



PRACTICE ADVISORY¹
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Freedom of Information Act and Immigration Agencies

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I. INTRODUCTION

The Freedom of Information Act (FOIA) allows individuals to access information from federal agencies. FOIA can be used to advocate for a client, seek information about agency operations, or obtain data from government agencies. This practice advisory provides a general overview of applicable provisions of the FOIA statute and how courts have interpreted them, explains how to file a FOIA request, identifies the types of records that are exempt under FOIA, and outlines the process for appealing a FOIA request and seeking review in federal court. General information about the FOIA processes of immigration agencies is provided in the Appendix.

II. FOIA: GENERAL OVERVIEW

What is the Freedom of Information Act?

The purpose behind FOIA is to promote open, transparent government.² As Justice Thurgood Marshall stated, “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”³ Because “disclosure, not secrecy, is the dominant objective of the Act,” the statute is liberally construed in favor of the release of information.⁴ FOIA states that any person has the right to request records or information from federal agencies. It also establishes other requirements such as deadlines by which an agency must respond to those requests. Through FOIA, an attorney might seek:

- A copy of a client’s “A-File”;
- Information about a client’s entries into and departures from the United States;
- Information about an agency’s policies, practices or procedures;
- Complaints or grievances filed with oversight agencies such as the Department of Homeland Security’s Office for Civil Rights and Civil Liberties; and
- Data, such as the number of individuals apprehended or encountered during a certain time span by immigration enforcement agencies.

FOIA states that an agency “shall” provide records to “any person” who 1) reasonably describes those records and 2) submits the request in accordance with agency rules.⁵ A “person” includes an individual, partnership, corporation, association, or public or private organization other than an agency,⁶ thus immigration status has no bearing on an individual’s ability to submit a FOIA request.⁷

² *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (noting that the basic purpose of FOIA was “to open agency action to the light of public scrutiny”) (internal citations omitted).

³ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

⁴ *Dep’t of Air Force v. Rose*, 425 U.S. at 361.

⁵ 5 U.S.C. § 552(a)(3).

⁶ 5 U.S.C. § 551(2).

⁷ See *Frequently Asked Questions, Who can Make a FOIA request?*, FOIA.gov, <https://www.foia.gov/faq.html> (“Generally any person - United States citizen or not - can make a FOIA request.”)

An “agency” includes any executive department, military department, government corporation, government-controlled corporation, or other institution within the executive branch of the U.S. Government (including the Executive Office of the President), or any independent regulatory agency.⁸ FOIA applies only to federal agencies and does not create a right of access to records held by Congress, the courts, or by state or local government agencies.⁹

What information does FOIA require agencies to disclose proactively?

Agencies are required to make certain records available to the public even absent a specific request for them.¹⁰ The statute requires that each agency make the following information available in the Federal Register:¹¹

- descriptions of agency organizational structure and information about how the public can obtain information, make requests and obtain decisions from the agency;
- the methods by which agency functions are determined, including informal and formal agency procedures;
- rules of procedure and descriptions of forms;
- substantive rules adopted by law and statements of general policy; and
- any amendment, revision, or repeal of any of the above.

Other types of information must proactively be made “available for public inspection in an electronic format.”¹² They include:

- final opinions and orders;
- policies adopted by the agency but not published in the Federal Register;
- staff manuals and instructions to staff that affect the public;
- copies and an index of all previously released records that, because of their subject matter, are likely to become the subject of subsequent requests for substantially the same records; or have been requested 3 or more times.

Many agencies devote a section of their websites to proactive FOIA disclosures.¹³ Significant information is not always available on agencies’ websites, however. Until recently, for example, the Board of Immigration Appeals had successfully argued that it did not have to provide

⁸ 5 U.S.C. § 552(f); *see* 5 U.S.C. § 551(1).

⁹ *See* 5 U.S.C. § 551(1) (defining “agencies” under FOIA). The National Freedom of Information Coalition collects each state’s Freedom of Information laws, as well as sample records requests for each state, and makes them available at <http://www.nfoic.org/state-freedom-of-information-laws>.

¹⁰ 5 U.S.C. § 552(a).

¹¹ 5 U.S.C. § 552(a)(1).

¹² 5 U.S.C. § 552(a)(2).

¹³ *See, e.g., FOIA Proactive Disclosure, ICE*, <https://www.ice.gov/foia/proactive>; *EOIR Proactive Disclosure, EOIR*, <https://www.justice.gov/eoir/proactive-eoir-disclosures>; *USCIS Electronic Reading Room*, <https://www.uscis.gov/records/electronic-reading-room>; *Available FOIA Records, DHS*, <https://www.dhs.gov/publication/cbp-immigration-records?collection=foia-library>.

unpublished Board of Immigration Appeals decisions on its website. The Second Circuit Court of Appeals recently found the failure to publish those decisions was a violation of FOIA's proactive disclosure provision and that courts can compel the agency to make documents publicly available in electronic reading rooms.¹⁴

What kind of information can I request under FOIA?

An individual may request any agency records as long as they are "reasonably" described and comply with an agency's "published rules stating the time, place, fees (if any), and procedures to be followed."¹⁵

To the extent possible, the request should include detailed information about the records sought, such as the date, title or name, author, recipient, and subject matter of the record.¹⁶ As a general rule, the more specific you are about the records that you want, the more likely the agency will be able to locate them.

An agency may take an opportunity after receiving a request to ask for clarity to "perfect" a request if, in the agency's view, the records are not reasonably described. Depending on the governing regulations, however, the agency has a role in helping clarify the request. Although DHS does not have a mandatory obligation,¹⁷ its regulations do state, for example, that component agencies "should inform the requester what additional information is needed or why the request is otherwise insufficient."¹⁸

Agencies that are not satisfied that the records are adequately described in the FOIA request may attempt to "administratively close" the request if requester does not provide a response to requests for additional information.¹⁹ If no additional information can be provided, a requester can explain how the request provides as much detail as possible about the records sought and therefore meets the agency requirements.²⁰

¹⁴ *New York Legal Assistance Grp. v. Bd. of Immigration Appeals*, 987 F.3d 207, 223-25 (2d Cir. 2021) (leaving the subset of decisions to be made public to the discretion of the district court on remand).

¹⁵ 5 U.S.C. § 552(a)(3)(A).

¹⁶ *See, e.g.*, 6 C.F.R. § 5.3(b) ("A reasonable description contains sufficient information to permit an organized, non-random search for the record based on the component's filing arrangements and existing retrieval systems.").

¹⁷ 81 Fed. Reg. 83,625, 83,627 (Nov. 22, 2016) ("[r]esources permitting, DHS will attempt to seek additional clarification rather than administratively close requests, but . . . will not impose an affirmative requirement to seek additional information or clarification in every instance.")

¹⁸ 6 CFR §5.3(b).

¹⁹ *See e.g.*, 6 CFR § 5.3(c) ("If a request does not adequately describe the records sought, DHS may at its discretion either administratively close the request or seek additional information from the requester. . . If the requester does not respond to a request for additional information within thirty (30) working days, the request may be administratively closed at DHS's discretion.").

²⁰ *See e.g.*, 6 CFR § 5.3(b) ("In general, requesters should include as much detail as possible about the specific records or the types of records that they are seeking").

How do I submit a FOIA request?

Each agency has specific rules about where to send FOIA requests.²¹ Depending on the agency from which you are requesting information, you either may submit a request online or send a letter to the agency. See Section IV. Agencies now strongly recommend submitting requests online, but if a requester would rather not share certain information in an on-line form, the only requirement for a FOIA request is that it be in writing; the records requested be reasonably described; and the request comply with agency-specific requirements.²²

When seeking information about a third party, the requester typically must submit proof that the third party has authorized the FOIA request, or proof that the third party is deceased (e.g., death certificate, obituary).²³

When should I expect a response to my FOIA request and what will the response contain?

All federal agencies are required to respond to a FOIA request within 20 business days (excluding Saturdays, Sundays and legal holidays) unless there are “unusual circumstances.”²⁴ The 20-day period does not begin until the request is received by the FOIA office that maintains the records.²⁵ Because acknowledgement letters are often received electronically, the time period that a requester must wait to receive an acknowledgement letter should be only a matter of days. This is not always the case, however, and sometimes steps must be taken to encourage the agency to respond. A requester can reach out to the agency for updates and may request assistance from the DHS Public liaison²⁶ and the Office of Government Information Services.²⁷

²¹ See 6 C.F.R. §§ 5.1-5.13 (DHS); 28 C.F.R. §§ 16.1-16.12 (DOJ). See also 6 C.F.R. Pt. 5, Subpt. A, App. I (listing FOIA contact information for all DHS components).

²² 5 U.S.C. § 552(a)(3)(A).

²³ Third party authorization is not mandatory, but “a requester may receive greater access” if the requester submits a third party’s notarized authorization or signed declaration, or proof of death. 6 C.F.R. § 5.3(a)(4); *but see id.* (“[E]ach component can require a requester to supply additional information if necessary”). In response to comments on the proposed rule, DHS indicated that “in many, but not all cases, the lack of a signed authorization may prove to be a barrier to access of third-party records unless a significant public interest is raised.” 81 Fed. Reg. 83,625, 83,626 (Nov. 22, 2016). With some exceptions, release of records requested under the Privacy Act still require written authorization. See 5 U.S.C. § 552a(b) (requiring prior written consent of the individual to whom the record pertains); 6 C.F.R. § 5.21(f) (requiring a written statement from a third party authorizing release of records to the requester).

²⁴ 5 U.S.C. §§ 552(a)(6)(A)(i), (B)(i).

²⁵ 5 U.S.C. § 552(a)(6)(A)(i).

²⁶ *DHS FOIA Contact Information, DHS Privacy Office*, <https://www.dhs.gov/foia-contact-information> (listing DHS contact email and the name of the current public liaison).

²⁷ *National Archives, Office of Government Information Services*, <https://www.archives.gov/ogis/mediation-program/request-assistance> (overview of steps to take to request OGIS involvement in resolving a dispute between FOIA requesters and Federal agencies).

An agency is not required to send the actual documents by the 20th business day; but is required to 1) inform the requester of a determination to comply with the request; 2) provide the reasons for the determination; 3) inform the requester of the right to seek assistance from the FOIA Public Liaison of the agency.²⁸ When the agency provides an adverse determination on the request, the agency is required to 1) inform the requester of the right to appeal the determination and 2) the right of the person to seek assistance from the FOIA Public Liaison or the Office of Government Information Services.²⁹ After determining that it will comply with the request, the agency must make the records “promptly available.”³⁰ As a practical matter, agencies often do not provide a determination on the FOIA request until a search for documents has occurred.

An agency may invoke an additional 10 days to respond in “unusual circumstances” when it determines there is 1) a need to search for and collect records from field offices separate from the office processing the request; 2) a need to search for, collect, and examine voluminous amount of records; or 3) the need to consult with another agency with substantial subject matter interests in the request.³¹ The agency now commonly invokes “unusual circumstances” to extend the time period for responding to requests, including requests for A-files.³²

When an agency receives a FOIA request which reasonably describes the records sought and is made in accordance with agency rules, it is required to make non-exempt and non-excluded records “promptly available” to the requester.³³

What fees will I have to pay?

Under FOIA, agencies are permitted to charge a “reasonable standard charge” for “document search, duplication, and review” of records.³⁴ Under this provision, each agency has set rates for record production. These rates are often published on agency’s websites or in their FOIA guides. Many agencies do not charge a fee if the requested record is below a set size or the assessed fees would fall below a set amount.³⁵ If an agency fails to comply with a statutory deadline for responding and no unusual or exceptional circumstances (as defined in 5 U.S.C. § 552(a)(6)(B) and (C)) excuse this delay, the agency may not charge any fee related to searching for responsive

²⁸ 5 U.S.C. § 552(a)(6)(A)(i)

²⁹ *Id.*

³⁰ 5 U.S.C. § 552(a)(6)(C)(i).

³¹ 5 U.S.C. § 552(a)(6)(B)(i)(I)-(III). An agency may not invoke an “unusual circumstance” that is not one of the three listed in the statute. *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 610 (D.C. Cir. 1976) (“only such unusual circumstances as are specified in [5 U.S.C. § 552(a)(6)(B)(i)] will suffice for a ten-day extension of the limits”).

³² FY2019 DHS FOIA Report at 27 (Feb. 2020),

https://www.dhs.gov/sites/default/files/publications/dhs_fy2019_foia_report_final_1.pdf (“In September 2019 USCIS began claiming unusual circumstances for Track 2 and Track 3 requests.”); *see also* Check Status of Request, <https://first.uscis.gov/#/check-status> (providing processing times for USCIS A-File and non-A-File records) (last reviewed May 17, 2021).

³³ 5 U.S.C. § 552(a)(3)(A).

³⁴ 5 U.S.C. § 552(a)(4)(A)(ii).

³⁵ *See, e.g., G-639 Instructions*, at 5, USCIS,

<https://www.uscis.gov/sites/default/files/files/form/g-639instr.pdf> (noting that fees are only charged if the combined cost for production is greater than \$14).

records.³⁶ In some cases, fees may be waived if disclosure of the requested records would be in the public interest.³⁷

III. FOIA EXEMPTIONS AND SEGREGABILITY

Although FOIA requires agencies to make records available upon receipt of a proper request, there are nine exemptions that allow the agencies to withhold information. The statute requires that an agency narrowly construe these exemptions and the burden is on the agency to demonstrate that it has withheld information subject to an exemption.³⁸ Furthermore, the exemptions generally are discretionary—meaning agencies may, but are not required to, withhold covered information.³⁹

When an agency determines that material is exempt from disclosure, it must indicate the specific exemption that covers the material.⁴⁰ Where agencies seek to establish the applicability of FOIA exemptions through a declaration and *Vaughn* index, these materials must “describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and [not be] controverted by either contrary evidence in the record nor by evidence of agency bad faith.”⁴¹

The exemptions discussed below are those commonly applied to records requested from immigration agencies.

- **EXEMPTION 3: Records specifically exempted from disclosure by statute other than FOIA.**

Exemption 3 applies to records exempted from disclosure by other statutes.⁴² They include:

³⁶ 5 U.S.C. § 552(a)(4)(A)(viii).

³⁷ To obtain a public interest fee waiver, the requester must demonstrate that 1) the information is likely to contribute significantly to public understanding of the operations or activities of the government, and 2) disclosure of the information is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

³⁸ 5 U.S.C. § 552(a)(4)(B); *ACLU v. DOD*, 628 F.3d 612, 619 (D.D.C. 2011) (“withholding responsive documents from a FOIA release bear[] the burden of proving the applicability of claimed exemptions.”).

³⁹ *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (“Congress did not design the FOIA exemptions to be mandatory bars to disclosure”); *see also* FOIA Update, Vol. VI, No. 3, at 3 (“[A]gencies generally have discretion under the Freedom of Information Act to decide whether to invoke applicable FOIA exemptions.”); *but see* *DOD v. FLRA*, 964 F.2d 26, 30-31 n.6 (D.C. Cir. 1992) (discussing Privacy Act’s limitations on discretionary FOIA disclosure).

⁴⁰ *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007), quoting *King v. DOJ*, 830 F.2d 210, 219 (D.C. Cir. 1987) (“[W]hen an agency seeks to withhold information, it must provide ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant[.]’”)

⁴¹ *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (internal quotation omitted).

⁴² 5 U.S.C. § 552(b)(3).

- statutes that explicitly prohibit disclosure of material, leaving no room for agency discretion.
- statutes which “establish[] particular criteria for withholding” or “refer[] to particular types of matters to be withheld,” leaving some room for agency discretion.⁴³

Statutes enacted after the Open FOIA Act of 2009 must cite Exemption 3 to fall under the exemption.⁴⁴

To determine whether information is properly withheld under Exemption 3, a court first will determine whether the non-FOIA statute explicitly exempts matters from public disclosure.⁴⁵ While a statute enacted prior to the Open FOIA Act’s date of enactment does not have to specifically cite to Exemption 3, it still must clearly limit public disclosure of government information or records.⁴⁶

A court also will consider whether the non-disclosure provision is mandatory or discretionary.⁴⁷ If the statute’s non-disclosure provision is mandatory, the only question remaining is whether the material falls within the scope of the provision.⁴⁸ If the statute’s nondisclosure provision is discretionary, the court will interpret the relevant nondisclosure provision and determine whether the agency properly invoked its discretion.⁴⁹

In the immigration context, Exemption 3 often has been invoked in relationship to INA § 222(f), which limits disclosure of Department of State and diplomatic and consular records “pertaining

⁴³ *Ass’n of Retired R.R. Workers, Inc. v. U.S. R.R. Retirement Bd.*, 830 F.2d 331, 334 (D.C. Cir. 1987), quoting *Church of Scientology of Cal v. United States Postal Service*, 633 F.2d 1327, 1330 (9th Cir. 1980).

⁴⁴ 5 U.S.C. § 522(b)(3)(B) (requiring all statutes enacted after the 2009 Act to “specifically cite to” Exemption 3 in order to fall within the exemption)

⁴⁵ *Reporters Comm. for Freedom of the Press v. DOJ*, 816 F.2d 730, 734 (D.C. Cir. 1987), *rev’d on other grounds*, *DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749 (1989) (stating that intent to exempt must be found “in the actual words of the statute ... not in the legislative history of the claimed withholding statute, nor in an agency’s interpretation of the statute”).

⁴⁶ *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 37 (D.C. Cir. 2002) (rejecting use of the Endangered Species Act for Exemption 3 purposes because “there is nothing in the Endangered Species Act that refers to withholding information.”).

⁴⁷ *Medina-Hincapie v. Dep’t of State*, 700 F.2d 737, 740 (D.C. Cir. 1983).

⁴⁸ *See, e.g., Fund for Constitutional Govt. v. Natl. Archives and Records Serv.*, 656 F.2d 856, 868 (D.C. Cir. 1981) (after determining that Rule 6(e) of the Federal Rules of Criminal Procedure was a mandatory non-disclosure statute, discussing the scope of Rule 6(e) and whether the requested information fell within that scope).

⁴⁹ *See, e.g., Long v. IRS*, 742 F.2d 1173, 1179 (9th Cir. 1984) (“The statute can either limit discretion to a particular item or to a particular class of items that Congress has deemed appropriate for exemption, or it can limit it by prescribing guidelines for its exercise.”). If the statute “establishes particular criteria for withholding,” the court will determine whether the agency properly followed those criteria. *Id.* at 1181 (noting that “reviewability of an administrator’s exercise of discretion may be the general rule under FOIA” and holding that a district court may engage in *de novo* review of an agency determination to invoke a particular discretionary withholding provision).

to the issuance or refusal of visas or permits to enter the United States.”⁵⁰ Courts have interpreted section 222(f) as both nondiscretionary, because it states that certain records “shall be considered confidential,” and discretionary, because the phrase “pertaining to the issuance or refusal of visas” is one that “refers to particular types of matters to be withheld.”⁵¹

An attorney may challenge the application of Exemption 3 pursuant to INA § 222(f) if the record does not implicate any past or pending request for a visa.⁵² The mere presence of the data in a database used to make determinations regarding visas is insufficient to block disclosure.⁵³

- **EXEMPTION 5: “Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”⁵⁴**

As a threshold matter, the agency must demonstrate that records it seeks to withhold under Exemption 5 were generated by an agency of the federal government.⁵⁵ This requirement provides an opportunity in some cases to argue that records passed between an agency and a non-government entity should not be considered inter or intra-agency documents. For example, some courts have found that communication between an agency and Congress may not be considered inter-agency or intra-agency communication.⁵⁶ Though the agency can argue that records passing between an outside consultant and an agency should fall under the exemption, this argument will

⁵⁰ 8 U.S.C. § 1202(f).

⁵¹ See *Holy Spirit Ass'n for Unification of World Christianity, Inc. v. Dep't of State*, 526 F. Supp. 1022, 1031 (S.D.N.Y. 1981) (holding that INA § 222(f) is a nondiscretionary exempt statute); *DeLaurentiis v. Haig*, 686 F.2d 192, 193 (3d Cir. 1982) (holding that INA § 222(f) “falls squarely” under the discretionary provision); *Medina-Hincapie*, 700 F.2d at 741-42 (holding that INA § 222(f) is an exempt statute under both provisions).

⁵² *Immigration Justice Clinic of the Benjamin N. Cardozo Sch. of Law v. Dep't of State*, No. 12 Civ. 1874, 2012 U.S. Dist. LEXIS 151563, *4 (S.D.N.Y. Oct. 18, 2012) (information held in consular databases should be disclosed if the information did not relate to a “past or pending visa application.”).

⁵³ *Darnbrough v. United States Dep't of State*, 924 F. Supp. 2d 213, 218 (D.D.C. 2013) (“Section 1202(f) cannot be extended to cover materials unrelated to a visa issuance or denial simply because those documents are contained in a database among other documents that may pertain to visa issuances and denials”)

⁵⁴ 5 U.S.C. § 552(b)(5).

⁵⁵ *Dep't of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 8-10 (2001) ((holding that communications between Native American Tribes and the Department of the Interior were not exempt because the Tribes were not functioning on a consulting basis but instead communicating their own interests to the Department); see also *McKinley v. Board of Governors of Federal Reserve System*, 647 F.3d 331, 341 (D.C. Cir. 2011); *Tigue v. DOJ*, 312 F.3d 70, 78-79 (2d Cir. 2003).

⁵⁶ *Dow Jones & Co., Inc. v. DOJ*, 917 F.2d 571, 574 (D.C. Cir. 1990)) (“It may well be true that if Congress had thought about this question, the Exemption would have been drafted more broadly to include Executive Branch communications to Congress But Congress did not, and the words simply will not stretch to cover this situation, because Congress is simply not an agency.”).

fail where the consultant is not acting as an agency employee, the agency did not solicit the advice from the consultant and that the consultant acted in its own interests.⁵⁷

For the exemption to apply, the records also must encompass information that a private party would be unable to obtain in litigation.⁵⁸ The exemption encompasses the civil discovery privileges including the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.⁵⁹

Though the attorney work-product privilege and the attorney-client privilege are implicated in immigration cases, Exemption 5 is most often invoked to protect information pursuant to the deliberative process privilege. This includes information the agency considers (1) pre-decisional and, (2) deliberative.⁶⁰ These documents include agency memoranda, emails with opinions or analysis, or immigration officer notes in an individual's immigration file.

There are several criteria the agency must meet, however, to prove that the records fall within this exemption. For each withheld document, the agency must show “(1) ‘what deliberative process is involved,’ (2) ‘the role played by the documents in issue in the course of that process,’ and (3) ‘the nature of the decisionmaking authority vested in the office or person issuing the disputed document[s], and the positions in the chain of command of the parties to the documents.’”⁶¹

The purpose of Exemption 5 “is to enhance the quality of agency decisions by protecting open and frank discussion among those who make [these decisions] within the Government.”⁶² Courts have found documents are pre-decisional if they encompass recommendations or opinions on legal or policy matters created prior to the adoption of an official agency policy.⁶³ Similarly, a document generally retains its pre-decisional classification even after a final agency decision is made.⁶⁴

⁵⁷ *Dep't of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 8-11 (2001) (holding that communications between Native American Tribes and the Department of the Interior were not exempt because the Tribes were not functioning on a consulting basis but instead communicating their own interests to the Department). The Ninth Circuit does not permit agencies to invoke the consultant corollary. *See Rojas v. FAA*, 922 F.3d 907, 915-16 (9th Cir. 2019) (“... the consultant corollary is contrary to Exemption 5's text and FOIA's purpose to require broad disclosure”).

⁵⁸ *Klamath Water Users Protective Assn.*, 532 U.S. at 8.

⁵⁹ *Tax Analysts v. IRS*, 294 F.3d 71, 76 (D.C. Cir. 2002).

⁶⁰ *Public Citizen, Inc. v. Office of Mgm't and Budget*, 598 F.3d 865, 875 (D.C. Cir. 2009).

⁶¹ *Ctr. for Investigative Reporting v. CBP*, 436 F. Supp. 3d 90, 101 (D.D.C. 2019).

⁶² *Klamath Water Users Protective Ass'n*, 532 U.S. at 8-9.

⁶³ *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *See, e.g., N.L.R.B. v. Sears, Roebuck, & Co.*, 421 U.S. 132, 151 (1975) (explaining that “[a]gencies are [] engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.”).

⁶⁴ *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979).

However, if the agency’s final decision “expressly [] adopt[s] or incorporate[s] by reference” a pre-decisional document that otherwise would be exempt, a court may order that it be disclosed.⁶⁵ For example, the Second Circuit held that a pre-decisional DOJ memorandum was not exempt where the Attorney General’s public statements made clear that the memo had been incorporated into its subsequently adopted policy regarding the authority of local law enforcement officers to enforce civil immigration laws.⁶⁶

To demonstrate a document is pre-decisional an agency typically must be able “to pinpoint an agency decision or policy to which the document contributed.”⁶⁷ A document is not necessarily “pre-decisional” merely because it is labeled a “draft” and a document that is not considered final by the agency may include some sections that are final.⁶⁸ A district court has ruled, for example, that factual portions of documents describing the expansion of ICE Homeland Security Investigations programs that include “statistics, success stories, and the most recent status of the projects” should not be redacted under Exemption 5.⁶⁹

To satisfy the deliberative process privilege, a document also must be “deliberative.” A document is deliberative if it is a “direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.”⁷⁰ Although facts underlying opinions generally may be disclosed, they are protected if their disclosure would indirectly reveal the agency’s deliberation process.⁷¹

Though district courts often are deferential to agencies’ decision about what information should be considered deliberative, it is important to hold the government to its burden for demonstrating Exemption 5 applies. When challenging Exemption 5, it also is helpful to remember that

⁶⁵ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975).

⁶⁶ *Nat’l Council of La Raza v. DOJ*, 411 F.3d 350 (2d Cir. 2005).

⁶⁷ *Ctr. for Investigative Reporting v. CBP*, 436 F. Supp. 3d 90, 101 (D.D.C. 2019) (citing *Senate of P.R. v. DOJ*, 823 F.2d 574, 585 (D.C. Cir. 1987)).

⁶⁸ *Knight First Amendment Inst. v. United States Dep’t of Homeland Sec.*, 407 F. Supp. 3d 334, 347 (“‘draft’ designation does not make a document pre-decisional, and the Vaughn Index descriptions imply that at least some portions of the memo are final.”)

⁶⁹ *Id.*

⁷⁰ *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975); *but see Coastal States Gas. Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (holding that documents which contained only explanations of regulations were not deliberative). The Supreme Court recently upheld agency exemptions pursuant to Exemption 5 in *Fish & Wildlife Services, et al., v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021). The Court discussed the nature of pre-decisional, deliberative documents, but in holding the exemption was properly applied to “draft biological opinions” submitted to the Environmental Protection Agency, did not obviously broaden instances where the exemption would apply. *Id.* at 786 (“what matters, then, is not whether a document is last in line, but whether it communicates a policy on which the agency has settled.”)

⁷¹ *Mapother v. DOJ* 3 F.3d at 1537, 1539-40 (DOJ report relating to a decision to exclude a foreign leader from the U.S. and place him on a “watch list” of excludable noncitizens was properly exempt; the factual information in the report had been extracted from larger documents revealing the agency’s assessment that the extracted information was most important to its decision).

agencies must demonstrate “foreseeable harm.”⁷² Congress codified this standard in 2016 in amendments to FOIA to restrict agencies’ discretion in withholding documents under FOIA.⁷³ Courts have found that this heightened standard requires agencies to provide “context or insight into the specific decision-making processes or deliberations at issue, and how they in particular would be harmed by disclosure.”⁷⁴ “General explanations” and “boiler plate language” is not sufficient to demonstrate foreseeable harm.⁷⁵

- **EXEMPTION 6: 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.”⁷⁶**

Exemption 6 protects personal information contained within government records about individuals whose private information is not a public concern. The threshold requirement for nondisclosure under Exemption 6 is that the withheld information must be contained in “personnel and medical files and similar files.”⁷⁷ The Supreme Court has held that the phrase “similar files” should be read broadly to include *any* “detailed Government records on an individual which can be identified as applying to that individual.”⁷⁸ Lower courts consequently have refined the types of information that are considered “similar files,” excluding records that are predominantly related to the business of government,⁷⁹ or contain information which cannot be linked to an individual.⁸⁰

The court must then examine whether disclosure would constitute a “clearly unwarranted invasion of personal privacy.” This requires a person to have a substantial privacy interest in the information.⁸¹ Information which could be used to identify a third party, such as a name, address, date of birth, social security number, or picture, and information about an individual’s history,

⁷² 5 U.S.C. § 552(a)(8)(A)(i)(I).

⁷³ *Ctr. for Investigative Reporting v. CBP*, 436 F. Supp. 3d 90, 101 (D.D.C. 2019) (internal citations omitted).

⁷⁴ *Id.* at 107 (internal citations omitted) .

⁷⁵ *Id.* at 106 (internal citations omitted).

⁷⁶ 5 U.S.C. § 552(b)(6).

⁷⁷ *Id.*

⁷⁸ *Dep’t of State v. Washington Post. Co.*, 456 U.S. 595, 602 (1982).

⁷⁹ *See, e.g., Aguirre v. SEC*, 551 F. Supp. 2d 33, 54 (D.D.C. 2008) (“Correspondence does not become personal solely because it identifies government employees.”); *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (finding that employee names and work telephone numbers are dissimilar to personnel or medical files, but also noting that the information is publicly available through the Office of Personnel Management, thus abrogating any invasion of privacy).

⁸⁰ *See, e.g., Arieff v. U.S. Dep’t of the Navy*, 712 F.2d 1462, 1467-68 (D.C. Cir. 1983) (rejecting the use of Exemption 6 where disclosure of a list of drugs would result in only the “‘mere possibility’ that the medical condition of a particular individual might be disclosed”).

⁸¹ *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763-65 (1989).

such as criminal or medical history, generally qualifies for Exemption 6 protection.⁸² The information need not be especially intimate or embarrassing to qualify as a privacy interest. Individuals may have a privacy interest in information that technically is classified as public if, as a practical matter, it is unavailable to the public.⁸³

Where there is no valid expectation of privacy, there will be no privacy interest at stake for the purposes of Exemption 6. Certain information about federal employees not employed in law enforcement, including name, present and past titles, grades, salaries, and job description, is considered public information by regulation.⁸⁴ Similarly, there is no privacy interest in information already in the public domain.⁸⁵ Individuals who are deceased also have diminished privacy interests for purposes of Exemption 6.⁸⁶

If the court determines that there is a privacy interest at stake, it will then weigh that interest with any public interest in disclosure.⁸⁷ The public interest must be significant; “the requester must show . . . an interest more specific than having the information for its own sake.”⁸⁸ A requester also must show that there is a “nexus between the requested information and the asserted public interest that would be advanced by disclosure.”⁸⁹ Where a significant public interest in disclosure outweighs the privacy interest, the information should be disclosed.⁹⁰

Under this “significance” test, courts have allowed the disclosure of details regarding government misconduct by high-ranking officials, but rejected disclosure of details of misconduct by low-ranking officials.⁹¹ In the immigration context, a district court upheld

⁸² See, e.g., *Wash. Post Co.*, 456 U.S. at 600 (citing “place of birth, date of birth, date of marriage, employment history, and comparable data” as information that may be exempted); *Showing Animals Respect & Kindness v. Dep’t of the Interior*, 730 F. Supp. 2d 180, 197 (D.D.C. 2010) (protecting the names and faces of individuals); *Reporters Comm. for Freedom of Press*, 489 U.S. at 764 (holding that criminal rap sheets are protected from disclosure).

⁸³ *Reporters Comm. for Freedom of Press*, 489 U.S. at 762-765 (1989) (holding that respondent had a cognizable privacy interest in his criminal rap sheet because it was practically unavailable, notwithstanding that it had been previously disclosed to the public).

⁸⁴ 5 C.F.R. § 293.311.

⁸⁵ See, e.g., *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1234 (10th Cir. 2007) (holding that names already released and part of the public record should not be exempted from disclosure).

⁸⁶ See, e.g., *Davis v. DOJ*, 460 F.3d 92, 97-98 (D.C. Cir. 2007).

⁸⁷ *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976); accord *Dep’t of State v. Ray*, 502 U.S. 164 (1991) (holding that the privacy interest of Haitian nationals interviewed by DOS outweighed public interest in learning their names); See *Horner*, 879 F.2d at 879 (declaring that “something, even a modest privacy interest, outweighs nothing every time.”).

⁸⁸ *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 158 (2004).

⁸⁹ *Id.* at 172-173.

⁹⁰ *Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994).

⁹¹ See, e.g., *Dobronski v. FCC*, 17 F.3d 275, 280 n.4 (9th Cir. 1994) (noting that “lower level officials . . . generally have a stronger interest in personal privacy than do senior officials”); *Trentadue*, 501 F.3d at 1234 (“The public interest in learning of a government employee’s misconduct increases as one moves up an agency’s hierarchical ladder.”); *Perlman v. DOJ*, 312

USCIS's redaction of information regarding USCIS employees, concluding the plaintiffs' attempts to demonstrate USCIS violated its own policies would not be supported by sharing the names of USCIS officials.⁹² Another court found Exemption 6 exemptions were lawfully applied to names and contact information of individuals who prepare and receive snapshots of an ICE enforcement database.⁹³ The court held that the public interest did not outweigh the individuals' privacy interest in nondisclosure, including avoiding harassment if the information were disclosed.⁹⁴

The D.C. Circuit Court, however, rejected a blanket redaction of the names of immigration judges who had complaints filed against them.⁹⁵ In that case, the court determined immigration judges may have different privacy interests based on the types of complaints filed against them and the circumstances of the individual judges. Similarly, the content of the complaints and the circumstances of the judges affected the value of the names to the public.⁹⁶ On remand, the district court used a balancing test to weigh the privacy interest against the public interest.⁹⁷

- **EXEMPTION 7: Records or information compiled for law enforcement purposes.**⁹⁸

Records protected under Exemption 7 must meet two requirements. First, the information must be compiled for law enforcement purposes. Second, the disclosure of the information must fall under one of the six subsections under Exemption 7.⁹⁹ Two of the subsections of Exemption 7 commonly applied to immigration records are 7(C)—law enforcement information reasonably expected to “constitute an unwarranted invasion of personal property”—and 7(E)—law enforcement records 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.”¹⁰⁰

F.3d 100, 107 (2d Cir. 2002) (finding that investigation of INS General Counsel for preferential treatment was of significant public interest due to his high status in the agency).

⁹² *Gosen v. USCIS*, 75 F. Supp. 3d 279, 289-90 (D.D.C. 2014).

⁹³ *Long v. ICE*, 279 F. Supp. 3d 226 (D.D.C. 2017).

⁹⁴ *Id.* at 244.

⁹⁵ *Am. Immigration Lawyers Ass'n v. EOIR*, 830 F.3d 667, 674-76 (D.C. Cir. 2016).

⁹⁶ *Id.* at 675.

⁹⁷ *Am. Immigration Lawyers Ass'n v. EOIR*, 281 F. Supp. 3d 23, 28 (D.D.C. 2017) ((The test took into account several factors including 1) whether the complaint was substantiated or unsubstantiated, 2) whether the judge was currently sitting on the bench, 3) whether the complaints were serious, 4) whether the complaint was related to conduct on the bench or outside the workplace, 5) whether the judge was the subject of repeated complaints, and 6) whether the judge faced disciplinary action).

⁹⁸ 5 U.S.C. § 552(b)(7).

⁹⁹ *See Id.* at (b)(7)(A)-(F).

¹⁰⁰ 5 U.S.C. § 552(b)(7)(C); (b)(7)(E).

Exemption 7's threshold requirement—that the information must be “compiled for law enforcement purposes”—has been interpreted broadly as applying to enforcement of criminal and civil statutes,¹⁰¹ state¹⁰² and foreign laws,¹⁰³ and national security matters.¹⁰⁴

Courts are split on whether a document compiled by a law enforcement agency is *per se* compiled for law enforcement purposes or whether the agency must show a “rational nexus” between the record and the agency’s investigatory activity.¹⁰⁵ Agencies that do not have a primary law enforcement purpose are held to a higher standard and must show that the records were related to the enforcement of a statute or regulation within the agency’s authority, and were compiled for investigatory or enforcement purposes under that authority.¹⁰⁶

To determine whether a record is compiled for law enforcement purposes, the “emphasis [is] on the contents, and not the physical format of documents.”¹⁰⁷ Thus, information originally compiled for a law enforcement purpose does not lose Exemption 7 protection if it is later recompiled into a non-law enforcement record,¹⁰⁸ and records not initially obtained for law enforcement purposes may be exempted if they subsequently are compiled for a law enforcement purpose.¹⁰⁹ Once it is determined that the records were compiled for law enforcement purposes,

¹⁰¹ See, e.g., *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970); *Rugiero v. DOJ*, 257 F.3d 534, 550 (6th Cir. 2001).

¹⁰² *Shaw v. FBI*, 749 F.2d 58, 64 (D.C. Cir. 1984) (federal investigation into commission of state crimes was “for law enforcement purposes”).

¹⁰³ *Bevis v. Dep’t of State*, 801 F.2d 1386, 1388 (D.C. Cir. 1986); *Miller v. DOJ*, 562 F. Supp. 2d 82, 117-18 (D.D.C. 2008) (concerning FBI records of a cooperation with foreign law enforcement investigation fell under Exemption 7).

¹⁰⁴ *Ctr. for Nat’l Sec. Studies v. DOJ*, 331 F.3d at 926, 929 (D.C. Cir. 2003) (finding that the names of post-9/11 detainees were properly withheld for, *inter alia*, national security reasons).

¹⁰⁵ The First, Second, Sixth, Eighth, Tenth and Eleventh Circuits have adopted a *per se* rule. See *Curran v. DOJ*, 813 F.2d 473, 475 (1st Cir. 1987); *Ferguson v. FBI*, 957 F.2d 1059, 1070 (2d Cir. 1992); *Jones v. FBI*, 41 F.3d 238, 245 (6th Cir. 1994); *Kuehnert v. FBI*, 620 F.2d 662, 666 (8th Cir. 1980); *Jordan v. DOJ*, 668 F.3d 1188, 1193 (10th Cir. 2011); *Arenberg v. DEA*, 849 F.2d 579, 581 (11th Cir. 1988). The Third, Ninth, and D.C. Circuits have adopted the “rational nexus” test. See *Abdelfattha v. DHS*, 488 F.3d 178, 184-85 (3d Cir. 2007); *Rosenfeld v. DOJ*, 57 F.3d 803, 809 (9th Cir. 1995); *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. Cir. 1982).

¹⁰⁶ See, e.g., *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002) (describing the IRS as a “mixed-function agency, subjecting it to an exacting standard when it comes to the threshold requirement of Exemption 7”); *Cooper Cameron Corp. v. Dep’t of Labor*, 280 F.3d 539, 545 (5th Cir. 2002) (examining OSHA records to determine whether they were prepared for enforcement purposes).

¹⁰⁷ *Ctr. for Nat’l Sec. Studies v. CIA*, 577 F. Supp. 584, 590 (D.D.C. 1983) (citing *FBI v. Abramson*, 456 U.S. 615 (1982)) (rejecting argument that a photocopied duplicate of a report submitted for a Congressional investigation was entitled to less protection than the original because the duplicate hadn’t been used for the investigation).

¹⁰⁸ *Abramson*, 456 U.S. at 631-62 (“[I]nformation initially contained in a record made for law-enforcement purposes [remains exempted] when that recorded information is reproduced or summarized in a new document prepared for a non-law-enforcement purpose.”).

¹⁰⁹ *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989).

the agency is required to prove that the disclosure of such documents is permissible under one of the seven Exemption 7 subsections.

Exemption 7(C) is the “law enforcement counterpart to Exemption 6,”¹¹⁰ and Exemption 6 and 7(C) often are considered together when law enforcement records are implicated. Like Exemption 6, a balancing test is applied to determine if Exemption 7(C) applies.¹¹¹ The court first must determine the extent of the privacy interest in the records. If the interest is “nontrivial,” the requester must demonstrate that the public interest in the records is “significant” and the disclosure is likely to advance that interest.¹¹² Then the court must balance the privacy interest against the public interest.¹¹³

Under Exemption 7(C), Courts also have permitted agencies to withhold the names of employees if the requester cannot explain how the identifying information would advance the public interest at issue.¹¹⁴ Courts also have found that the privacy interest is not necessarily lessened by the passage of time.¹¹⁵ If publicly available, the documents should be released, but evidence that the withheld documents are publicly available must be specific.¹¹⁶ Courts also have found that noncitizens have a strong privacy interest in protecting their identities from disclosure.¹¹⁷

Though courts tend to be deferential to agency decisions to exempt information under Exemption 7(C), in some instances they have found it proper to disclose documents. This is particularly true in cases involving government wrongdoing or misconduct.¹¹⁸ A district court held, for example, there was a strong public interest in records related to the mistreatment of unaccompanied

¹¹⁰ *Seized Prop. Recovery, Corp. v. CBP*, 502 F. Supp. 2d 50, 56 (D.D.C. 2007).

¹¹¹ *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989).

¹¹² *Tuffly v. DHS*, 870 F.3d 1086, 1092-1093 (9th Cir. 2017).

¹¹³ *Families for Freedom v. CBP*, 797 F. Supp. 2d 375, 398-99 (S.D.N.Y. 2011) (public interest in understanding whether the expectations and requirements articulated in a memoranda reflect high-level agency policy outweighed privacy interest in names of government officials; court noted officials’ names, “not phone numbers or other more intrusive categories of personal information,” were sought by requesters).

¹¹⁴ See e.g., *Conti v. DHS.*, No. 12-5827, 2014 U.S. Dist. LEXIS 42544, *52-53 (March 24, 2021) (citing *DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773 (1989)).

¹¹⁵ *Judicial Watch v. DHS*, 736 F. Supp. 2d 202, 211 (D.D.C. 2010) (“that the passage of time has not diluted the privacy interest at stake and, if anything, has actually increased [the] privacy interest as the events surrounding the . . . prosecution have faded from memory”)

¹¹⁶ See e.g., *Wilson v. Cent. Intelligence Agency*, 586 F.3d 171, 186 (2d Cir. 2009).

¹¹⁷ See *Tuffly*, 870 F.3d at 1094 (noncitizens released from ICE detention had a strong privacy interest in protecting their identities).

¹¹⁸ *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (“ . . .”[if] the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties . . . the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred); *CASA de Md., Inc. v. DHS*, No. 10-1264, F. App’x 697, *698-701 (4th Cir. 2011) (per curiam) (plaintiffs seeking documents regarding an unlawful immigration raid at a 7-Eleven store met the *Favish* misconduct standard);

children in DHS custody by DHS officials.¹¹⁹ The court reasoned that learning the names of Border Patrol agents was the only way the requesters were able to connect the records of abuse allegations to particular agents and to learn that one agent was regularly the subject of abuse allegations.¹²⁰ In another case, the requester organization was able to demonstrate public interest outweighed privacy interests after submitting evidence that during an immigration raid resulting in the arrest of day laborers, ICE agents ignored non-Latino day laborers and one agent alleged the arrests were “close to being out of line with current service policy.”¹²¹

Exemption 7(E) is one of the most frequently encountered exemptions in immigration cases. It protects from disclosure information compiled for law enforcement purposes 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.”¹²² Among the immigration-related records that courts have withheld under Exemption 7(E) are DHS criteria for ranking the priority of immigration enforcement,¹²³ fraud indicators used to evaluate H1-B applications,¹²⁴ CBP investigative memoranda,¹²⁵ documents relating to planning and carrying out ICE raids,¹²⁶ and CBP secondary inspection procedures at airports.¹²⁷

Though, courts tend to be deferential to exemptions under Exemption 7(E) by immigration agencies that have a law enforcement function, such as CBP and ICE, courts have held the standard of review is not “vacuous.”¹²⁸ Although Exemption 7(E) is broad, for example, it is limited to redacting “techniques and procedures” and “guidelines.”¹²⁹ Courts have found that

¹¹⁹ *ACLU of Ariz. v. DHS*, No. 15-00247, 2018 U.S. Dist. LEXIS 47599, *9-19 (D. Ariz. March 22, 2018)

¹²⁰ *Id.* at *11-12.

¹²¹ *CASA de Md.*, 409 F. App'x at *700-701.

¹²² 5 U.S.C. § 552(b)(7)(E).

¹²³ *Allard K. Lowenstein Int'l Human Rights Project v. DHS*, 626 F.3d 678, 681-82 (2d Cir. 2010).

¹²⁴ *Am. Immigration Lawyers Ass'n v. DHS*, 852 F. Supp. 2d 66, 77-80 (D.D.C. 2012).

¹²⁵ *Ahmed v. USCIS*, No. 11-CV-6230 CBA, 2013 WL 27697, at *6 (E.D.N.Y. Jan. 2, 2013).

¹²⁶ *Unidad Latina En Accion v. DHS*, 253 F.R.D. 44, 54 (D. Conn. 2008); *see also Am. Immigration Lawyers Ass'n v. DHS*, 21 F. Supp. 3d 60, 82 (D.D.C. 2014).

¹²⁷ *Bishop v. DHS*, 45 F. Supp. 3d 380, 392 (S.D.N.Y. 2014).

¹²⁸ *Long v. ICE*, 149 F. Supp. 3d 39, 53 (D.D.C. 2015), quoting *Campbell v. DOJ*, 164 F.3d 20, 32 (D.C. Cir. 1998).

¹²⁹ Courts are split over whether the clause “if such disclosure could reasonably be expected to risk circumvention of the law” applies only to guidelines or also to techniques and procedures. *Compare Lowenstein*, 626 F.3d at 681-682 (finding that there was “no ambiguity” to limiting the “risk of circumvention” language only to guidelines); *Durrani v. DOJ*, 607 F. Supp. 2d 77, 91 (D.D.C. 2009) (finding agency did not need to show risk of circumvention for techniques and procedures); *with Catledge v. Mueller*, 323 F. App'x 464, 466-67 (7th Cir. 2009) (per curiam) (requiring showing of risk of circumvention for techniques and procedures); *Davin v. DOJ*, 60 F.3d 1043, 1064 (3d Cir. 1995) (same). Where it does apply, agencies have to prove that disclosure creates a “risk” of circumvention. *Mayer Brown, LLP v. IRS*, 562 F.3d 1190, 1192-93 (D.C. Cir. 2009).

summaries and analyses of pertinent case law—are not considered a technique, procedure, or guideline for purposes of Exemption 7(E).¹³⁰ Questions asked of immigrant minors suspected of smuggling were not “a specialized, calculated technique,” for example, because there were no “special method or skills being used” or evidence that the children being asked the questions wouldn’t learn the “technique.”¹³¹

In challenging Exemption 7(E), it also is not dispositive that guidelines are labeled “law enforcement sensitive”¹³² Furthermore, courts generally have required that the technique or procedure not be well known to the public.¹³³ An agency also must demonstrate, with detail, that the records requested would reasonably risk circumvention of the law.¹³⁴

If you encounter an agency invoking Exemption 7(E), consider the type of record you have requested. Does it share a technique, procedure, or guideline? Has the information previously been released to the public in another form? Has the agency made specific arguments as to why disclosing the information would risk circumvention of the law?

- **SEGREGABILITY**

Exemptions may apply to all or only part of a document. If a document contains both exempt and non-exempt material, an agency is required to disclose “any reasonably segregable portion” of the document.¹³⁵ A document’s non-exempt portions must be disclosed unless those portions

¹³⁰ *Mayer Brown, LLP*, 562 F.3d at 1191 n.1; *PHE, Inc. v. DOJ*, 983 F.2d 248 at 251-252 (D.C. Cir. 1993) (finding that records withheld by the agency including “discussion of search and seizure law” and a “digest of useful caselaw” were “precisely the type of information appropriate for release”).

¹³¹ *Am. Civil Liberties Union Found. v. DHS*, 243 F. Supp. 3d 393, 403-05 (S.D.N.Y. 2017)

¹³² *Campbell v. DOJ*, 164 F.3d 20, 32 (D.C. Cir. 1998) (“The fact that information is stored in a [document] with an official-sounding label is insufficient standing alone to uphold nondisclosure.”).

¹³³ *See, e.g., Founding Church of Scientology of D.C. v. Nat’l Sec. Agency*, 610 F.2d 824, 832 n.67 (D.C. Cir. 2004) (noting that “routine techniques and procedures already well known to the public” should not be protected) (internal quotation omitted); *Families for Freedom v. CBP*, 797 F. Supp. 2d 375, 391-94 (S.D.N.Y. 2011) (“charge codes” improperly redacted because codes were publicly available). Courts have held, however, that even when a procedure or technique is known to the public, the agency need not disclose *how* it uses the technique. *Barnard v. DHS*, 598 F. Supp. 2d 1, 23 (D.D.C. 2009) (involving the disclosure of specific details about administration of the No-Fly List). Courts also have held that publicly known techniques and procedures can be withheld from the public if disclosure would reduce or nullify their effectiveness. *See, e.g., Coleman v. FBI*, 13 F. Supp. 2d 75, 83 (D.D.C. 1998) (withholding the FBI’s use and rating of investigative techniques due to the risk that disclosure would allow criminals to avoid the FBI’s most successful criminal strategies).

¹³⁴ *See e.g., Families for Freedom v. CBP*, 797 F. Supp. 2d 375, 391-94 (S.D.N.Y. 2011) for Freedom I] (border arrest statistics improperly withheld because they were not sufficiently detailed to enable wrongdoers to circumvent border security measures).

¹³⁵ 5 U.S.C. § 552(b) (agencies must release “[a]ny reasonably segregable portion of a record . . . to any person requesting such record after deletion of the portions which are exempt under this

“are inextricably intertwined with exempt portions.”¹³⁶ Agencies also must provide “a more detailed justification” rather than mere “conclusory statements” to establish that non-exempt material was not reasonably segregable.¹³⁷

A district court, for example, examined asylum interview assessments and determined after *in camera* review of the documents that, despite an agency declaration to the contrary, certain portions of the assessment could be released.¹³⁸ The court found that the redacted paragraphs were not deliberative because they “recite[d] and summarize[d] the facts” provided to the asylum officer, were not “plucked from a broader array of facts” and did not include “interpretation, characterization or analysis” by the asylum officer.¹³⁹ The court also found that the withheld paragraphs were not “inextricably intertwined with exempt portions” of the document and so were “reasonably segregable” and should be produced.¹⁴⁰

Arguing the government did not provide segregable information places pressure on the agency to produce additional documents. Often the declaration provided by an agency official in support of a motion for summary judgment makes conclusory and insufficient assertions regarding segregability. In addition, the agency’s *Vaughn* index – the log providing the agency’s reasoning for applying exemptions – often does not provide a sufficient basis to determine that the Government has released all segregable, non-exempt portions of the documents.¹⁴¹ The agency also frequently redacts substantial portions of documents and provides justifications that consist only of a brief description of the document. In certain cases, it may be helpful to argue to the court that *in camera* review of documents is appropriate to determine whether segregable portions of documents should be released.

IV. ADMINISTRATIVE APPEALS

The requester may appeal an adverse determination to the head of the agency or a designated department within the agency to “exhaust” administrative remedies prior to filing a complaint in federal court.¹⁴² Even when the agency responds outside of the statutory period, the requester

subsection.”); *see also* *Stolt-Nielsen Transp. Group LTD v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (“[A]n agency cannot justify withholding an entire document simply by showing that it contains some exempt material.”) (internal quotation omitted).

¹³⁶ *Mead Data Central, Inc.*, 566 F.2d at 260.

¹³⁷ *Id.* at 261.

¹³⁸ *Gatore v. DHS*, 327 F. Supp. 3d 76, 83 (D.D.C. 2018).

¹³⁹ *Id.* at 88-89 (internal citations omitted).

¹⁴⁰ *Id.* at 89 (internal citations omitted). *Compare Anguimate v. DHS*, 918 F. Supp. 2d 13, 19 (D.D.C. 2013) (finding that an asylum officer’s assessment of an asylum application was deliberative when it included an analysis of the interview with the applicant and explained the officer’s subjective credibility determination);

¹⁴¹ *See, e.g., Ctr. For Biological Diversity v. EPA*, 369 F. Supp. 3d 1, 26-27 (D.D.C. 2019) (reviewing “fairly lengthy presentations” with “‘logically divisible sections,’ that may be ‘amenable to segregation and disclosure’” and ordering release of portions of ten records) (quoting *Nat’l Ass’n of Criminal Def. Lawyers v. DOJ*, 844 F.3d 246, 257 (D.C. Cir. 2016))

¹⁴² *Freedom Watch v. NSA*, 783 F.3d 1340, 1344 (D.C. Cir. 2015) (organization failed to appeal the agencies’ denials and therefore failed to exhaust administrative remedies prior to seeking seeking judicial review)

must appeal prior to filing suit in federal court.¹⁴³ An administrative appeal is not required, however, when the agency wholly fails to respond to a FOIA request.

Appeals must be made within a period determined by the agency, if the agency has set such a timeframe. For example, the Department of Homeland Security requires that an appeal be filed within 90 working days.¹⁴⁴ The agency then has 20 working days to respond to the appeal.¹⁴⁵

There are several issues that can be raised on an administrative appeal:

- A challenge the adequacy of the agency’s search for records. Too often, an agency will close a request with a decision stating that no records were found, but then on appeal, will locate records.¹⁴⁶
- A challenge to any redactions that the agency made based upon the statutory exemptions¹⁴⁷ or the agency’s failure to produce segregable information. See Section III above.
- A challenge to a denial of a request for a fee waiver. See Section II, above.

While some agencies may provide specific appeal forms, an appeal need only be in writing and sent to the location provided by the agency. In preparing an appeal, be specific as to the basis for the appeal and provide any supporting evidence or case law that backs your position.

An agency may grant an appeal in whole or in part or deny it. Regardless of the outcome, an adverse agency decision on a FOIA appeal generally constitutes a “final agency action,” which allows you to file a federal court action.¹⁴⁸

V. DISTRICT COURT APPEALS

Following the administrative appeal process, a requester may challenge any denial or claimed exemption in federal district court. This section addresses the basics of such a suit.

Who are the plaintiffs and defendants in a FOIA lawsuit?

The plaintiff in a FOIA lawsuit is the FOIA requester.¹⁴⁹ A FOIA request made by an attorney on behalf of a client must clearly indicate this—and name the client—in order for the client to have

¹⁴³ *Oglesby v. United States Dep't of Army*, 920 F.2d 57, 63 (D.C. Cir. 1990) (“an administrative appeal is mandatory if the agency cures its failure to respond within the statutory period by responding to the FOIA request before suit is filed”).

¹⁴⁴ 6 C.F.R. § 5.8(a)(1).

¹⁴⁵ 5 U.S.C. § 552(a)(6)(A)(ii).

¹⁴⁶ 5 U.S.C. § 552(a)(3).

¹⁴⁷ 5 U.S.C. § 552(b)(1)-(7).

¹⁴⁸ *See, e.g.*, 6 C.F.R. § 5.8(a)(2) (“An adverse determination by the component appeals officer will be the final action of DHS.”).

¹⁴⁹ *See, e.g., Hajro*, 811 F.3d at 1104 (stating that “a practicing immigration attorney who files and signs FOIA requests is a requester under FOIA”); *Abuhouran v. Dep't of State*, 843 F. Supp. 2d 73, 77 (D.D.C. 2012) (dismissing FOIA suit because the plaintiff “was not a party to the underlying FOIA request”).

subsequent standing to bring a FOIA challenge.¹⁵⁰ The defendant in a FOIA lawsuit is the agency to which the requests were made, not the agency head or any other agency official.¹⁵¹

When can I file in District Court?

There is a six year statute of limitations for challenging a FOIA decision.¹⁵² The six year period begins when administrative remedies have been exhausted.¹⁵³ Before applying for judicial review, a requester generally *must* exhaust administrative remedies by filing an administrative appeal.¹⁵⁴ See Section IV, above. Following an adverse determination of an administrative appeal, the requester may challenge the agency's decision in federal district court.¹⁵⁵

Additionally, should the agency fail to respond to requests within the statutory time frames, the requester will be deemed to have “constructively” exhausted administrative remedies and can apply for judicial review.¹⁵⁶ In such a case, if the agency demonstrates that exceptional circumstances caused a delay beyond the statutory time frame, the court may retain jurisdiction over the suit but give the agency extra time with which to respond to the request.¹⁵⁷

Courts have strictly construed the exhaustion requirement and dismissed FOIA lawsuits for failure to exhaust where, for example, the requester failed to describe the records sufficiently,¹⁵⁸

¹⁵⁰ See, e.g., *Three Forks Ranch Corp. v. Bureau of Land Mgmt.*, 358 F. Supp. 2d 1, 2 (D.D.C. 2005); *Mahtesian v. OPM*, 388 F. Supp. 2d 1047, 1050 (N.D. Cal. 2005) (finding that the plaintiff lacked standing to sue when his attorney only identified him as a “client” in the original FOIA request and did not identify him by name).

¹⁵¹ 5 U.S.C. § 552(a)(4)(B); see *Drake v. Obama*, 664 F.3d 774, 786 (9th Cir. 2011) (affirming dismissal of FOIA claims against President Obama and other government officials because “they are all individuals, not agencies”).

¹⁵² See *Spannaus v. DOJ*, 824 F.2d 52, 55-56 (D.C. Cir. 1987) (applying the general federal statute of limitations, 28 U.S.C. § 2401(a), to FOIA actions).

¹⁵³ *Id.* at 56-57 (holding that a FOIA suit “first accrues” under the statute of limitations when all administrative remedies are exhausted).

¹⁵⁴ See, e.g., *Dettmann v. DOJ*, 802 F.2d 1472, 1476 (D.C. Cir. 1968) (“It goes without saying that exhaustion of remedies is required in FOIA cases”); *Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994).

¹⁵⁵ You may also appeal to the Office of Government Information Services at the National Archives for mediation. The OGIS also serves as a FOIA ombudsman; for more information, visit their website at: <https://ogis.archives.gov/>.

¹⁵⁶ 5 U.S.C. § 552(a)(6)(C); see *Taylor*, 30 F.3d at 1369 (“A party is deemed to have constructively exhausted all administrative remedies ‘if the agency fails to comply with the applicable time limit provisions of [5 U.S.C. § 552(a)(6)(C)]’”).

¹⁵⁷ 5 U.S.C. § 552(a)(6)(C)(i).

¹⁵⁸ *Latham v. DOJ*, 658 F. Supp. 2d 155, 161 (D.D.C. 2009) (holding that a requester’s failure to adequately describe the records sought meant that the requester “has not submitted a proper FOIA request [and] has not exhausted his administrative remedies”).

comply with the agency's proof of identity regulations,¹⁵⁹ or pay required fees.¹⁶⁰ A court similarly dismissed a challenge to a denial of a fee waiver where the FOIA requester failed to exhaust administrative remedies relative to the fee waiver request.¹⁶¹ Therefore, potential litigants should be sure to follow all requirements at all stages of administrative consideration of a FOIA request.

Where should I file suit?

You may file suit in the district where the plaintiff (the FOIA requester) resides, the district in which the plaintiff's principal place of business is located, the district where the agency records are located, or the District of Columbia.¹⁶²

What claims should I allege in my complaint?

A requester may allege the agency violated the FOIA statute by 1) failing to respond within the statutory time period;¹⁶³ 2) failing to conduct an adequate search;¹⁶⁴ 3) improperly withholding documents;¹⁶⁵ 4) failing to produce segregable information; see Section III; 5) and improperly denying a fee waiver, see Section II.

What possible outcomes are there in District Court?

After filing suit, the government attorney may attempt initiate discussions to determine how to amicably resolve the case. If this is the case, you may be able to negotiate an additional search based on the FOIA request you submitted. The agency generally will not allow for additional searches beyond the scope of the original request, but if the new search is arguably within the parameters of the original request, you may be able to negotiate a new search and receive additional documents without needing to file motions for summary judgement.

District courts review an agency's invocation of an exemption de novo.¹⁶⁶ They have the authority to conduct in camera review of agency records to determine whether information was properly withheld under an exemption.¹⁶⁷ A court will give substantial weight to agency affidavits, but the agency must still meet its burden and justify the use of an exemption.¹⁶⁸

¹⁵⁹ *Ramstack v. Dep't of the Army*, 607 F. Supp. 2d 94, 102-103 (D.D.C. 2009).

¹⁶⁰ *Reynolds v. Att'y Gen. of the U.S.*, 391 F. App'x 45, 46 (2d Cir. 2010) (affirming dismissal for failure to exhaust after requester neither requested a fee waiver nor paid the required fee).

¹⁶¹ *Voinche v. U.S. Dep't of the Air Force*, 983 F.2d 667, 669 (5th Cir. 1993).

¹⁶² 5 U.S.C. § 552(a)(4)(B).

¹⁶³ 5 U.S.C. § 552(a)(6)(A)(i).

¹⁶⁴ 5 U.S.C. § 552(a)(3).

¹⁶⁵ 5 U.S.C. § 552(b)(1)-(7).

¹⁶⁶ 5 U.S.C. § 552(a)(4)(B).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

Discovery in FOIA litigation is limited.¹⁶⁹ Instead, agencies responding to FOIA litigation must prepare what is known as a “Vaughn Index,” which is an itemized list of every document withheld and the statutory exemptions claimed for each specific document.¹⁷⁰ A Vaughn Index allows a court “to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves, as well as to produce a record” for any appeal.¹⁷¹ As such, at a minimum, “the requester and the trial judge [must] be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure.”¹⁷²

Can I get attorneys’ fees if successful in a district court challenge?

A district court may award “reasonable attorney’s fees and litigation costs” to plaintiffs who have “substantially prevailed” at trial.¹⁷³ Fees generally are only available for work performed during the federal court litigation; a plaintiff normally is not entitled to fees for work performed at the administrative level.¹⁷⁴

To be eligible for an award of either attorney’s fees or litigation costs, a plaintiff must have “substantially prevailed” in the suit. To substantially prevail under FOIA, a requester must obtain relief through a judicial order, an enforceable written agreement or consent decree, or “a voluntary or unilateral change in position by the agency.”¹⁷⁵ A judicial order need not be a final order in favor of the plaintiff; even an interim order compelling production of records by a certain date may permit a plaintiff to recover fees.¹⁷⁶ In order to show that a plaintiff’s lawsuit caused the agency to change its position, the plaintiff must show that the lawsuit was the catalyst behind its decision to release records.¹⁷⁷ Thus, where an agency voluntarily decides to release previously withheld records in response to a lawsuit, a plaintiff may be eligible for fees.¹⁷⁸

¹⁶⁹ *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801 (1984).

¹⁷⁰ *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

¹⁷¹ *Dellums v. Powell*, 642 F.2d 1351, 1360 (D.C. Cir. 1980).

¹⁷² *Hinton v. DOJ*, 844 F.2d 126, 129 (3d Cir. 1988).

¹⁷³ 5 U.S.C. § 552(a)(4)(E)(i).

¹⁷⁴ *See, e.g., NW. Coal. for Alternatives to Pesticides v. Browner*, 965 F. Supp. 59, 65 (D.D.C. 1997) (“FOIA does not authorize fees for work performed at the administrative stage.”).

However, some courts have accepted that a plaintiff may be entitled to limited fees for work involving the exhaustion of administrative remedies. *See, e.g. Oregon Nat. Desert Ass’n v. Gutierrez*, 442 F. Supp. 2d 1096, 1101 (D. Or. 2006), *aff’d in part, rev’d in part sub nom. Oregon Nat. Desert Ass’n v. Locke*, 572 F.3d 610 (9th Cir. 2009) (holding that a plaintiff’s was entitled to fees for its expenditures to exhaust administrative remedies and compile a record for the purpose of litigation).

¹⁷⁵ 5 U.S.C. § 552(a)(4)(E)(ii).

¹⁷⁶ *See, e.g., Citizens for Responsibility & Ethics in Wash. v. DOJ*, 820 F. Supp. 2d 39, 47 (D.D.C. 2011).

¹⁷⁷ *See Summers v. DOJ*, 569 F.3d 500, 502-503 (D.C. Cir. 2009) (concluding that Congress intended to codify the “catalyst theory” in FOIA and overturn a previous Supreme Court decision which had rejected this theory).

¹⁷⁸ *See, e.g., Judicial Watch v. DOJ*, 878 F. Supp. 2d 225, 231-232 (D.D.C. 2012).

Even where a plaintiff is eligible for fees, a court will consider whether the plaintiff is entitled to them in the exercise of equitable discretion. In making this determination, a court will balance four factors; “(1) the public benefit derived from the case, (2) the commercial benefit to the complainant, (3) the nature of the complainant’s interests in the records sought, and (4) whether the government’s withholding had a reasonable basis in law.”¹⁷⁹ Where the government is found to have had a reasonable basis to withhold documents, a litigant is not entitled to fees. *Id.* The remaining factors are not dispositive and are left to the discretion of the court.

¹⁷⁹ *Davy v. CIA*, 550 F.3d 1155, 1159 (D.C. Cir. 2008).

VI. APPENDIX: AGENCY INFORMATION

The following chart lists basic information about agencies that maintain immigration-related records. Practitioners are strongly encouraged to verify agency policies prior to submitting a FOIA request.

Many agencies adjusted their FOIA processes during the COVID-19 pandemic, limiting capacity to receive paper FOIA requests and mail records.

Department of Homeland Security

The DHS Privacy Office manages FOIA across the department and centralizes FOIA request processing for many DHS headquarters offices and some DHS agencies (components). The Office maintains a [FOIA website for DHS](#) providing information on previously released records, how to make a request, submission and FOIA status information for DHS components, and reporting on FOIA operations.¹⁸⁰ DHS component agencies are listed in the [organizational chart](#).¹⁸¹

The following DHS components use the [DHS FOIA Public Access Link \(PAL\) Portal](#): the DHS Privacy Office, The Office of Intelligence and Analysis (I&A), the Federal Emergency Management Agency (FEMA), National Protection and Programs Directorate (NPPD), Office of Biometric Identity Management (OBIM), Science and Technology Directorate (S&T), Immigration and Custom Enforcement (ICE), Transportation Security Administration (TSA), and the U.S Coast Guard (USCG). Four components use their own system: U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), United States Secret Service (USSS), and Federal Law Enforcement Training Centers (FLETC).

If you are unable to determine which DHS component is the appropriate recipient for a FOIA request, you may submit the request to: The Departmental Disclosure Officer, Department of Homeland Security, Washington DC, 20528. The Departmental Disclosure Office will forward your request to the component it believes most likely to have the requested records.

¹⁸⁰ Department of Homeland Security, “Freedom of Information Act (FOIA),” last published Feb. 26, 2021, <https://www.dhs.gov/freedom-information-act-foia>.

¹⁸¹ Department of Homeland Security, “Organizational Chart,” last published April 16, 2021, <https://www.dhs.gov/organizational-chart>.

| AGENCY | WHAT TO REQUEST | HOW TO REQUEST | WHERE TO CHECK STATUS | OTHER INFORMATION |
|---|---|---|---|--|
| DHS Privacy Office | <ul style="list-style-type: none"> Information related to DHS Headquarters or FOIA operations, including policies, guidance, and communications. | <p>DHS FOIA Public Access Link (PAL), https://foiarequest.dhs.gov/</p> <p>In addition to the Privacy Office, 11 DHS components use this system.</p> | <p>Check the status of your request in the PAL system or at https://www.dhs.gov/foia-status.</p> | <p>DHS FOIA website.</p> <p>The preferred FOIA request submission method and contact information for all DHS component agencies is listed under FOIA Contact Information.</p> |
| U.S. Citizenship and Immigration Services (USCIS) | <ul style="list-style-type: none"> Individual immigration records (“A-File”). USCIS policies, data, and communications. | <p>USCIS’ online system, FIRST, https://first.uscis.gov/.</p> <p>You may also request records by email, fax, or mail with a complete Form G-639. USCIS states that requests submitted outside of FIRST may be delayed.</p> | <p>Check the status of your request in FIRST or at https://first.uscis.gov/#/check-status.</p> <p>The website also lists average processing times.</p> | <p>USCIS FOIA website.</p> <p>USCIS generally categorizes requests as Simple, Complex, or Priority. In addition, USCIS categorizes requests as those for A-File material and those for non-A-File material. USCIS uses a three-track system to process A-File requests and a two-track system for non-A-File requests.</p> <p>Priority / Track III are requests for A-File materials for individuals scheduled for a hearing before an immigration judge. These requests</p> |

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| | | | | must include written notice the hearing (ex. Forms I-122, I-863, I-862). |
| Customs and Border Protection (CBP) | <ul style="list-style-type: none"> Agency information such as policies, data, and communications. Travel, entry, or exit records. Contracts; CBP Detention. Other information on CBP programs, operations, and activities. CBP lists some common FOIA requests. | <p>CBP participates in the system FOIAonline, https://foiaonline.gov/.</p> <p>During the COVID-19 pandemic, CBP stopped accepting paper FOIA requests.</p> | Check the status of your request in your FOIAonline account, or search the system with the request tracking number. | <p>CBP FOIA website.</p> <p>If requesting records on behalf of someone else, including a client, CBP requires a signed G-28 form or another form of signed consent.</p> |
| Immigration and Customs Enforcement (ICE) | <ul style="list-style-type: none"> Agency information such as policies, data, and communications. ICE encounters with individuals, including records of arrest and detention. ICE investigations. Detention facility records, statistics, and contracts. Bond requests; detainees. | <p>ICE participates in the DHS FOIA Public Access Link (PAL), https://foiarequest.dhs.gov/.</p> <p>ICE requires written FOIA requests. They may be submitted electronically, by mail, or fax. Electronic requests can be sent through PAL, ICE's FOIA Request Form, or email to ICE-FOIA@dhs.gov or ice-foia@ice.dhs.gov.</p> | Check the status of your request in the PAL system or at https://www.dhs.gov/foia-status . | <p>ICE FOIA website.</p> <p>Form G-639 can be used to complete your FOIA Request.</p> |

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| Office of Biometric Identity Management (OBIM) | <ul style="list-style-type: none"> Information on entry, removal, and other interactions with officials at a U.S. border. Records maintained in the Automated Biometric Identification System (IDENT). | <p>OBIM participates in the DHS FOIA Public Access Link (PAL), https://foiarequest.dhs.gov/</p> <p>Requests also may be submitted mail (please note the address listed on the is missing a digit in the zip code extension), fax, or email to foia-obim@hq.dhs.gov.</p> | <p>Check the status of your request in the PAL system or at https://www.dhs.gov/foia-status.</p> | <p>DHS FOIA website lists OBIM contact information.</p> <p>OBIM asks that requesters not use staples, metal fasteners, scotch tape, lots of tape, or other office materials on the request and/or envelope.</p> <p>OBIM has confirmed that fingerprint scan cards can be scanned in.</p> |
| DHS Office of Inspector General (OIG) | <ul style="list-style-type: none"> Records relating to OIG operations including reports, investigations, and complaints. | <p>DHS OIG participates in the DHS FOIA Public Access Link (PAL), https://foiarequest.dhs.gov/.</p> | <p>Check the status of your request in the PAL system or at https://www.dhs.gov/foia-status.</p> | <p>DHS OIG FOIA website.</p> <p>The OIG uses a three-track processing system.</p> |

Department of State

The U.S. Department of State (DOS) Office of Information Programs and Services manages FOIA requests for the department. The DOS Office of Inspector General (OIG) operates a separate FOIA process for OIG-specific requests. All DOS offices are listed in the [organizational chart](#).

DOS manages other information access under the [Privacy Act](#) and the [Mandatory Declassification Review](#) program.

| AGENCY | WHAT TO REQUEST | HOW TO REQUEST | WHERE TO CHECK STATUS | OTHER INFORMATION |
|----------------------------------|---|---|---|---|
| Department of State (DOS) | <ul style="list-style-type: none"> DOS information such as policies, operations, data, and communications. | <p>DOS prefers requests through their Electronic Submission form.</p> | <p>Check the status of your request by contacting (202) 261-8484 or</p> | <p>DOS FOIA website and the Information Access Guide.</p> |

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| | <ul style="list-style-type: none"> • Consulate records; some passport or visa application records.¹⁸² | <p>Requests may be sent by fax, mail, or email to mailto:FOIARequest@state.gov.</p> <p>Requests for personal records must be submitted through mail or fax, not online.</p> | <p>FOIAStatus@state.gov.</p> | <p>Requests for personal information have additional requirements, including “Proper Authorization” for release to a third party. DOS does not accept authorization forms from other agencies. DOS does not recommend using Form DS 5505 (Authorization for Release of Information under the Privacy Act) for FOIA requests.</p> |
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Department of Justice

The U.S. Department of Justice (DOJ) Office of Information Policy (OIP) oversees agency compliance with FOIA and develops guidance. The majority of DOJ components process their own records in response to FOIA requests. OIP processes FOIA requests for seven [Senior Management Offices](#).

OIP publishes the [FOIA Reference Guide](#), which details guidance for submitting FOIA requests to DOJ. The Guide describes the function of [each DOJ component](#) to assist with identifying from which office to request records. [Proactive disclosures](#) are posted by components.

If you are unable to determine which DOJ component has the records you seek, you may submit the request to: FOIA/PA Mail Referral Unit (MRU), U.S. Department of Justice, Room 115, LOC Building, Washington, D.C. 20530-0001 or MRUFOIA.Requests@usdoj.gov. The MRU will forward the request to the component(s) it believes are most likely to have the requested records.

¹⁸² DOS notes that records “pertaining to the issuance or refusal of visas or permits to enter the United States” are generally exempt from disclosure under (b)(3), whether the requester is a third party or the visa applicant. *See* U.S. Dept. of State, “How to Request Visa Records” at “Step 2”, <https://foia.state.gov/Request/FOIA.aspx>.

| AGENCY | WHAT TO REQUEST | HOW TO REQUEST | WHERE TO CHECK STATUS | OTHER INFORMATION |
|---|---|--|---|--|
| Department of Justice (DOJ) | <ul style="list-style-type: none"> Agency records maintained by the relevant DOJ component. The list of DOJ components includes brief descriptions of publicly available information. | <p>DOJ OIP guidance.</p> <p>If you know which component has the records you seek, submit your request on the DOJ FOIA Portal on FOIA.gov.</p> <p>Depending on the component, you may submit requests by mail, fax, or electronically. See the FOIA Contact list.</p> <p>If you are unsure about which component has the records you seek, you may send your request to the DOJ FOIA/PA Mail Referral Unit.</p> | <p>The process varies by component.</p> <ul style="list-style-type: none"> The list of DOJ components provides some process details. FOIA Contact Information for each component. | <p>FOIA Reference Guide.</p> <p>To access your client's records, you will need a notarized authorization signed by the individual or a declaration compliant with 28 U.S.C. § 1746. Specific components may have other requirements.</p> |
| Executive Office of Immigration Review (EOIR) | <ul style="list-style-type: none"> Information such as policies, manuals, data, and communications. Court orders and decisions; other immigration court records. See the EOIR section in the list of DOJ components. | <p>Submit your request to DOJ EOIR on the DOJ FOIA Portal.</p> <p>You may send requests by email to EOIR.FOIARequests@usdoj.gov or by mail:</p> <p>Office of the General Counsel</p> | <p>Check request status by calling (703) 605-1297 and asking to speak to the FOIA Specialist on your request or the FOIA Public Liaison.</p> | <p>See the EOIR FOIA website.</p> <p>When requesting records for another person, EOIR recommends including a complete and signed Form EOIR-59 (Certification and Release of</p> |

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| | | <p>Attn: FOIA Service Center</p> <p>Executive Office for Immigration Review</p> <p>5107 Leesburg Pike, Suite 2150</p> <p>Falls Church, VA 22041</p> | | <p>Records). Attorneys also may wish to include Form EOIR-27 or Form EOIR-28.</p> <p>EOIR uses a three-track system to organize and process requests.</p> |
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Department of Health and Human Services

The major components within the U.S. Department of Health and Human Services (HHS) has a FOIA Requester Service Center that processes relevant requests. Requests do not need to be addresses to a specific division or component, though it is helpful.

| AGENCY | WHAT TO REQUEST | HOW TO REQUEST | WHERE TO CHECK STATUS | OTHER INFORMATION |
|---------------------------------|--|--|---|--|
| Health and Human Services (HHS) | <ul style="list-style-type: none"> Agency information such as policies, data, and communications. | <p>Submit your request in the HHS online system, Public Access Link (PAL).</p> <p>HHS prefers PAL submissions due to COVID-19, but requests may still be sent through fax, mail, or email to FOIARequest@hhs.gov.</p> | <p>Check request status through the HHS Online System or contacting the relevant FOIA Office.</p> | <p>HHS FOIA website.</p> |