Programs that have an equity interest in the documents to review and redact these documents in Adobe Acrobat Pro. To provide custodians ample time to search for documents, it is recommended that the Lead FOIA Program provide custodians the search instructions at or shortly after the Lead FOIA Program submits the centralized search request. In the search instructions, ask custodians to document, with as much specificity as possible, how they conducted their search.

Below are tips the Lead FOIA Program may want to consider as it develops search instructions to custodians to search for responsive records.

It is important for custodians to evaluate all repositories that are reasonably likely to contain responsive records. 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 to their EPA email account. Once forwarded into EPA's email system, EDD can capture the information via the centralized search.

EDD's centralized search also does not extend to data uniquely retained on mobile devices, such as text messages, photos, or notes that are unique to the mobile device. You, or someone in your FOIA program, should remind custodians of the Agency's direction regarding forwarding text messages to their EPA email account so that EDD can capture such messages via the centralized search.[2]

Practice Tip: Instructions on how to forward text messages to EPA email accounts are located at: (b)(6) - Internal Web Address [redacted]

### Part 4.E.iii. Lotus Notes

For routine FOIA requests, the EDD will not search Lotus Notes mailboxes or calendars, or other Lotus Notes databases. If a FOIA request seeks emails or information located in Lotus Notes, the Lead FOIA Program and the FOIA Officer or Coordinator in any Contributing FOIA Programs should provide custodians the step-by-step instructions for searching Lotus Notes.

[2] 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.

### Part 4.E.iv. EZ Email Records

Even though emails saved through EZ Email Records are archived into the Electronic Content Management System (ECMS) as Agency records, they are not captured by EDD's centralized search. 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 ECMS manually for any non-duplicative emails that may be responsive to the request.

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 for more information. Detailed search instructions for ECMS are available at: https://usepa.sharepoint.com/sites/oei/ermd/ECMS/SitePages/Search-Records-User-Guide.aspx.

### Part 4.E.v. 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.

### Part 4.E.vi. Extended Leave or Detail and Separated Employees

If a potential custodian of responsive records is on detail or extended leave from the Lead FOIA Program or a Contributing FOIA Program during the time of the search, the Lead FOIA Program must ensure that the employee's records are searched in their absence. The Lead FOIA Program and Contributing FOIA Programs should work together to ensure that custodians' files are searched, even if those custodians are on detail, extended leave, or have separated from the Agency.

You may include separated employees as custodians in your centralized search request for Outlook emails, Outlook calendar entries, Skype chats, and records on OneDrive, SharePoint, network drive(s), and workstations. The Office of Mission Support (OMS) has a procedure on approving access to the email and electronic records of separated or absent employees outside of the EDD centralized search process.

To request access to records of employees who are on leave or separated, the Lead FOIA Program processing the request must send an email 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.

| Request for Access to Records of Employees Who are on Leave or Separated | |
|---|---|
| Role | Name |
| Approver | John Doe (IMO, IRM BCs or their designee whose name has been provided as authorized approvers) |
| Mail Box Name<br>Employee's full name<br>Employee's LAN ID<br>Telephone number | Doe.Jane@epa.gov<br>Jane Any Doe<br>Jdoe<br>111-222-3333 |
| Person Receiving Access (Include email address) | Steven Jones (Jones.StevenT@epa.gov) |
| Access Needed for the Following Applications (as applicable): | o Lotus Notes<br>o Office 365 (Including OneDrive)<br>o Data Files (network drives, F: and/or G:. EZ Tech<br>o HQ Voice mail files<br>o HQ VoIP Call logs<br>o Mobile device data<br>o Login Events (EZ Tech) |
| The Approver (IRM BC or IMO) must complete this table and submit the table via email to OEI_FILE_ACCESS_REQUEST@epa.gov. The email Subject must include the nature of the request (i.e. email access). | |

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

The table below depicts the type of information available and the time limit for requesting access to the related data. As each access request is completed, the IRM BC or IMO will notify

and provide any instructions to the Lead FOIA Program requesting the information, if necessary.[3]

| Electronic Activities | Content | Request Time Limit |
|---|---|---|
| Lotus Notes | Emails, Calendars | Up to 2/29/2013 |
| 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 |

[3] A list of IRM BCs and IMOs, by office, is available at https://usepa.sharepoint.com/sites/oei_Community/CIOSAC/Documents/Admin/Member%20List/Official%20CIO%20SAC-SIO-IMO-SITL%20List.pdf.

## Part 5. Review Records

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.

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

### Part 5.A. Develop your Review Strategy

The Agency's FOIA procedures require the approval of a Division Director or equivalent for FOIA responses. The approval applies to both withholdings and releases. Before you begin to review the records, review your FOIA Program's local FOIA procedures, available at (b)(6) - Internal Web Address [redacted], and consider who will likely need to review the records.

Your review strategy depends on the size and complexity of the FOIA request and potentially responsive records. For the simplest request, you may only need to perform first-level review and your manager may perform the second-level review of the records. For more complex requests, multiple individuals or offices may 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.

Lead and Contributing FOIA Programs should work together in developing a review strategy, considering:

- The number of records associated with each FOIA Program (i.e., EPA Region or Headquarters Program Office);
- The extent records associated with a Contributing FOIA Program overlap those associated with the Lead FOIA Programs;
- Whether a Contributing FOIA Program has specific resource issues that would limit its ability to timely complete the review; and
- The extent to which distributing review of records among the Lead FOIA Program and Contributing FOIA Programs would lead to greater consistency or efficiencies, such as accelerating equity reviews.

### Part 5.B. Document Review Tools

Relativity is EPA's standard document review platform for all records collected by an eDiscovery Division centralized search. EPA staff can access Relativity through a web browser from their office or from a remote location.

Resource L, eDiscovery Division Relativity Guidance.

To review any records that are not collected by an eDiscovery Division centralized search, it is recommended that EPA staff use EPA-approved document review and redaction software, such as Adobe Acrobat Pro DC. Contact your local Information Security Officer or local Information Technology staff to obtain access to Adobe Acrobat Pro DC.

Resource M, Redacting in Adobe Acrobat Pro DC.

## Part 5.C. Develop Coding Memo

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 keywords and acronyms that can help reviewers identify responsive material.
    **Tip:** 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).
    **Tip:** 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.
  - As a reminder, EPA organizations may not redact non-responsive information within a responsive FOIA record. Where a FOIA requester has narrowed their FOIA request to exclude non-responsive information within a responsive record, such narrowing should be memorialized in writing to ensure clarity.
- 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.
- 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.

## Part 5.D. Levels of Review

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 FOIA requests, responsiveness review and the FOIA exemption review are done concurrently during the first-level review. During a 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 Consultation"), and whether any documents should be flagged for upper management awareness.

The levels of additional review beyond the first-level 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 Strategy. *See* Part 5.A, Develop your Review Strategy.

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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.

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The FOIA Policy provides: "All records released or withheld 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." *See* FOIA Policy, 6.F.

For many FOIA requests, 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 request warrants a second-level review at the staff level or by an attorney prior to documents going through management review. Second-level review can take many forms. Below

are types of reviews that may be completed. This should be discussed with the FOIA team in conjunction with your management.

### Part 5.D.i. First-level Review

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:

**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.

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, 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 the material. Where a FOIA requester has narrowed their request to exclude non-responsive information within a responsive record, such narrowing should be memorialized in writing to ensure clarity.

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

Resource J, FOIA Exemptions Review.

**Equity Review by Other FOIA Programs**: If the record is responsive and contains discussions or information from another EPA office, identify those records for internal equity review, as described below.

**Consultations with Other Federal Agencies or the White House**: If the record is responsive and contains discussions or information from another federal agency or involves the White House, you will need to identify those records for external equity review, as described below.

**Upper Management Review:** During first-level review, you should mark records for further review if you think management may have a specific interest in being aware of prior to release.

### Part 5.D.ii. CBI Review

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).

Practice Tip: For example, 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 to identify potential CBI: "[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* reach out to the affected business via telephone, email, or letter, and ask if they claim the information as CBI. 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(a) 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(c), 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," "controlled unclassified information," 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 Lead FOIA Program must include the initial denial language, found in the PBI Case Tracking Procedures, final determination 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 Lead FOIA Program 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. EPA's CBI Regulations are accessible at https://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=40:1.0.1.1.2.

Resource K, Proprietary Business Information (PBI) Case Tracking.

Template N—CBI Substantiation Request Letter Sample A - FOIA

Template O—CBI Substantiation Request Letter Sample B - Non-FOIA

Template P—CBI Substantiation Request Letter Sample C - FIFRA, FOIA

Template Q—CBI Substantiation Request Letter Sample D - FIFRA, non-FOIA

Template R—CBI Substantiation Request Letter Sample E - TSCA

### Part 5.D.iii. 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. If information in a responsive FOIA record 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 "redact" the content subject to a FOIA exemption, as discussed below.

Resource L, eDiscovery Division Relativity Guidance.

Resource M, Redacting in Adobe Acrobat Pro DC.

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

### Part 5.D.iv. Quality Assurance/Quality Control

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 Pro DC and Relativity Practice Tips for smoother, more efficient QA/QC process.

**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 "NAIL" + any union officials or topic words that may be relevant.
- OEX equities
  - Include current administrator's name and email addresses 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.

**QA/QC in Relativity.** In Relativity, saved searches can be set up to capture common coding inconsistencies and/or missed equities. Common coding inconsistencies include:

- A document coded as "release in full" but the document contains one or more redactions; and
- A document coded as "release with redactions" but the document does not have any redactions.

EDD delivers a coding conflicts view and a coding conflicts saved search as part of its standard Relativity workspace delivery. The coding conflicts view and saved search allows you to look for coding conflicts within your workspace. Visit EDD's Relativity Resource Center to access quick reference guides on using the coding conflict checks view and the coding conflicts saved search.[4]

Additionally, you can create saved searches to identify other coding conflicts. When setting up a search to catch coding inconsistencies, it is a best practice to design the search to capture documents in the following categories:

- Release with redaction and no exemption selected
- Release with redaction and no redactions applied (if not using the EDD coding conflict view or saved search)
- Release in full and exemption selected
- Release in full and redactions applied (if not using the EDD coding conflict view or saved search)
- 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

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 Pro DC, as mentioned above.

### Part 5.D.v. 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:

- Are there emails involving personnel in another office?
- Are the documents created in another office?
- Are there comments/contributions to a document from personnel in another office?
- Are there opinions or legal advice given by an attorney in a legal office?

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.

If records are identified for equity review, an "equity review" task should be created in FOIAonline for the appropriate FOIA Program or Region. Records can be provided to the other FOIA Program or Region in several ways:

- Links to saved searches in Relativity
- Batches in Relativity

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[4] https://usepa.sharepoint.com/sites/oei_Community/relativity/SitePages/Home.aspx

- PDF versions of the records through an informal export from Relativity

It is best to check with the FOIA Program or Region conducting the equity review how they would prefer to receive the records.

Best Practices for Equity Review:

- Having Program Offices/Regions conduct first-level review on their records for large multi-office FOIAs will reduce the need for equity review
- Check if the FOIA Program or Region conducting equity review wants to review "withhold in full" records. If they do not, this will reduce the number of records requiring equity review.

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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.

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When in doubt about another office's interest in conducting an internal equity review or reviewing a specific document, call and ask. 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
  - Any document from 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
- OPA—Office of Public Affairs
  - 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
- OCIR—Office of Congressional and Intergovernmental Affairs
  - 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 mail involving personnel from that office

### Part 5.D.vi. External Consultations and Referrals

If you identify a record that originates from another federal agency, the Lead FOIA Program must either consult with that Federal agency or refer those records or portions of records to that Federal agency. *See* 40 C.F.R. § 2.103(d). It is ultimately the Lead FOIA Program's responsibility to ensure this coordination occurs; however, when the Lead FOIA Program tasks a Contributing FOIA Program with document review, the FOIA Programs may agree that the Contributing FOIA Program is the one to reach out to the other agency.

For assistance in determining whom to contact at another agency, please see the NFO's SharePoint site or check with your fellow FOIA Officers and Coordinators.

**Consultation.** The Lead FOIA Program, or where appropriate the Contributing FOIA Programs, will make records available for review to another federal agency or the White House when the documents include information of substantial interest to that agency or the White House. This includes documents created by, emails involving personnel from, and legal opinions or advice provided by that federal agency or the White House. This review is called a "consultation." The purpose of the consultation is to ask another federal agency for a recommendation as to how to treat, and possibly redact or withhold, the record.

The Lead FOIA Program will coordinate with the NFO when there are consultations with other federal agencies. In performing consultations, the Lead FOIA Office will:

- Concurrently notify the NFO in writing for any consultation sent to an individual below the Deputy Assistant Secretary-level and will obtain the NFO's concurrence prior to any consultation sent to an individual at the Deputy Assistant Secretary-level or higher, except for the OIG; and
- Contact the NFO for instructions on how to complete consultations with the White House.

Practice Tip: You should request an informal export if you need to consult with another Federal Agency regarding the application of exemptions on records or portions of records where the other Federal Agency has equity. If you are referring records to another federal agency, you should submit a formal production request to EDD for those records. See Appendix, Section 5.G. for additional information regarding informal export and formal production requests.

**Referrals.** The Lead FOIA Program should refer any record that originated with another federal agency to that agency for direct response to the requester. The Lead FOIA Program must obtain the NFO's concurrence before they refer records to another federal agency. 40 C.F.R. § 2.103(d)(2).

If the referral is to a federal agency that uses FOIAonline, then the Lead FOIA Program should send the referral in FOIAonline. If the referral is to a federal agency that does not use FOIAonline, then the Lead FOIA Program should first send the referral either by email or mail and second document the communication making the referral in FOIAonline.

Template L—To Requester, Close Out and Referral to Other Agency

Template M—To Agency, Cover Letter to 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.

# Part 6. Producing Records

## Part 6.A. Awareness Notification

If a request is designated for awareness notification, the Lead FOIA Program will follow the instructions outlined in the Awareness Notification memo before releasing records in FOIAonline. See EPA Chief of Staff Memorandum, Awareness Notification Process for Select Freedom of Information Act Releases (Nov. 16, 2018).

## Part 6.B. Final Approval

Consistent with 40 C.F.R. § 2.103(b) of the FOIA Regulations, Administrator, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, Deputy Regional Administrators, General Counsel, Deputy General Counsels, Regional Counsels, Deputy Regional Counsels, and Inspector General, or those individuals' delegates, are authorized to make final determinations required by 5 U.S.C. § 552(a)(6)(A). Those individuals' delegates may be officials at the headquarters division director-level or the second supervisory-level down from the Regional Administrator.

## Part 6.C. Upload Records to FOIAonline

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.

The Lead FOIA Program and Contributing FOIA Programs will upload all responsive records into FOIAonline, including:

- Responsive records that will be released to the public;
- Records that are responsive but are being withheld in full per one or more FOIA exemptions; and
- The original, unredacted version of any record that is being released with redactions.

Responsive records that are being withheld in full and original, unredacted versions of any records that are being released with redactions should be coded appropriately so that access is limited to EPA staff.

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 may be reviewed in full on appeal or during litigation. If a FOIA Program chooses to maintain non-releasable responsive records in another manner pursuant to EPA's FOIA records retention schedule, Schedule 1049, the FOIA Program must provide a notation in FOIAonline that identifies where such records are maintained.

To upload records to FOIAonline:

1. Log in to FOIAonline and search for the FOIA request.
2. Under the "Actions" tab on the left choose "Upload Responsive Records."
3. Click the "Select Files" button and navigate to the documents selected for uploading.
4. Select the documents to upload (can select and upload more than one document at

a time).

5. Select the appropriate Release Type from the dropdown menu:
   a. UU (unredacted, unreleasable) – select for any document that is being withheld in full pursuant to one or more FOIA exemption.
   b. UR (unredacted, releasable to the general public) – select for any document that is being released in full within FOIAonline.
   c. RR (redacted, releasable to the general public) – select for any document that has redactions and is being released in FOIAonline. Select the appropriate exemption(s).
   d. REQ (release to requester only) – select for any document that is being released to the requester but will not be released to the public in FOIAonline.

   Note: if records are consolidated into one PDF file make sure to choose all the exemptions that apply to the consolidated records.

6. Click Save.

Before closing a request, you should also upload all key correspondence to FOIAonline and download a copy of the invoice, if applicable, to send to the Cincinnati Finance Office.

## Part 6.D. Interim Responses

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.").

### Template T—Interim Response

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 the requester is most interested to increase the possibility that the requester may be satisfied with an interim production as a conclusion to the request.

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 provide 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 the interim production letter should, therefore, provide the Agency point-of-contact.

## Part 6.E. 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: (b)(6) - Internal Web Address [redacted].

When issuing a final response, the following dispositions are available in FOIAonline and one must be selected:

- All Records Referred to Another Agency. The EPA searched for records, and the records all belonged to another agency. The records were referred to the other agency for direct response to the requester and the request was closed out.
- Duplicate Request. In some instances, a requester submits more than one request with the same scope. EPA will process one of the requests and close the other request as a duplicate request upon notice to the requester.
- Records Not Reasonably Described. The EPA reached out to the requester indicating that the request did not reasonably describe the records sought, and the requester failed to provide the additional information necessary to clarify the scope of the request.
- Not an Agency Record. The EPA reached out to the requester indicating that the request is not seeking Agency records, and the requester failed to identify the Agency records sought.
- Full Grant. All responsive records are being released in full to the requester.
- Full Denial Based on Exemptions. All records will be withheld from release pursuant to one or more FOIA exemptions.
- Fee-Related Reasons. The request is being denied for a fee-related reason, such as:
  - EPA reached out to the requester to obtain payment assurance based on the Agency's estimated fees to process the request, and the requester has failed to provide a payment assurance; or

- The requester has not paid all fees for a prior FOIA request as required by the regulations.

- 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 Lead FOIA Program, except for the OIG, must obtain approval from OGC or ORC prior to issuing a Glomar response.
- 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 will be informed in writing.
- 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.
- Request Withdrawn. The requester voluntarily withdraws the FOIA request
- Improper FOIA Request for Other Reasons. The request is being denied because it was not properly submitted per the Agency's FOIA regulations.
- Other.

In addition, if a final response is also a final determination pursuant to 40 C.F.R. §§ 2.103(b), 2.104(i), the final determination letter will include:

- The name and title or position of the person responsible for the determination;
- A brief statement of the reason or reasons for the denial, including an identification of records being withheld (either individually or, if a large number of similar records are being denied, described by category) and any FOIA exemption applied by the office in denying the request;
- An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through annotated deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption;
- A statement that an adverse determination may be appealed under 40 C.F.R. § 2.104(j) and description of the requirements for submitting an administrative appeal; and
- A statement that the requester has the right to seek dispute resolution services from an EPA FOIA Public Liaison or the Office of Government Information Service. 40 C.F.R. § 2.104(i).

## Template S—Final Response Letter

## Part 7. Administrative Appeals

### Part 7.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(h), define "adverse determinations" as:

- A decision that the requested record is exempt from disclosure, in whole or in part;
- A decision that the information requested is not a record subject to the FOIA;
- A decision that the requested record does not exist or cannot be located;
- A decision that the requested record is not readily reproducible in the form or format sought by the requester;
- 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 processing.

Within 90 days of an adverse determination by the Agency, requesters may submit appeals, in writing, by email at hq.foia@epa.gov, or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460, or through FOIAonline if the requester is an account holder. Consistent with 40 C.F.R. § 2.104(j), an appeal should "clearly identif[y] the determination being appealed" including the assigned FOIA request number.

### Part 7.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, OGC issues the decision to the requester through FOIAonline.

### Part 7.C. What is your role in the administrative appeal process?

When an appeal is received, OGC notifies the EPA manager who signed the final determination that an appeal has been filed. You may be notified by your FOIA Coordinator or Officer that an appeal relating to the FOIA request assigned to you has been received. Further, 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. The OGC attorney assigned to an appeal can be viewed in FOIAonline, so you can always reach out to the OGC attorney to provide any context or other information that may be helpful for processing the appeal.

Please follow the instructions provided by the OGC attorney concerning what action or information is needed in a timely manner. All communication regarding the processing of the FOIA request, as well as all documents responsive to the FOIA request (released, withheld in full

and withheld in part), should be included in FOIAonline. When contacted by OGC, please be sure to have the following information available if it is not already in FOIAonline:

- A complete set of the documents withheld in full, in unredacted form;
- A complete set of documents withheld in part (redacted documents) and a markup copy of the redactions not yet applied (these documents are needed to facilitate review of the material redacted);
- The complete organized file relevant to the FOIA, including communications with the requester; and
- Points of contact for staff in the Contributing Offices who worked on the request.

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 include the adequacy of the search, the propriety of the withholdings, the propriety of denying a fee waiver or expedited processing request, and the adequacy of the Agency's description of withholdings in the response letter.

### Part 7.D. 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 Lead FOIA Program (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.
    - OGC will re-open the FOIAonline case file for the request. New information, such as additional responsive documents or an updated response letter, should be uploaded to the reopened request case file.
    - In most cases, you should issue a new determination letter. 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.

## Part 8. 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. Office of Regional Counsel Attorneys may also actively assist with FOIA litigation under the direction of the General Law Office. 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.

### Part 8.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 Lead FOIA Program 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 Lead FOIA Program the status of the Agency's processing of the FOIA request, including information on the search and production activities.

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

**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).

**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.

**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.

**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 of Law 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.

The content of the declaration depends on the issues the 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)).

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Practice Tip: Who can be a declarant? The declarant must have "personal knowledge" of the facts presented. *See* Fed. R. Civ. P. 56(c)(4). 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.

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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.

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.

| ED_004712_00005410 | ESA BiOps 8.3. 2018 .docx | Ex. 5 - Deliberative Process (DP) |
|---|---|---|
| The withheld information is internal to EPA and was provided as a briefing document to Administrator Wheeler and other Agency leaders. The one-page document is titled, "Endangered Species Act (ESA) Biological Opinions (BiOps)." The document contains a footer that reads, "Internal, Deliberative, Do Not Distribute." The document is organized into three sections: (1) "Background," (2) "Issue," and (3) "Timeline." EPA staff used the document to brief the Administrator, and other senior leaders, in order to facilitate decision-making related to the registration review for the pesticide Chlorpyrifos. The "Issue" and "Timeline" sections of the document are withheld pursuant to Exemption 5, deliberative process privilege. The withheld information is pre-decisional because it was generated prior to arriving at a final decision concerning EPA's actions regarding the registration review for the pesticide Chlorpyrifos. At the time, EPA was still deliberating about the then-ongoing pesticide registration review, and the ESA consultation with the National Marine Fisheries Service (NMFS) was part of that registration review process.<br><br>The withheld information is deliberative because it reflects internal Agency discussion and deliberation relating to the Agency's work, including tentative plans and estimated timelines, on the continued coordination with the NMFS that is required as part of the pesticide registration review. The information does not reflect an official Agency decision or policy, instead it reflects analysis, opinions, and tentative plans and estimated timelines on actions still in development. The document was used to brief Administrator Wheeler, and other relevant senior Agency leaders, before making a final decision on the Agency's approach to this topic.<br><br>The foreseeable harm associated with release of the withheld information is that disclosure would impair agency staff's ability to brief issues with candor and provide advice and options to senior level decisionmakers. If the withheld information were released, staff would be more circumspect in providing their views and opinions, which would impair the Agency's ability to foster forthright, | | |

## Part 8.B. Key Roles of the FOIA Programs in Litigation

The Lead FOIA Program and Contributing FOIA Programs 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.

Practice Tip: 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.

## Part 8.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.

## Part 8.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's fees, the court 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:

- the public benefit derived from the case;
- the commercial benefit to the plaintiff;
- the nature of the plaintiff's interest in the records sought; and
- 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 (b)(6) - Internal Web Address [redacted]), 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 (Lead FOIA Program) for the FOIA request.

# Toolkit Appendices

## Resource A. FOIA Project Checklist

You may use this checklist when you are acting as the Lead FOIA Program and coordinating the initial meeting with a Contributing FOIA Program

**Participants for an initial discussion**: Lead contact and subject matter experts from the Lead FOIA Program, and FOIA Coordinator and subject matter experts from any Contributing FOIA Programs.

- ☐ Identify and clarify roles:
  - ☐ FOIA Coordinator for each office; and
  - ☐ Contact in the Lead FOIA Program and any other lead contact(s) from Contributing FOIA Programs to include on all internal correspondence.

- ☐ Understand the FOIA Request. Discuss:
  - ☐ Time period;
  - ☐ Potential custodians;
  - ☐ Record types, locations, and systems;
  - ☐ Potential search terms; and
  - ☐ Whether the request could benefit from clarification.

- ☐ Timing to Respond:
  - ☐ FOIA clock
    - ☐ How many days remain on the FOIA clock; and
    - ☐ Are there unusual circumstances permitting the Agency to extend the due date? *See* Part 2.D.iii, Extending the FOIA Response Deadline.
    - ☐ Potential resource concerns
      - ☐ What do the team's resources look like?
      - ☐ Any upcoming large projects?
      - ☐ Emergency project or anticipated resource issues?
      - ☐ Familiarity with Relativity?
  - ☐ Criminal enforcement custodians and topics
    - ☐ Does the scope of the request encompass a topic that may be related to or implicate a criminal enforcement effort?
    - ☐ Does the scope of the request include custodians who are criminal enforcement staff?

## Resource B. Sample Search Instructions for Potential Custodians

These are model search instructions for the Lead FOIA Program to provide to potential record custodians, both in the Lead FOIA Program and to the FOIA Officer or Coordinator in any Contributing FOIA Programs. These instructions should be customized to reflect the search plan that the Lead FOIA Program and Contributing FOIA Programs develop to search for and collect from any relevant sources that were not included in the eDiscovery Division centralized search. As part of the Search Plan, the Lead FOIA Program should identify a Point of Contact (POC) who will collect all potentially responsive records and upload releasable, responsive records to FOIAonline. Each Contributing FOIA Program should also identify a POC who will collect records from Contributing FOIA Program custodians and transfer these records to the Lead FOIA Program 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 Lead FOIA Program should select the appropriate locations from the list below. {**

- Enterprise Content Management System (ECMS)
- Superfund Enterprise Management System (SEMS)
- Local or shared computer drives (C:, F:, G:, etc.);
- SharePoint sites (including any associated with Microsoft Teams)
- OneDrive
- Mobile devices (e.g., text messages and photographs)
- Voicemail
- External drives and discs
- Hard-copy files (including any Federal Record Centers, if appropriate)
- Other**}]**

Please use the following key words in your search:

- **[The Lead FOIA Program should provide search terms here.]**

Attached for your reference are step-by-step instructions for conducting a search of the source locations identified above. **[The Lead FOIA Program 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 the **[Lead FOIA Program Point of Contact's email address]**. In your email, include the following information:

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

STEP 3: TRANSFER SEARCH RESULTS FOR REVIEW

**[Select one of these:**
**Option 1: For Lead FOIA Program Custodians: {**Once you have completed your search in accordance with Step 1, above, and confirmed that your search is complete (Step 2), please transfer the records in accordance with the instructions below. You may also be asked to review the responsive records for responsiveness and potential FOIA exemptions, once all potentially responsive records are collected.**}**

**OR, Option 2: For Contributing FOIA Program Custodians: {**Once you have completed your search in accordance with Step 1, above, and confirmed that your search is complete (Step 2), please transfer the records in accordance with the instructions below. Your Contributing FOIA Program POC will review the records for responsiveness and potential redactions. Your Contributing FOIA Program POC may seek your input before providing the records to the Lead FOIA Program.**}]**

**[The Lead FOIA Program Point of Contact (POC) should provide specific instructions; the information below is an example of such instructions and should be revised, as necessary, by the Lead FOIA Program.]**

{<u>For collection via email</u>: 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 labeled "Your Name, FOIA Request Number, Folder # of #_Nonresponsive." You will send these folders via email to [For Lead FOIA Program custodians: Lead FOIA Program POC@epa.gov] or [For Contributing FOIA Program custodians: Contributing FOIA Program 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.**}**

{<u>For collection via OneDrive</u>*:* Lead FOIA Program POC and/or Contributing FOIA Program 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.**}**

{<u>For collection via thumb drive</u>*:* 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 the Lead FOIA Program POC or your Contributing FOIA Program POC.}

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

## Resource C. Search Tracking Memo

This memorandum provides an example of how the Lead FOIA Program may document the search plan and track the search process.

Lead FOIA Program

Point of Contact: Office:

Contributing FOIA Programs

Point(s) of Contact: Office:

Request Information

Requester: FOIA Number(s):

Subject of Request: Date Range:

Custodians:

| Name | Office (Separated=NA) | Date Tasked | Date Completed |
|---|---|---|---|
| | | | |
| | | | |

Repositories Searched

☐ Outlook ☐ SharePoint Sites

☐ Lotus Notes ☐ OneDrive

☐ Microsoft Teams ☐ SEMS

☐ ECMS ☐ Mobile Devices

☐ CMS ☐ Voicemail

☐ Local or Shared Computer Drives ☐ External Drives and Discs

☐ Other: ☐ Hard-Copy Files

Other: _____

_____

_____

Search Terms Used

Total Number Responsive Records

## Resource D. Instructions for Searching & Collecting Other Electronic Files

These instructions are for custodians who may be searching and collecting electronic files from network drives or source locations that were not included in an EDD centralized search. 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 Lead FOIA Program/ Contributing FOIA Program 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.

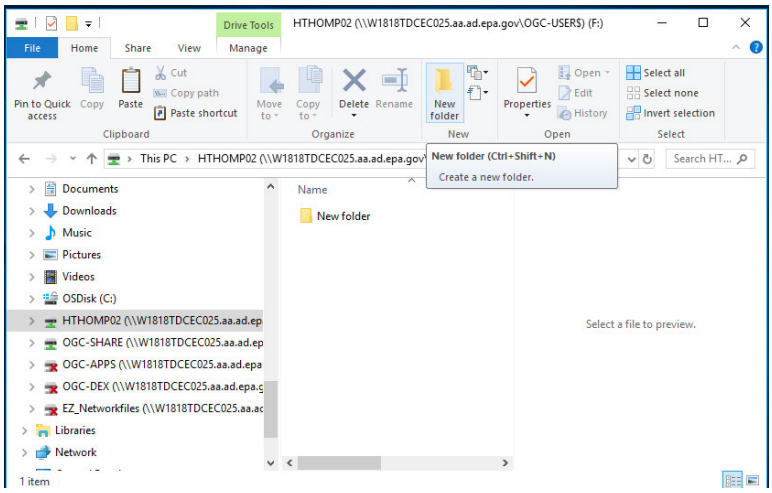
Below are detailed instructions that will guide you through the following steps:

(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) Transfer the files to the Lead FOIA Program or your Contributing FOIA Program POC.

**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 "Final Collection" folders for responsive and nonresponsive records. You should follow the instructions provided by the Lead FOIA Program or your Contributing FOIA Program POC regarding the creation of folders. As an example, the Lead FOIA Program or Contributing FOIA Program may provide instructions like 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 the records from the search folders.
- ✓ In the "Final Collection" folder, create two subfolders, one for "responsive" records and the other for "nonresponsive" records.

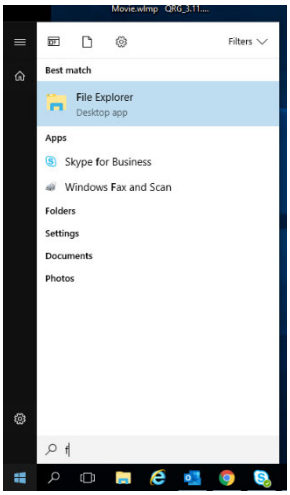
**Step 2. Conduct the Search**

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).

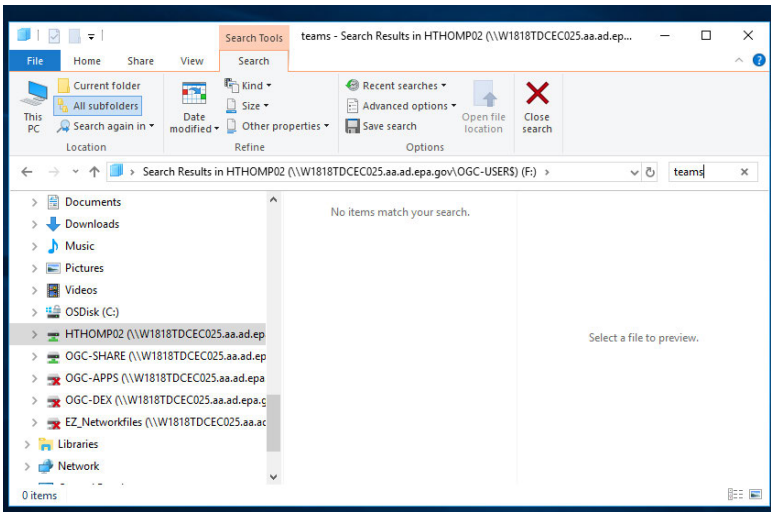
One place to start is with a Windows Search of an entire drive, such as the C:Drive. To perform such a search, follow the steps below.

<u>Windows Explorer Search for Entire Drive</u>

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




- ✓ Identify the drive that you want to search (C:, F:, etc.).
- ✓ Type the search term in the search box **in the upper right corner of the file explorer screen.**"




- ✓ Click on the Search Tools tab.
- ✓ Under "Location" click "All subfolders."
- ✓ The search will automatically start.

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.

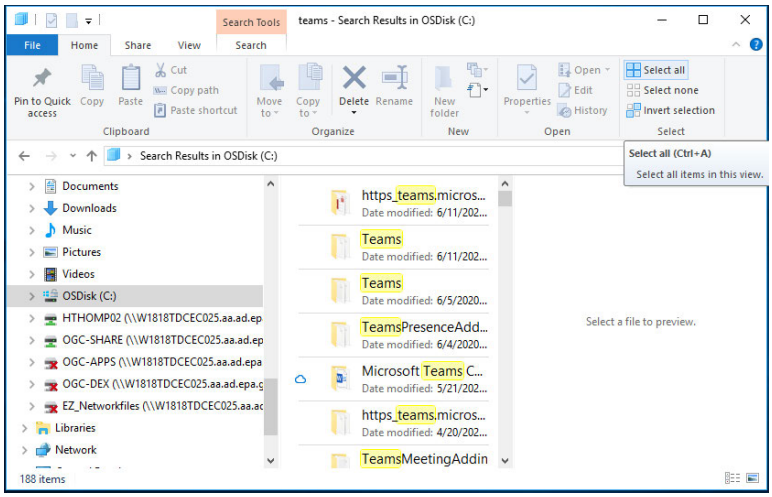
Note: If when searching, the search unexpectedly stops running, the green "progress" bar stops moving, or the search gets stuck in one folder, consider searching each subfolder within a drive separately per the instructions below.

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 "Home tab," and click ***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 the files inside the folder. Go to the "Home" tab, click ***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 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. Transfer Records to the Lead FOIA Program or your Contributing FOIA Program Point of Contact**

Please refer to the Resource C, Sample Search Instructions for Potential Custodians, for advice on how to transmit your files to the Lead FOIA Program/Contributing FOIA Program Point of Contact.}

## Resource E. Instructions for Searching and Collecting Lotus Notes

Refer to these instructions to search and collect Lotus Notes emails. If applicable, please include this as an attachment to your Search Instructions for custodians. Note that any FOIA request seeking emails sent or received prior to February 2013 requires a Lotus Notes search.

To fulfill your responsibility under the FOIA, you may need to search Lotus Notes email for any potentially responsive emails and collect these records. Note that you will need access to the IBM Notes application to search Lotus Notes mailboxes.

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

- If needed, request a Lotus Notes license and have IBM Notes installed and configured on your computer.
- Request access to the Lotus Notes mailbox.
- Open the mailbox and verify that it is indexed.
- Perform the search.
- Save each responsive email as a PDF to your collection folder.
- Send the responsive emails to your point of contact or upload the emails into FOIAonline.

### Requesting a Lotus Notes License

1. Contact your local Information Resources Management (IRM) Branch Chief or Information Management Official (IMO) to request a Lotus Notes license.

   **Example of email to your IRM Branch Chief or IMO requesting a Lotus Notes license:**

   From: [auto-populated with your email address]
   Sent: 6/2/2014 12:59:40 PM
   To: [insert email address of your IRM Branch Chief or IMO]
   Cc: [insert email address of your supervisor]
   Subject: Request for a Lotus Notes license

   Hello –

   I am writing to request a Lotus Notes license to search and collect Lotus Notes emails responsive to a FOIA request. I am requesting a Lotus Notes license until [insert date].

   My supervisor, [insert supervisor's name], is copied on this request in case supervisor approval is required.

   Thank you.

   [insert your name or signature block]

2. Your IRM Branch Chief or IMO will submit a Lotus Notes license request to the Enterprise IT Service Desk (EISD).

3. EISD will issue a ticket to the EUS Notes Administrators group to license the account.

4. The EUS Notes Administrator will license the account and then notify your local IT service desk to install and configure the IBM Notes application.
5. The local IT service desk will contact you to set up a time to configure the IBM Notes application.
6. The IT service desk will notify the EUS Notes Administrators group when the IBM Notes application is configured and ready to use.

## Requesting Access to Your Lotus Notes Mailbox

If you are seeking access to your own Lotus Notes mailbox, include this request in the same communication you send to request a Lotus Notes license. Please follow the instructions in the next section if you are requesting access to the Lotus Notes mailbox for another custodian.

**Example of email to your IRM Branch Chief or IMO requesting a Lotus Notes license and access to your Lotus Notes mailbox:**

From: [auto-populated with your email address]
Sent: 6/2/2014 12:59:40 PM
To: [insert email address of your IRM Branch Chief or IMO]
Cc: [insert email address of your supervisor]
Subject: Request for a Lotus Notes license and access to my Lotus Notes mailbox

Hello –

I am writing to request a Lotus Notes license and access to my Lotus Notes mailbox. I am requesting a license and access to my Lotus Notes mailbox to search and collect Lotus Notes emails responsive to a FOIA request. I am requesting a license and access to my Lotus Notes mailbox until [insert date].

My supervisor, [insert supervisor's name], is copied on this request in case supervisor approval is required.

Thank you.

[insert your name or signature block]

Once the account is licensed and the IBM Notes application is installed, the EUS Notes Administrator will start the file index for your active and archive mailboxes, and email you hyperlinks to your mailbox and archive mailbox.

**Example of email to requester from the EUS Notes Administrator:**

**From:** Longenberger, Randall
**Sent:** Thursday, February 18, 2021 10:32 AM
**To:** Doe, Jane <Doe.Jane@epa.gov>
**Subject:** The location of the requested Notes mail files have been found

Good Morning,

The requested access for the Notes mail has been granted. We implemented indexing to assist in searching. Use the below links to access the mail files inside of the IBM Notes application.

Notes://epamail/12345a6789bc123de ← John Smith Mail
Notes://epamail/12345a6789bc123de ←John Smith Archive

Regards,

Randall Longenberger
EUS Administrator
O:919-541-2347
Longenberger.Randall@epa.gov
Team SAIC Redefining Ingenuity™
NCC Bldg, N191J, RTP, NC

## Requesting Access to Another Custodian's Lotus Notes Mailbox

Follow these instructions to request access to the Lotus Notes mailbox of another active employee or a separated employee.

1. Send an email to the custodian's supervisor (or former supervisor, in the case of separated personnel) requesting access to the custodian's Lotus Notes mailbox. Ask the supervisor to send written approval to their IRM Branch Chief or IMO.

   **Example of email to custodian's manager requesting access to another custodian's Lotus Notes mailbox:**

   From: [auto-populated with your email address]
   Sent: 6/2/2014 12:59:40 PM
   To: [insert email address of the custodian's manager]
   Cc: [insert email address of your supervisor]
   Subject: Request for access to [insert custodian's name] Lotus Notes mailbox

   Hello –

   I am writing to request access to [insert custodian's name] Lotus Notes mailbox. I am requesting access to this Lotus Notes mailbox to search and collect Lotus Notes emails responsive to a FOIA request. I am requesting access to this Lotus Notes mailbox until [insert date].

   My supervisor, [insert supervisor's name], is copied on this request in case supervisor approval is required.

   Please email your written approval of this request to the IRM Branch Chief or IMO for your office.

   Thank you.

[insert your name or signature block]

2. To approve the request, the custodian's manager should forward the request email to the IRM Branch Chief or IMO for their office and indicate that the request is approved.

3. If the IRM Branch Chief or IMO approves the request, they will forward the request to OEI_FILE_ACCESS_REQUEST@epa.gov. The IRM Branch Chief or IMO's email should include the following information:

| Request for Access to Records of Employees Who are on Leave or Separated | |
|---|---|
| Role | Name |
| Approver | John Doe (IMO, IRM Branch Chiefs or their designee whose name has been provided as authorized approvers) |
| Mailbox Name<br>Employee's full name<br>Employee's LAN ID<br>Telephone number | Doe.Jane@epa.gov<br>Jane Any Doe<br>Jdoe<br>111-222-3333 |
| Person Receiving Access (Include email address) | Steven Jones (Jones.StevenT@epa.gov) |
| Access Needed for the Following Applications (as applicable): | Lotus Notes |
| The email Subject must include the nature of the request (i.e., requesting access to a Lotus Notes mailbox). | |

4. The ticket will be assigned to an EUS Notes Administrator. The EUS Notes Administrator will add the requester to the mail file ACL, start the file index, and email the requester links to the custodian's Lotus Notes mailbox.

   **NOTE: Indexing a large mail file will take several hours (most email files are large).**

   **Example of email to requester from the EUS Notes Administrator:**

   **From:** Longenberger, Randall
   **Sent:** Thursday, February 18, 2021 10:32 AM
   **To:** Doe, Jane <Doe.Jane@epa.gov>
   **Subject:** The location of the requested Notes mail files have been found

   Good Morning,

   The requested access for the Notes mail has been granted. We implemented indexing to assist in searching. Use the below links to access the mail files inside of the IBM Notes application.

   Notes://epamail/12345a6789bc123de ← John Smith Mail

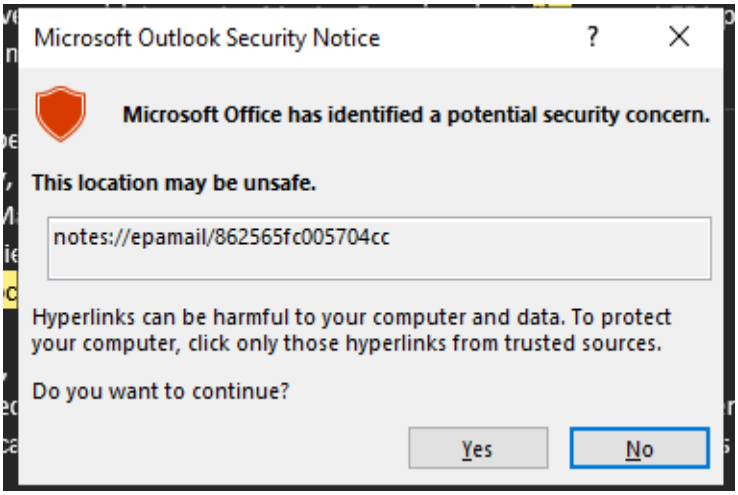
Notes://epamail/12345a6789bc123de ←John Smith Archive

Regards,

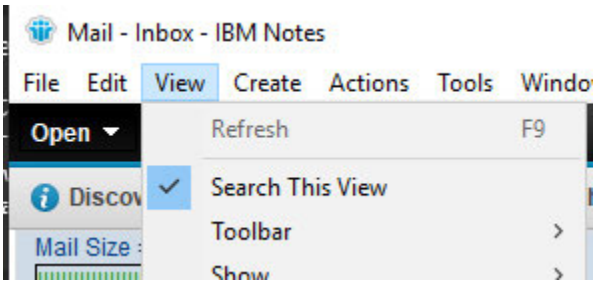
Randall Longenberger
EUS Administrator
O:919-541-2347
Longenberger.Randall@epa.gov
Team SAIC Redefining Ingenuity™
NCC Bldg, N191J, RTP, NC

## Accessing the Lotus Notes mailbox, turning on the search function, and verifying the Index is Completed

1. Click the link in the email from the Notes Administrator and select yes on the Outlook security notice

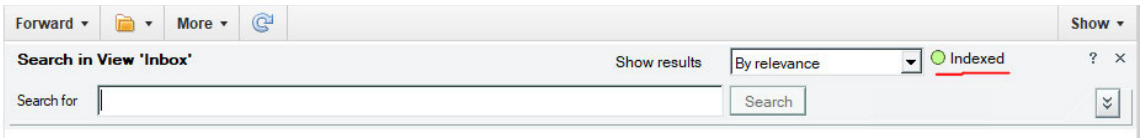



2. Once the mailbox opens in IBM Notes, go to View in the top left and ensure "Search this View" is checked



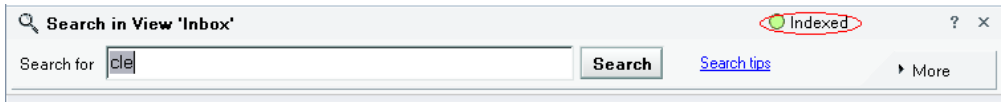

This will add a search bar to the top of the mail window. The index status will be located to the right of Show results.

3. If the index status reads "not indexed," close the file and wait up to 24 hours before checking the status again. If the file is still not indexed, email EUS_Notes_Administrators@epa.gov to request that they check the indexing status.



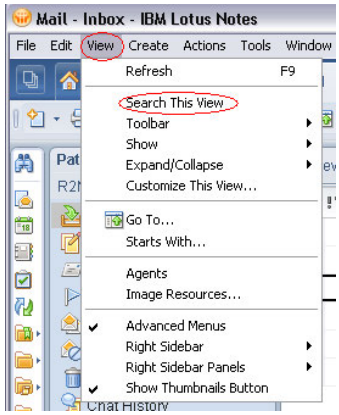

## Search for Emails

1. Make sure that your email 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.

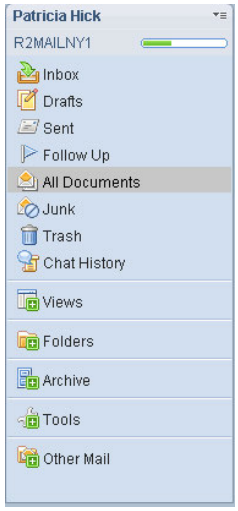



If you do not see the search box:

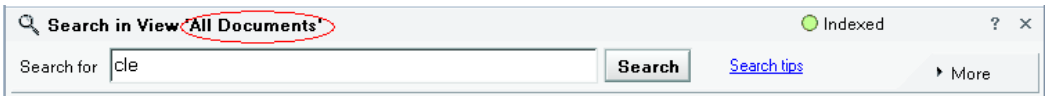
✓ Click ***View > Search this View*** from the menu bar at the top of your Notes screen.



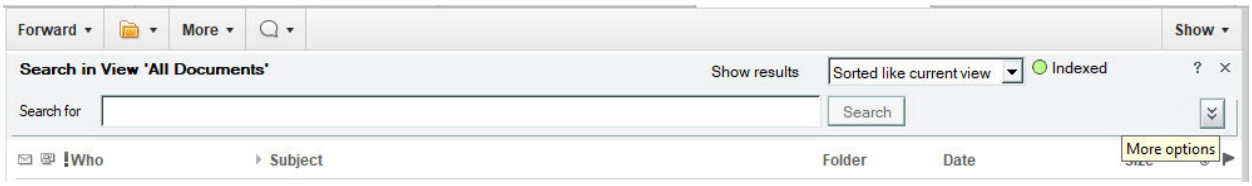

2. On the listings at the left side of your Inbox select ***All Documents.*** This will capture all potentially responsive documents, even if emails are stored in folders.



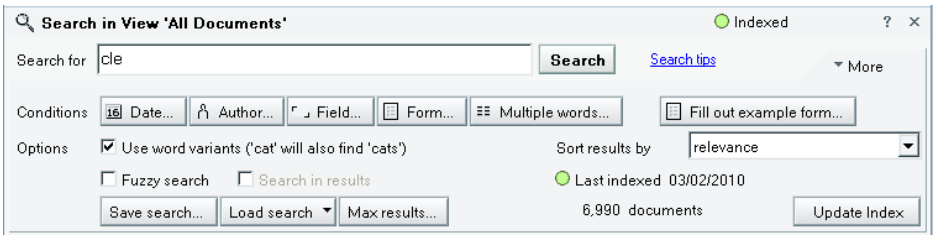

The "Search in View" will now indicate that the search will consider "All Documents."




3. Click on **the double arrow icon** at the right side of the screen to reveal additional search options.




The screen should now look like the snapshot below:

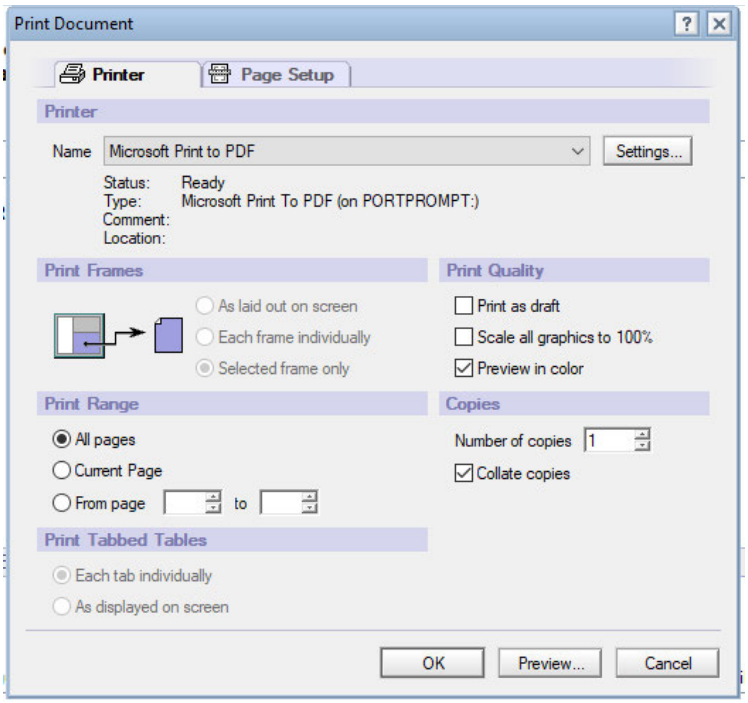



**NOTE: Clicking on the Multiple words box will allow you to choose up to <u>eight words</u> for your search.**

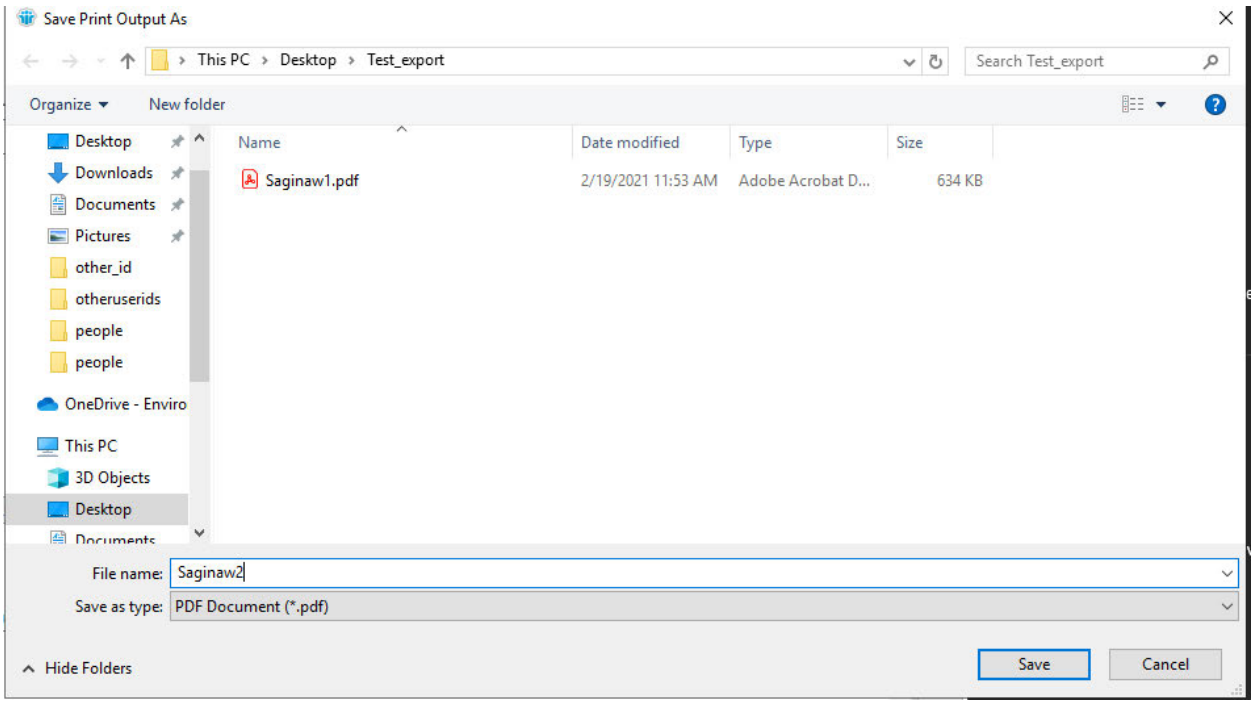
4. Enter the search terms provided in the Search Instructions and click **Search**. Your search results will appear below the Search window.

5. Save each email as a pdf to the collection folder on your OneDrive or network drive.

   - ✓ Select the first email (click to the left of the email to add a check mark next to the email)
   - ✓ Go to File and choose Print (Ctrl+P)
   - ✓ Select "Microsoft Print to PDF" as the printer and click "OK"




✓ Navigate to the collection folder you created for this search, name the file, and click "Save"




6. Repeat step 5 above until you have saved each of the returned results as a pdf to your collection folder.

**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 search terms (talk with your POC prior to doing this); or
- Conduct multiple searches using fewer terms.

7. Repeat steps 4 through 6 above until you have completed the search.

## Review Search Results for Responsiveness

1. Review the emails and attachments in your collection folder to make sure that they are responsive to the FOIA request. It is possible for a search to return documents that use one of the search terms in a context that is outside the scope of the request. Organize the records into responsive and non-responsive folders in accordance with the instructions provided by your point of contact.

2. Organize your responsive records into three sub-folders: release in full; release with redactions; and withhold in full. Refer to the instructions provided by your point of contact to redact any exempt material.

## Upload Responsive Search Results into FOIA Online

Refer to the instructions provided by your point of contact for next steps (e.g., save responsive records to a folder on a shared network drive or SharePoint site; upload the responsive records to the FOIA request case file in FOIAonline).

## Resource F. How to Access and Collect Earlier Versions of SharePoint Documents

The versioning feature in SharePoint allows you to store, track, and restore files in a library by listing new "versions" whenever the file is changed. If you are required to collect prior versions of a document, here are instructions for identifying and restoring prior versions:

1. Navigate to your SharePoint Site. Choose "view online" option if you are navigating to your OneDrive through file explorer.
2. Right click on a document and choose "version history." This will identify all the available versions of the document.
3. Open each version and save a copy to the folder created to collect documents for the request.

## Resource G. Quick Reference Guide: How to Save Text Messages

This document offers direction on how to forward text messages from a mobile device to the EPA email system. These instructions are located at:
(b)(6) - Internal Web Address [redacted].

EPA discourages the use of text messages for transmitting substantive (or non-transitory) federal records. *See* EPA, EPA National Records Management Program https://www2.epa.gov/records (last visited Aug. 31, 2020). 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**

Tap the "***Messages"*** icon on the device.

1. Find the text message conversation that you need to save as a record.
2. Tap and hold one of the text messages in the conversation.
3. Tap the "***More***" option that appears above the text message.
4. Put a check mark in the circle beside any or all the text messages that you want to save as records.
5. Tap the blue arrow icon in the lower right corner of the screen.
6. Type your EPA email address in the "***To***" field.
7. After the text message, enter contextual information about the message—including to, from, date, time, and a relevant subject—and 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".***
8. 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 do not have an email listed or it still does not 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, and 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—and 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.

## Resource H. FOIA Search Guide: Best Practices

This document offers simple 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 in 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.
  - Remember to search absent or former employees.
- ✓ Maximize the Centralized Search.
  - You may submit a search request to the eDiscovery Division (EDD) for Outlook emails, Skye Chats, and records on OneDrive, SharePoint, network drives, and workstations. EPA organizations should submit search requests to collect electronic documents from the identified electronic record source locations covered by the eDiscovery Division's centralized search, unless a more targeted collection is more likely to locate all responsive documents, such as where all responsive records are located in a specific folder within an email account.
  - 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.
- ✓ Conducting a 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, or a shared network drive for the collection of documents not captured in EDD's centralized search.

✓ When in Doubt, Ask.

- The General Law Office's Information Law Practice Group, the Office of Regional Counsel (if the matter concerns a Regional FOIA), and the National FOIA Office are available to assist you.

## Resource I. FOIA Exemptions Review

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 Part 5.D.ii, CBI Review, 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. There are two threshold steps in determining if Exemption 5 applies:

1. Is the record an intra-agency or inter-agency communication?
2. Does a discovery privilege apply?

If your record meets both requirements, you must then analyze which discovery privilege applies. The three most used Exemption 5 privileges are:

- Deliberative Process Privilege;

- Attorney-Client Privilege; and
- Attorney Work Product Privilege.

**Deliberative Process Privilege (DPP)**

- To apply DPP, the record must be:
  - Predecisional: The information must have been created before the adoption of an agency policy/decision.
  - Deliberative: Material is deliberative if it "reflects the give-and-take of the consultative process."
- DPP exists to: (1) encourage open, frank discussions; (2) protect against premature disclosure of proposed policies; and (3) protect against public confusion.
- DPP should only be used "if the agency reasonably foresees that disclosure would harm an interest protected by an exemption."
- Additionally, DPP cannot be used on records that were created 25 years prior to the date they were requested.
- Some common examples include:
  - Draft documents
  - Staff analysis
  - Comments on draft rule-making documents
  - Emails or memos discussing Agency opinions or options

**Attorney-Client Privilege (ACP)**

- Protects internal communications:
  - Between an attorney(s) and client(s);
  - Made in confidence;
  - For the purpose of seeking or providing legal advice.
- Confidential communications between agency attorneys can be covered, as can communications between attorneys and staff, that discuss legal issues or ask for legal advice.
- May have to show that disclosure is restricted to those who need to know within the Agency/Executive branch.

**Attorney-Work Product Privilege (AWP)**

- To apply AWP, the record must be:
  - Prepared by, or at the direction of, an attorney
  - In reasonable anticipation of litigation
- 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.

# PROPRIETARY BUSINESS INFORMATION CASE TRACKING

A. Purpose: Explain how to track FOIA requests in FOIAonline when information is withheld pursuant to FOIA Exemption 4 pending a confidentiality determination by the appropriate legal office.

B. Process:

1. Include the initial denial language, included in a final determination in which information is withheld under FOIA Exemption 4:

   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. The program or region is responsible for creating a PBI case in FOIAonline after issuing an initial denial in which information was withheld under Exemption 4:

   a. Select "New Request."

   b. Agency, Sub-Agency, and Submitted Date are pre-populated.

   c. Do not select a Perfected Date.

   d. Select "PBI" as Request Type.

   e. Fill in contact information as provided by the FOIA requester. Do not include an email address.

   f. Processing Fees information pre-populated.

   g. Fill in the following for Description:

   [**OGC or ORC**] to provide confidentiality determination for **[TSCA or FIFRA]** information initially withheld under FOIA Exemption 4 in response to FOIA request no. EPA-HQ-20XX-XXXXXX. Do not perfect the request. Please assign to **[OGC or ORC in Region X]** without correspondence to the requester.

   h. Do not select Expedited Processing or Fee Waiver.

i. Under Additional Information – Records Location select Headquarters or Region as appropriate.
j. Attach a copy of the PBI Final Response Letter to the underlying FOIA request as a Supporting File.

k. Select "Preview."

l. After confirming the information is correct, select "Submit."

3. The new PBI case is automatically routed to NFO. The NFO standard centralized intake process does not apply to PBI cases, specifically NFO will not issue any correspondence to the requester as part of the intake process. NFO assigns PBI case to OGC or Regional ORC, as indicated in the Request Description:

   a. The NFO opens the PBI case.

   b. Then selects "Make Assignment."

   c. Under Assign to Organization:

      i. For HQ PBI determinations: Search for and select "EPA/HQ/OGC/PBI – PBI Determination"; or

      ii. For Regional PBI determinations: Search for and select the appropriate Regional Sub-agency, "EPA/RX – Region X".

   d. Select "Save."

4. The OGC or ORC individual assigned the PBI request is responsible for:

   a. Contacting the FOIA requester to confirm continued interest in receiving a final confidentiality determination;

   b. Closing out PBI request if requester fails to confirm interest or is not interested in receiving a final confidentiality determination;

   c. Providing an estimate of fees where appropriate, with the input of the HQ or Regional FOIA program;

   d. Closing out PBI request if requester fails to assure payment of fees, or provide advanced payment if applicable;

   e. Notifying HQ or Regional FOIA program of need to request substantiation from affected business(es) and provide program recommendation where appropriate;

f. Issuing final confidentiality determination to the affected business(es);

g. Closing out PBI request in FOIAonline.

h. The HQ or Regional FOIA program is responsible for reopening the FOIA request and providing an updated response/records to requester where appropriate.

## Resource K. eDiscovery Division Relativity Guidance

The eDiscovery Division (EDD) maintains a Relativity Resource Center SharePoint site[5] that provides access to Relativity user guides and recorded trainings. The SharePoint site includes comprehensive user guides as well a tip sheets on discreet Relativity topics, such as how to create a saved search and how to apply text redactions to a document.

GETTING DOCUMENTS OUT OF RELATIVITY

- There are two options for exporting documents out of your Relativity workspace.
- Informal Export – An informal export may be used to export records for review within the Agency (*e.g.*, manager review; equity reviews), and if you need to consult with another federal agency regarding the application of exemptions on records or portions of records where the other federal agency has equity.
- Formal Production – A formal production is used to export records from Relativity when:
  a. You have a set of records ready to release to the requester; or
  b. You are referring records to another federal agency for direct response to the requester.
- To request an informal export, fill out an "Informal PDF Export Request" form. To request a formal production, fill out a "Formal Production Request" form. 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. Submit the completed form to relativitysupport@epa.gov. EDD's Relativity Support 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. You may access these forms and instructions for filling out the formal production request form on EDD's Relativity Resource Center SharePoint site.
- **NOTE:** All informal exports will include a "Not for Public Distribution" watermark. The informal export should only be used to manage reviews within the Agency and solely for consultations with other federal agencies. If you are referring records to another federal agency, you should request a formal production for those records.
- You may also use the "export to file" option in Relativity to export out an index of designated documents. This tool is useful if you need to create a log of withheld records, or if you would like to have a list of documents in the workspace to assist in clarification discussions with the requester. While such a list of the records in the workspace is useful to the EPA FOIA processing team, this spreadsheet should not be shared with the requester. In addition, the FOIA processing team should review and redact any sensitive or exempt information from the log of withheld records before releasing the log to the requester.

[5] https://usepa.sharepoint.com/sites/EDD/RRC/Documents/Forms/AllItems.aspx

## Resource L. Redacting in Adobe Acrobat Pro DC

To review any records that are not collected by an eDiscovery Division centralized search, it is recommended that EPA staff use EPA-approved document review and redaction software, such as 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** and 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.

**Note:** When marking documents for redactions in Adobe, always save two versions of the document:

- 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

# General Instructions for Using Templates

The FOIA Toolkit Appendix provides to document drafters recommended template language but does not impose any legally binding requirements.

If you choose to use these templates, text in a template that appears in regular font and black ink is intended to be inserted into your document without significant changes. General instructions appear in blue ***bold italics***. Specific instructions on what to insert appear within the template as bolded blue text in square brackets **[like this]**. Text that appears within blue curly brackets **{like this}** is optional to include or may be omitted. Once you insert the appropriate text, please remove the brackets, instructions, and color.

Send this template in response to an email or mailed letter intended as a FOIA request that a member of the public sends directly to a FOIA Program.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Improperly Submitted FOIA Request

Dear **[Requester Name]**:

You submitted a request for Environmental Protection Agency (EPA) records using a method that EPA's Freedom of Information Act (FOIA) regulations do not authorize. Pursuant to 40 C.F.R. § 2.101(a), requesters must submit all FOIA requests to the EPA's National FOIA Office using one of the following methods:

- EPA's FOIA submission website at https://www.foiaonline.gov
- The government's central website for FOIA at https://www.foia.gov
- U.S. Mail sent to the following address:
  National FOIA Office
  U.S. Environmental Protection Agency
  1200 Pennsylvania Avenue, NW (2310A)
  Washington, DC 20460
- Overnight delivery service to:
  National FOIA Office
  U.S. Environmental Protection Agency
  1200 Pennsylvania NW, Room 7309C
  Washington, DC 20460

EPA does not accept, and will not process, the enclosed correspondence as a FOIA request because you failed to submit it pursuant to one of the above-listed methods, which are listed in EPA's FOIA regulations. In the future, if you wish to submit a FOIA request to EPA, please submit your request through one of the methods provided in EPA's updated FOIA regulations described above.

EPA is providing to you this letter as a courtesy and reminder of the EPA's FOIA regulation's requirements for submitting FOIA requests to the EPA. You may not receive another notice if you submit a FOIA request using an unapproved submission method.

If you have any questions, please contact the EPA's FOIA Requester Service Center at (202) 566-1667.

Sincerely,

**[Staff Name**
**Title]**

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If you choose to use these templates, text in a template that appears in regular font and black ink is intended to be inserted into your document without significant changes. General instructions appear in blue ***bold italics***. Specific instructions on what to insert appear within the template as bolded blue text in square brackets **[like this]**. Text that appears within blue curly brackets **{like this}** is optional to include or may be omitted. Once you insert the appropriate text, please remove the brackets, instructions, and color.

Once the NFO assigns a request to the Lead FOIA Program, you may choose to contact the requester on behalf of your FOIA Program using the template below. You can accomplish this by clicking the "Create Correspondence" tab in FOIAonline or by sending via e-mail and then uploading a copy into FOIAonline.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Initial Letter

Dear **[Requester Name]**:

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]**.

My office has been assigned to process your FOIA request. I will contact you again after we have had the opportunity to fully review your request. Please feel free to contact me directly with any questions or concerns at **[email address]** or **[phone number]**.

***Insert the following if there are other requests that may produce records on the same or a similar topic as this request. Also consider referencing other requests to which you will release records to and provide an interim release for any relevant records already released. See Resource GG, Template—Interim Response.***

{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.}

If you need any further assistance or would like to discuss any aspect of your request, you may seek assistance 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, 8601 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. For all media inquiries, please contact press@epa.gov.

Sincerely,

**[Staff Name]**
**[Title]**

# General Instructions for Using Templates

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This template provides optional sections and language to fit the circumstances of some requests. 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 a copy of the correspondence in FOIAonline or send as an email via FOIAonline.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Initial Response

Dear **[Requester 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 Click or tap to enter a date., in which you requested **[insert directly what the FOIA request stated or accurately paraphrase description of requested records].**

***Insert the following text if the request is not reasonably described. See Part 2.A, Reasonably Described Requests.***

{Opportunity to Discuss and Modify

Your request does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them.

**[Explain what information or modification is necessary for you to search for records. For example: "We would like to discuss the types of records you are interested in, and the possible locations of these records." OR "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."]**

The FOIA does not require an agency to create new records, answer questions posed by requesters, or attempt to interpret a request that does not identify reasonably described records.

EPA's FOIA regulations state:

> "Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, the requester should include any file designations or descriptions for the records that the requester wants. The more specific the requester is about the records or type of records that the requester wants, the more likely EPA will be able to identify and locate records responsive to the request."

40 C.F.R. § 2.102(c).

We would like to provide you the opportunity to discuss the request with us and modify your request 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.}

***Insert the following if the request is reasonably described but could benefit from additional clarification. See Part 2.G, Clarifying FOIA Requests.}***

{Clarification

We are requesting that you clarify your request. **[Explain what information or clarification is necessary for you to search for records. For example, you can pose a specific question or generally request clarification regarding the types of records, the custodians of the records, the subject matter or search terms for the request, or the search cut-off dates.]**

EPA's FOIA regulations state:

> "Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, the requester should include any file designations or descriptions for the records that the requester wants. The more specific the requester is about the records or type of records that the requester wants, the more likely EPA will be able to identify and locate records responsive to the 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.}

***Insert the following section if unusual circumstances exist. See Part 2.D.iii, Extending the FOIA Response Deadline.***

{Unusual Circumstances and Extension of Time

Pursuant to 40 C.F.R. § 2.104(e), an extension of time to respond to your request is necessary. Given the scope of the request, EPA anticipates that **[Insert all of the unusual circumstances that apply: (1)** {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}**; (2)** {to search for and collect the requested records from multiple EPA offices that are separate from the office processing the request}**; and/or (3)** {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. ***Insert the following if you can provide an estimated date of completion:*** {Nonetheless, at this time, EPA estimates the Agency will be able to complete this request by **[Month Day, Year].** We appreciate your patience.} ***Insert the following if you are unable to provide an estimated date of completion:*** {We would like to set up a time to update you on the status of your request. We will call you on or before **[Month Day, Year].}**

***Insert the following section if you wish to discuss processing fees and related issues with the requester. See Part 3, Fees.***

{Processing Fees

***Choose one of the following fee-related options:***
**(1)** On **[Month Day, Year]**, EPA's National Freedom of Information Office granted the fee waiver request that accompanied the FOIA request. Therefore, you will not be assessed fees.
**(2)** On **[Month Day, Year]**, 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.
**(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. § 2.107. Therefore, we must receive an assurance of payment before processing the request.
**(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. § 2.107. Therefore, we must receive an assurance of payment before processing the request.

**(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. § 2.107.**}**

Publicly Available Information

The following are sources of publicly available information that you can access immediately: **[Edit as appropriate to your request. You may include links to your Program specific website, links to records released on the same subject matter, 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
- EPA Guidance Document Portal: https://www.epa.gov/guidance

Next Steps

The processing clock is stopped for your FOIA request until we receive your **[**clarification ***OR*** modification**]**. You may contact **[program contact]** at **[email address]** or at **[telephone number]** with your response or if you have any further questions.

Please respond within 20 calendar days from the date of this letter. Once the request is **[**clarified ***OR*** modified**]** we will continue processing your FOIA request and provide you with an estimated timeframe for completion. If we do not receive a response from you, EPA may issue a final determination to close out your request. Please note that you are not prohibited from submitting additional Freedom of Information Act requests in the future. For more information, please visit our website at: https://www.epa.gov/foia.

If you need any further assistance or would like to discuss any aspect of your request, you may seek assistance 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, 8601 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,

**[Staff Name]**
**[Title]**

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Use this template when a requester failed to modify an improper request or has not replied to agency correspondence.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Closure for Failure to Modify FOIA Request

Dear **[Requester Name]**:

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 the text of the request as submitted by the requester 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. EPA's FOIA regulations explain:

> "Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, the requester should include any file designations or descriptions for the records that the requester wants. The more specific the requester is about the records or type of records that the requester wants, the more likely EPA will be able to identify and locate records responsive to the request."

40 C.F.R. § 2.102(c).

On **[Month Day, Year]**, EPA contacted you to inform you of what additional information you need to provide or why your request is otherwise insufficient. EPA provided you with an opportunity to discuss and modify your request. As of the date of this letter, we have received no response from you. Therefore, we are issuing a final determination and closing your request. If you would like to resubmit your Freedom of Information Act request, please refer to the instructions available on EPA's FOIA website at: https://www.epa.gov/foia.

This letter concludes our response to your request. You may appeal this determination by email at hq.foia@epa.gov, or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460 or through FOIAonline if you are an account holder. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Avenue, N.W., WJC-N Building, Room 7309C, Washington, DC 20460.

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 p.m. 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."

If you need any further assistance or would like to discuss any aspect of your request, you may seek assistance 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, 8601 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. For all media inquiries, please contact press@epa.gov.

Sincerely,

**[Staff Name]**
**[Title]**

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Use this template when a FOIA request does not seek Agency records.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Request Not for Agency Records

Dear **[Requester Name]**:

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 the text of the request as submitted by the requester or accurately paraphrase description of requested records]**.

The EPA is unable to process your request under the Freedom of Information Act because your request does not involve EPA agency records. For your reference and as a courtesy for you, we are providing the following information: **[Add in information as a courtesy for the requester. For example: {**It appears that you are requesting information for the **[other agency]**. For more information, you may contact the **[other agency]** for more information at www.foia.gov or at **[other agency contact information.}]**

The total fee incurred in processing this request does not meet the cost threshold; therefore, it is not billable. If you have any questions, please contact the National FOIA Office at (202) 566-1667 or hq.foia@epa.gov.

You may appeal this determination by email at hq.foia@epa.gov, or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460 or through FOIAonline if you are an account holder. If you are submitting your appeal by

hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Avenue, N.W., WJC-N Building, Room 7309C, Washington, DC 20460.

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 p.m. 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."

If you need any further assistance or would like to discuss any aspect of your request, you may seek assistance 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, 8601 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. For all media inquiries, please contact press@epa.gov.

Sincerely,

**[Staff Name]**
**[Title]**

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You may use this template to confirm, in writing, a requester's modification of their request. As a best practice, this letter should be sent and uploaded to the case file or sent via FOIAonline at the same time as you modify the request description.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Confirmation of Modification

Dear **[Requester Name]**:

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 the text of the request as submitted by the requester or accurately paraphrase description of requested records]**.

Modification

On **[Month Day, Year]**, you spoke to **[Contact]** regarding the scope of your request. During the conversation, you clarified your FOIA 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, such as emails, documents, memoranda, notes, presentations, text messages, schedule, voicemail, data, and logs;**
- **Subject Matter/Topic/Search Terms;**
- **Date Range; or**

- **Specific Departments/Custodians/Positions.]**

***Insert the following if you can provide an estimated date of completion.***

{Estimated Date of Completion

EPA estimates the Agency will be able to complete this request by **[Month Day, Year]**. We appreciate your patience as we continue to process your FOIA request.}

***Insert the following if you can provide a fee estimate or if there are outstanding fee-related issues such as a requested assurance of payment. See Part 3, Fees.***

{Processing Fees

**[Provide appropriate information regarding fees]}**

Next Steps

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 **[Month Day, Year]**.}

***Insert the following if there are other requests that may produce records on the same or a similar topic as this request. Also consider referencing other requests to which you will release records to and provide an interim release for any relevant records already released. See Resource GG, Template—Interim Response.***

{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.}

Please contact **[Contact]** if you have any questions about your request and please reference your 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, Room 2510, 8601 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,

**[Staff Name]**
**[Title]**

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You can use this template 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. Create a separate document that includes the sentence below identifying the location of the publicly available records and upload this document as a responsive record in FOIAonline to allow the public to access the location of this publicly available information.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX],** Records Publicly Available

Dear **[Requester Name]**:

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]**.

EPA is now releasing records in response to your request. The records you requested can be accessed online at **[insert web address link]** (link last accessed on **[Month Day, Year]**).

Because the records you requested are publicly available, the FOIA request is being provided with the final disposition of full grant.

You may appeal this determination by email at hq.foia@epa.gov, or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460 or through FOIAonline if you are an account holder. If you are submitting your appeal by

hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Avenue, N.W., WJC-N Building, Room 7309C, Washington, DC 20460.

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 p.m. 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."

If you need any further assistance or would like to discuss any aspect of your request, you may seek assistance 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, 8601 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. For all media inquiries, please contact press@epa.gov.

Sincerely,

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Use the following template when requesting an advanced payment of fees or assurance of payment. *See* Part 3.D, Advanced Payments and Assurances of Payment.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Assurance of Payment

Dear **[Requester Name]**:

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]**.

**[Select one of these options:**

**(1) {**On **[Month Day, Year]**, the EPA's National FOIA Office denied the fee waiver request that accompanied the FOIA request. Therefore, we are writing to provide you with an estimate for the cost of processing your latest request, and to seek assurance of payment before complying with the request.**}**

**(2) {**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. § 2.107.**}]**

EPA has estimated that the aggregate cost to process your request as $ XXX.00. This total is based on **{#}** of staff members to search for, review, and duplicate responsive records, using the

appropriate rates contained in 40 C.F.R. §§ 2.107(c)(2)(i)(B), (ii), (iii). Pursuant to 40 C.F.R. § 2.107(e), EPA requires written assurance of payment before processing the FOIA request when the estimated fees exceed $25.00. Once your written assurance of payment is received, we will begin to process your FOIA request.

If the actual costs fall below the provided estimate, you will only be billed the actual cost amount. If we find that the provided estimate will be insufficient to cover actual costs, we will complete work up to the amount in the assurance of payment, provide you with an estimate of fees for the remainder of work, and seek assurance of payment before completing the remainder of work.

In estimating costs to process your FOIA requests, the EPA has interpreted your request for **[explain the scope of the request if broad/narrow]**. If you wish to clarify your request to cover a **[**broader/more narrow**]** scope, the estimated costs will be **[**higher **or** lower**] [*insert the following text if broader:* {**, and EPA would need to receive further assurance of payment and would likely need additional time to process this request**}]**.

Please respond to this letter with your payment assurance for the full amount, **[$XXX.00]** within ten calendar days from the date of this letter.

You may contact **[Staff Name]** at **[email address]** with your response or contact me at **[telephone]** if you have any further questions. If we do not receive a response from you within this time period, we will administratively close your request. 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, Room 2510, 8601 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,

**[Staff Name**
**Title]**

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Use the following template to send a "still interested" inquiry to a requester. Still Interested inquiries should only be sent in accordance with the Department of Justice's guidance for agency Still-Interested Inquiries, July 20, 2015, available at: https://www.justice.gov/oip/oip-guidance-8. Additionally, DOJ has made available an Implementation Checklist for agencies to use during "Still-Interested" Inquiries, available at: https://www.justice.gov/oip/oip-guidance-7. To the extent possible, the DOJ Guidance and Implementation Checklist should be followed.

Implementation Checklist from OIP Guidance on "Still-Interested" Inquiries:

- Ensure there are reasonable grounds to make a "still-interested" inquiry in first instance. Reasonable grounds may include the passage of time without regular communication with the requester and after making an interim release to a requester that may satisfy the requester's information needs.
- Absent good cause, do not send a requester multiple "still-interested" inquiries about the same request.
- Use requester's preferred method of communication and in the absence of a preference, communicate by telephone or email as the default.
- Memorialize any decision by a requester to withdraw a request that is conveyed by telephone by sending the requester a brief email or letter noting the withdrawal.
- Provide requesters no less than thirty (30) working days to respond to the "still-interested" inquiry and ensure that there is a simple way to do so.
- Advise the requester that if they elect not to respond to the inquiry, the request will be administratively closed at the conclusion of the designated time period (which must be at least 30 working days).
- Prior to administratively closing a request based upon the lack of a response by the requester, make good faith efforts to reach out to the requester using multiple methods of communication. For example, when your attempt to reach a requester by phone is unsuccessful, you should send a written communication, either email or letter, and include in that outgoing communication a notification to the requester of what will happen to the request if the requester does not respond to the "still-interested" inquiry.
- In the event a requester responds to the "still- interested" inquiry within a reasonable time after the deadline has passed, reopen the request and place it back into the processing queue where it would have been.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Still Interested Inquiry

Dear **[Requester Name]**:

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 have been assigned to process your FOIA request. **[Enter reason for the letter here: {**Given that so much time has passed since the submission of your request**} AND/OR {**Since you have had an opportunity to review EPA's interim release of records on **{Month Day, Year}}]**, I am writing to inquire whether you are still interested in the continued processing of your request. If not, I would be happy to withdraw and close out the request.

Please notify me within **30 working days** from the date of this letter, ***[insert 30 working days from date of this letter:* [Month Day, Year]]**, if you are still interested in proceeding with this FOIA request. Please contact **[Staff Name]** at **[email address]** or **[telephone]** or by mail at **[mailing address]**. Please reference your request tracking number in any correspondence. If you do not respond within the designated time, EPA may issue a final determination to close out your request in accordance with Department of Justice guidance. Please see https://www.justice.gov/oip/oip-guidance-8. Please note that you are not prohibited from submitting additional Freedom of Information Act requests in the future. For more information, please visit our website at: https://www.epa.gov/foia..

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, 8601 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,

**[Staff Name**

# Title]

## General Instructions for Using Templates

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Use the following template to issue a final response and close out a request when the requester has not responded to a still interested inquiry. Note that you should only issue a final response for failure to respond to a still interested letter if you have: (1) sent the requester a still interested inquiry; (2) provided at least 30 working days for the requester to respond to the still interested inquiry; and (3) followed up with the requester regarding the still interested inquiry using a different method of communication than used for the initial still interested inquiry. Still Interested inquiries should only be sent in accordance with the Department of Justice's guidance for agency Still-Interested Inquiries, July 20, 2015, available at: https://www.justice.gov/oip/oip-guidance-8. Additionally, DOJ has made available an Implementation Checklist for agencies to use during "Still-Interested" Inquiries, available at: https://www.justice.gov/oip/oip-guidance-7. To the extent possible, the DOJ Guidance and Implementation Checklist should be followed.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Still Interested Inquiry

Dear **[Requester Name]**:

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]**.

On **[Month Day, Year],** EPA's **[Contact]** contacted you in writing to ask whether you were still interested in obtaining additional responses to your request. On **[Month Day, Year]**, EPA's **[Contact]** contacted you by **[telephone, email, OR U.S. mail]** as a follow up to inquire whether you were still interested in the continued processing of your request. As of the date of this letter,

we have received no response from you. We provided you at least thirty working days to respond to us in accordance with guidance form the Department of Justice's Office of Information Policy, located at https://www.justice.gov/oip/blog/oip-releases-new-guidance-agency-still-interested-inquiries. Therefore, we are issuing a final determination and closing your request. Please note that you are not prohibited from submitting additional Freedom of Information Act requests in the future. For more information, please visit our website at: https://www.epa.gov/foia.

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 EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Avenue, N.W., WJC-N Building, Room 7309C, Washington, DC 20460.

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, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. For all media inquiries, please contact press@epa.gov.

If you have any questions concerning this response, please contact **[Contact]** at **[email address]** or **[telephone]**.

Sincerely,

**[Staff Name]**
**[Title]**

# General Instructions for Using Templates

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This template is to confirm in writing any clarification details from the requester. If not sent via FOIAonline, a copy should be uploaded to the FOIAonline case file.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Confirmation of Clarification

Dear **[Requester Name]**:

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]**.

<u>Clarification</u>

On **[Month Day, Year]**, 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, such as emails, documents, memoranda, notes, presentations, text messages, schedule, voicemail, data, and logs;**
- **Subject Matter/Topic/Search Terms;**
- **Date Range; or**
- **Specific Departments/Custodians/Positions.]**

***Insert the following if you can provide an estimated date of completion.***

{Estimated Date of Completion

EPA estimates the Agency will be able to complete this request by **[Month Day, Year]**. We appreciate your patience.}

***Insert the following if you can provide a fee estimate or if there are outstanding fee-related issues such as a requested assurance of payment. See Part 3, Fees.***

{Processing Fees

**[Provide appropriate information regarding fees]}**

Next Steps

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 Click or tap to enter a date..}

Please contact **[Contact]** at **[Email Address]** or **[Phone Number]** 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, 8601 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 wish to request information connected to this request in the future, please reference the FOIA request number.

Sincerely,

**[Staff Name]**
**[Title]**

## General Instructions for Using Templates

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Use this template if you are referring an entire request to another federal agency. Remember, the Lead FOIA Program must obtain the NFO's concurrence before they refer records to another federal agency. 40 C.F.R. § 2.103(d)(2).

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Referral to **[Other Federal Agency]**

Dear **[Requester Name]**:

This letter is the final response to your FOIA request seeking **[Insert a description of the FOIA request. If the request has been clarified, include the most recent clarification, and note when it was clarified.]**

After a careful review of your FOIA request, we determined that the information you are seeking is not under the purview of EPA. Requests for this information should be made to **[Other Federal Agency]**. Therefore, we have referred your request to **[Other Federal Agency]**. To assist you on this matter, we are providing you with the following contact information:

> **[FOIA Officer Name**
> **Title**
> **Other Federal Agency**
> **Address**
> **City, State Zip**
> **Phone Number**
> **Email Address]**

This letter concludes our response under the FOIA. Please be advised that this action is not a denial of your request and will not preclude you from filing other requests in the future.

You may appeal this determination by email at hq.foia@epa.gov, or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460 or through FOIAonline if you are an account holder. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Avenue, N.W., WJC-N Building, Room 7309C, Washington, DC 20460.

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 p.m. 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."

If you need any further assistance or would like to discuss any aspect of your request, you may seek assistance 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, 8601 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. For all media inquiries, please contact press@epa.gov.

If you have any questions about this response, please contact **[Contact]** at **[Phone Number]** or **[Email Address]** and please reference your EPA FOIA request number.

Sincerely,

**[Staff Name]**
**[Title]**

## General Instructions for Using Templates

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You can use this template as a cover letter for referring an entire or portion of a FOIA request when records originating with another federal agency have been found.

**[Month Day, Year]**

**[Agency FOIA Officer Name**
**Title**
**Other Federal Agency**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Referral

Dear **[Requester Name]**:

This letter concerns the above-referenced FOIA request, received by the U.S. Environmental Protection Agency (EPA or Agency) on **[Month Day, Year]**. The Requester **{Name of FOIA Requester and organization, if applicable}** is seeking the following records: **[Insert a description of the FOIA request. If the request has been clarified, include the most recent clarification, and note when it was clarified.]**.

**[Select one of these:]**
**[Option 1: Not an EPA Request, Referring Entire Request]**

After a careful review of the FOIA request, we determined that, if such documents exist, they would be under your agency's purview. Therefore, we have referred this request to your agency. Please respond directly to the requester.

**[OR, Option 2: EPA Request, Referring Records to Other Agency]**

During our search for responsive records, we located records that originated within your agency. Therefore, we are transferring the responsive documents, totaling **{###}** pages **[OR {###} records]**, to you for your review and direct response to the requester.

The requester has been notified of this referral. A copy of the referral letter is attached. If you have any questions, you may contact **[EPA FOIA Contact]** by phone at **[Phone Number]** or by email at **[Email Address]**.

Sincerely,

**[Staff Name]**
**[Title]**

AApproved OMB 2020-003
Approval expires 09/30/2023

**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. Please be advised that 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.

In making its final confidentiality determination, the EPA will consider the relevant substantive criteria in its CBI regulations, under 40 C.F.R. § 2.208(a)-(d), as well as the U.S. Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media* (*Argus*), 139 S. Ct. 2356 (2019), which evaluated the definition of "confidential" as used in Exemption 4. In the *Argus* decision, the Court held that at least where "[1] commercial or financial information is both customarily and actually treated as private by its owner and [2] provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Argus*, 139 S. Ct. at 2366.

Thus, for each item or class of information that you claim as CBI, please answer the following questions, giving as much detail as possible. EPA will use your responses to these questions 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. Please explain why EPA should protect the information you claim as confidential for the time period specified in your answer to question #1.

3. Has EPA, another federal agency, or court made any determination as to the confidentiality of the information? If so, please attach a copy of the determination.

4. Is the information contained in any publicly available material such as patents or patent applications, publicly available databases (including state databases), promotional publications, annual reports, or articles? Yes/No

   If you answered "yes", please identify the publicly available information and its location (e.g., patent number or website address).

5. Has your company taken reasonable measures to protect the information claimed as CBI? If so, please identify the measure or internal controls your business has taken to protect the information claimed as confidential:

   a. Non-disclosure agreement required prior to access. Yes/No
   b. Access is limited to individuals with a need-to-know. Yes/No
   c. Information is physically secured (e.g. locked in a room or cabinet) or electronically secured (encrypted, password protected, etc.). Yes/No
   d. Other internal control measures(s). Yes/No. (*If yes, please explain.*)

6. Does your company customarily keep the information private or closely-held? If so, please explain the basis for your response.

7. At the time you submitted the information you claimed as CBI, did EPA provide any express or implied assurance of confidentiality? If so, please provide the specific assurance(s) you received. For example, expressed assurances indicating that information will not be publicly disclosed could include legal authorities (regulation or statute), direct communications, class determinations, etc. Examples of implicit assurances could include a description of the specific context in which the information was received.

8. Did the Agency provide any expressed or implied indications at the time the information was submitted that EPA would publicly disclose the information?

9. If you believe any submitted information to be a trade secret, please 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.

10. **[Potential Question based on circumstance:** Are there any means by which a member of the public could obtain access to the information or readily discover the information claimed as confidential through reverse engineering?**]**

11. **[Potential Question based on the type of CBI claim:** Please explain why the information claimed as confidential is not emissions data under the Clean Air Act, effluent data under the Clean Water Act, health and safety data under the Toxics Substances Control Act, or any other information that is prohibited from protection under regulation or statute.**]**

12. Explain any other issue or additional information you deem relevant to EPA's determination.

Please note that *you bear the burden of substantiating your CBI 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 your 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(s), and the EPA may release the information.

If you wish to claim any information that you provide in your response to this letter to be claimed as CBI, you must mark the response with "**CONFIDENTIAL BUSINESS INFORMATION**" or with a similar designation, and you 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,

**[Signature and Title; Office Name and Address]**

**[**Enclosure**]**

Approved OMB 2020-003
Approval expires 09/30/2023

**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.

In making its final confidentiality determination, the EPA will consider the relevant substantive criteria in its CBI regulations, under 40 C.F.R. § 2.208(a)-(d), as well as the U.S. Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media* (*Argus*), 139 S. Ct. 2356 (2019), which evaluated the definition of "confidential" as used in Exemption 4. In the *Argus* decision, the Court held that at least where "[1] commercial or financial information is both customarily and actually treated as private by its owner and [2] provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Argus*, 139 S. Ct. at 2366.

Thus, for each item or class of information that you claim as CBI, please answer the following questions, giving as much detail as possible. EPA will use your responses to these questions 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. Please explain why EPA should protect the information you claim as confidential for the time period specified in your answer to question #1.

3. Has EPA, another federal agency, or court made any determination as to the confidentiality of the information? If so, please attach a copy of the determination.

4. Is the information contained in any publicly available material such as patents or patent applications, publicly available databases (including state databases), promotional publications, annual reports, or articles? Yes/No

   If you answered "yes", please identify the publicly available information and its location (e.g., patent number or website address).

5. Has your company taken reasonable measures to protect the information claimed as CBI? If so, please identify the measure or internal controls your business has taken to protect the information claimed as confidential:

   a. Non-disclosure agreement required prior to access. Yes/No
   b. Access is limited to individuals with a need-to-know. Yes/No
   c. Information is physically secured (e.g. locked in a room or cabinet) or electronically secured (encrypted, password protected, etc.). Yes/No
   d. Other internal control measures(s). Yes/No. (*If yes, please explain.*)

6. Does your company customarily keep the information private or closely-held? If so, please explain the basis for your response.

7. At the time you submitted the information you claimed as CBI, did EPA provide any express or implied assurance of confidentiality? If so, please explain the specific assurance(s) you received. For example, expressed assurances indicating that information will not be publicly disclosed could include legal authorities (regulation or statute), direct communications, class determinations, etc. Examples of implicit assurances could include a description of the specific context in which the information was received.

8. Did the Agency provide any expressed or implied indications at the time the information was submitted that EPA would publicly disclose the information?

9. If you believe any submitted information to be a trade secret, please 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.

10. **[Optional Question for Program to include if applicable:** Are there any means by which a member of the public could obtain access to the information or readily discover the information claimed as confidential through reverse engineering?**]**

11. **[Optional Question for Program to include if applicable:** Please explain why the information claimed as confidential is not emissions data under the Clean Air Act, effluent data under the Clean Water Act, health and safety data under the Toxics Substances Control Act, or any other information that is prohibited from protection under regulation or statute.**]**

12. Explain any other issue or additional information you deem relevant to EPA's determination.

**[If applicable to an 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,

**[Signature and Title; Office Name and Address]**

**[**Enclosure**]**

Approved OMB 2020-003
Approval expires 09/30/2023
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.

In making its final confidentiality determination, the EPA will consider the relevant substantive criteria in its CBI regulations, under 40 C.F.R. § 2.208(a)-(d), as well as the U.S. Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media* (*Argus*), 139 S. Ct. 2356 (2019), which evaluated the definition of "confidential" as used in Exemption 4. In the *Argus* decision, the Court held that at least where "[1] commercial or financial information is both customarily and actually treated as private by its owner and [2] provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Argus*, 139 S. Ct. at 2366.

Thus, for each item or class of information that you claim as CBI, please answer the following questions, giving as much detail as possible. EPA will use your responses to these questions 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. Please explain why EPA should protect the information you claim as confidential for the time period specified in your answer to question #1.

3. Has EPA, another federal agency, or court made any determination as to the confidentiality of the information? If so, please attach a copy of the determination.

4. Is the information contained in any publicly available material such as patents or patent applications, publicly available databases (including state databases), promotional publications, annual reports, or articles? Yes/No

   If you answered "yes", please identify the publicly available information and its location (e.g., patent number or website address).

5. Has your company taken reasonable measures to protect the information claimed as CBI? If so, please identify the measure or internal controls your business has taken to protect the information claimed as confidential:

   a. Non-disclosure agreement required prior to access. Yes/No
   b. Access is limited to individuals with a need-to-know. Yes/No

c. Information is physically secured (e.g. locked in a room or cabinet) or electronically secured (encrypted, password protected, etc.). Yes/No
d. Other internal control measures(s). Yes/No. (*If yes, please explain.*)

6. Does your company customarily keep the information private or closely-held? If so, please explain the basis for your response.

7. At the time you submitted the information you claimed as CBI, did EPA provide any express or implied assurance of confidentiality? If so, please explain the specific assurance(s) you received. For example, expressed assurances indicating that information will not be publicly disclosed could include legal authorities (regulation or statute), direct communications, class determinations, etc. Examples of implicit assurances could include a description of the specific context in which the information was received.

8. Did the Agency provide any expressed or implied indications at the time the information was submitted that EPA would publicly disclose the information?

9. If you believe any submitted information to be a trade secret, please 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.

10. **[Optional Question for Program to include if applicable:** Are there any means by which a member of the public could obtain access to the information or readily discover the information claimed as confidential through reverse engineering?**]**

11. Explain any other issue or additional information you deem relevant to EPA's determination.

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,

**[Signature and Title; Office Name and Address]**

**[**Enclosure**]**

Approved OMB 2020-003
Approval expires 09/30/2023

**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 **[INSERT NAME]**:

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.

In making its final confidentiality determination, the EPA will consider the relevant substantive criteria in its CBI regulations, under 40 C.F.R. § 2.208(a)-(d), as well as the U.S. Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media* (*Argus*), 139 S. Ct. 2356 (2019), which evaluated the definition of "confidential" as used in Exemption 4. In the *Argus* decision, the Court held that at least where "[1] commercial or financial information is both customarily and actually treated as private by its owner and [2] provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Argus*, 139 S. Ct. at 2366.

Thus, for each item or class of information that you claim as CBI, please answer the following questions, giving as much detail as possible. EPA will use your responses to these questions to determine whether the information has been shown to be entitled to confidential treatment:

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?

Questions 8 through 17 must be answered for each type of information that you claimed as confidential:

8. 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.

9. Information submitted to the EPA becomes stale over time. Please explain why EPA should protect the information you claim as confidential for the time period specified in your answer to question #1.

10. Has EPA, another federal agency, or court made any determination as to the confidentiality of the information? If so, please attach a copy of the determination.

11. Is the information contained in any publicly available material such as patents or patent applications, publicly available databases (including state databases), promotional publications, annual reports, or articles? Yes/No

    If you answered "yes", please identify the publicly available information and its location (e.g., patent number or website address).

12. Has your company taken reasonable measures to protect the information claimed as CBI? If so, please identify the measure or internal controls your business has taken to protect the information claimed as confidential:

    a. Non-disclosure agreement required prior to access. Yes/No
    b. Access is limited to individuals with a need-to-know. Yes/No
    c. Information is physically secured (e.g. locked in a room or cabinet) or electronically secured (encrypted, password protected, etc.). Yes/No
    d. Other internal control measures(s). Yes/No. (*If yes, please explain.*)

13. Does your company customarily keep the information private or closely-held? If so, please explain the basis for your response.

14. At the time you submitted the information you claimed as CBI, did EPA provide any express or implied assurance of confidentiality? If so, please explain the specific assurance(s) you received. For example, expressed assurances indicating that information will not be publicly disclosed could include legal authorities (regulation or statute), direct communications, class determinations, etc. Examples of implicit assurances could include a description of the specific context in which the information was received.

15. Did the Agency provide any expressed or implied indications at the time the information was submitted that EPA would publicly disclose the information?

16. If you believe any submitted information to be a trade secret, please 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.

17. Explain any other issue or additional information you deem relevant to EPA's determination.

Please note that *you bear the burden of substantiating your CBI 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. 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(a)-(d).

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 your 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(s), and the EPA may release the information.

If you wish to claim any information that you provide in your response to this letter to be claimed as CBI, you must mark the response with "**CONFIDENTIAL BUSINESS INFORMATION**" or with a similar designation, and you 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,

**[SIGNATORY AND TITLE]**

[Enclosures]

Approved OMB 2020-003
Approval expires 09/30/2023

**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 section 14(f) of the Toxic Substances Control Act (TSCA), EPA shall require any person to "reassert and substantiate or resubstantiate the [CBI] claim" under certain circumstances. EPA will review such CBI claim (1) to determine whether the information qualifies for protection under Exemption 4 when requested to be disclosed under a Freedom of Information request; (2) if the Administrator has a reasonable basis to believe the information does not qualify for protection under TSCA; or (3) for any chemical substance that EPA determines under TSCA section 5(b)(4)(A) presents an unreasonable risk of injury to health or the environment. 15 U.S.C. § 2613(f).

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 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.

**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 or all of the CBI claims. If you have already substantiated your CBI claim at the time of submission, and believe that your previously submitted substantiation remains accurate and up to date, you may choose to rely on that substantiation by referring to or preferably physically attaching your substantiation to your response to this letter.

## 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. Will disclosure of the information claimed as confidential likely cause a substantial harm to your business's 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-claimed 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.

B. 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.

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

If you answered yes, please identify the publicly available information and its location (e.g., patent number or website address) and explain why the information should nonetheless be treated as confidential.

D. Are there any means by which a member of the public or competitor could obtain access to the information or readily discover the information claimed as confidential through reverse engineering?

E. Does the information claimed to be CBI contain (a) trade secret(s)[1] ? 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(f)(3)), then please indicate the number of years (between 1-10 years) or specific date after which the claim is withdrawn.[2]

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.

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[1] "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." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

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

## 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 by the public or your competitors 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:

   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.

**Certification**

You must include the following statement in the submission.

I hereby certify to the best of my knowledge and belief that all information provided in this submission 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 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 Scott Sherlock, (202) 564-8257 and Sherlock.Scott@epa.gov; or Jessica Barkas, (202) 250-8880 and Barkas.Jessica@epa.gov.

Sincerely,

**[Signature and Title; Office Name and Address]**

# General Instructions for Using Templates

The FOIA Toolkit Appendix provides to document drafters recommended template language but does not impose any legally binding requirements.

If you choose to use these templates, text in a template that appears in regular font and black ink is intended to be inserted into your document without significant changes. General instructions appear in blue ***bold italics***. Specific instructions on what to insert appear within the template as bolded blue text in square brackets **[like this]**. Text that appears within blue curly brackets **{like this}** is optional to include or may be omitted. Once you insert the appropriate text, please remove the brackets, instructions, and color.

The checklist below details items to be included in a final response letter and provides sample language that may be useful. Draft your final response 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 and uploaded to FOIAonline even if it is not being delivered electronically. Remember, only authorized officials have authority to issue final decisions. *See* Part 6.B, Final Approval.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Final Response

Dear **[Requester 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.]**

<u>Disposition</u>

**[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.**}]**

Description of Records

***Insert the information below if the request is being granted in full:***

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.]**

***Insert the information below if the request is being denied in full:***

The Agency has concluded its search for records responsive to your request and is withholding all responsive records**. [Include a description of the records being withheld in full. If there is a large volume of records that are being withheld, include an index of those records.]**

***Insert the information below if the request is being denied in part:***

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.** The EPA is withholding **{#}** records in full and **{#}** records in part. **[Include a description of the records being withheld in full or withheld in part. If there is a large volume of records that are being withheld, include an index of those records.]**

***Insert the information below if records are being withheld in whole or in part, noting which FOIA exemptions are the basis for the withholding(s).***

**{**Records are being withheld pursuant to: **[insert 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**}; AND/OR {**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)**}; AND/OR {**contain personal information which would be an unwarranted invasion of personal privacy if released (PP)**}]**. The attached index of withholdings provides **[if not voluminous: {**further information concerning the withheld records**} OR if voluminous: {**The attached appendix contains a categorical description of withholdings and a volume estimate**}]**.

***Insert the information below if you are assessing fees, explaining that fees are being assessed for the request and how to pay those fees.***

{Cost Information

The cost to process your request was **{$}**. Please see the attached invoice for billing and payment instructions.}

Final Appeal Rights and Contact Information

You may appeal this determination by email at hq.foia@epa.gov, or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460 or through FOIAonline if you are an account holder. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Avenue, N.W., WJC-N Building, Room 7309C, Washington, DC 20460.

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 p.m. 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."

If you need any further assistance or would like to discuss any aspect of your request, you may seek assistance 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, 8601 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. For all media inquiries, please contact press@epa.gov.}

***Insert the information below if you have withheld any information responsive to the FOIA request under 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 determination by email at hq.foia@epa.gov, or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460 or through FOIAonline if you are an account holder. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Avenue, N.W., WJC-N Building, Room 7309C, Washington, DC 20460.

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 p.m. 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."

If you need any further assistance or would like to discuss any aspect of your request, you may seek assistance 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, 8601 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. For all media inquiries, please contact press@epa.gov.**}**

If you have any questions concerning this response, please contact **[Staff Contact]** of my staff at **[phone number]**.

Sincerely,

**[Authorized Official Signature]**
**[Title]**

## General Instructions for Using Templates

The FOIA Toolkit Appendix provides to document drafters recommended template language but does not impose any legally binding requirements.

If you choose to use these templates, text in a template that appears in regular font and black ink is intended to be inserted into your document without significant changes. General instructions appear in blue ***bold italics***. Specific instructions on what to insert appear within the template as bolded blue text in square brackets **[like this]**. Text that appears within blue curly brackets **{like this}** is optional to include or may be omitted. Once you insert the appropriate text, please remove the brackets, instructions, and color.

The below template can be used as a cover letter for an interim production. An interim response should include the following components in the correspondence:

- Request information (number, date received, summary);
- Description of the interim production (number of records, general description);
- Stated as an interim and not final response;
- Anticipated closeout date/upcoming productions;
- Notice that appeal information will be provided at close out; and
- Contact information.

**[Month Day, Year]**

**[Requester Name**
**Organization**
**Address**
**City, State Zip]**

Re: Freedom of Information Act Request No. EPA-**[XX-20XX-XXXXXX]**, Interim Response

Dear **[Requester 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]**. **[Optional: insert a description of a rolling production schedule or when the next interim production is expected if there will be additional interim productions.]**

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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 **[Contact Name]** at **[email address]** or by phone at **[phone number]**. 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, 8601 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.; telephone: (202) 741-5770 or (877) 6846448; or fax: (202) 741-5769.

Sincerely,

**[Staff Name]**
**[Title]**

DRAFT