


**EFFECTIVELY
MANAGING
THE FREEDOM OF
INFORMATION
ACT
PROCESS**

**D.C. FOIA
FY23
TRAINING SERIES**

Presented by:
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Government
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INSTRUCTOR




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**Office of Open
Government
Board of Ethics
& Government
Accountability**



BEGA advises the District government on FOIA. The Board issues an annual best practices report that recommends changes to FOIA.




The Office of Open Government ("OOG") may issue Advisory Opinions on FOIA issues (implementation of FOIA).




The Office of Open Government also serves as an advocate to ensure the FOIA process is fair and executed properly.

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**About
the
OOG**

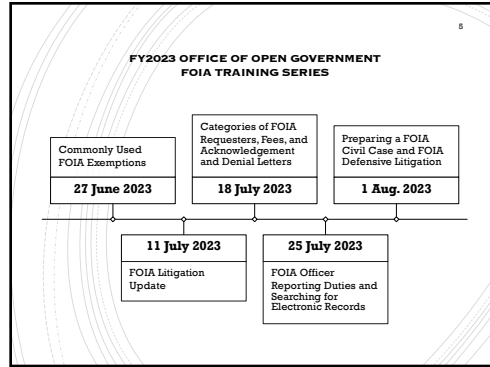


OOG is responsible for training public bodies on the requirements of FOIA, including issuing advisory opinions.



OOG also assists members of the public in filing FOIA requests with the requisite public agency.

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Presentation Contents

- Introduction to FOIA
- Responding to FOIA Requests
- Conducting Searches for Records
- Producing Records
- Decision Letters

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**THE DISTRICT OF COLUMBIA
FREEDOM OF INFORMATION ACT**

INTRODUCTION

The DC Freedom of Information Act (FOIA) is a DC law that gives the public the right to access information from the District of Columbia Government.

Under DC FOIA, DC government must release information that is requested, unless that information is protected from disclosure.

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INTRODUCTION

The D.C. Freedom of Information Act (FOIA) also requires that DC agencies proactively provide certain information without a FOIA request.






DC law requires that the information is available upon request and online and listed on the agency's website under the "FOIA" tab.

DC government has also proactively released hundreds of datasets, available on opendata.dc.gov. FOIA information may be [here](#).

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DC's Public Records Laws

-  District of Columbia public policy entitles all persons to full and complete information regarding the affairs of government and the official acts of those who represent them.
-  Enacted in 1973, the District's Freedom of Information Act (FOIA) is designed to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."
-  The Act gives any person the right to request records, in any form, that are prepared, owned, used, in the possession of, and retained by a public body.
-  When FOIA requests are submitted, agencies are required to make a reasonable search for records.
-  On an annual basis, District government agencies are required to report FOIA disclosure activities for the previous fiscal year to the Secretary of the District of Columbia and the Council of the District of Columbia.

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DC FOIA MANAGEMENT

FOIA
Who's
Who

There is no central body within DC government that handles FOIA requests. Instead, each D.C. agency processes its own records. The primary point of contact for DC FOIA is the agency FOIA Officer or the Agency Director.

The DC Mayor's Office of Legal Counsel handles FOIA Appeals. The DC Office of the Attorney General (OAG) handles FOIA litigation through its Civil Litigation Division and also provides FOIA advice through its Legal Counsel Division.

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DC FOIA MANAGEMENT

MORE
FOIA
Who's
Who

The Mayor of the District of Columbia has also created the District of Columbia "Open Government Advisory Group"

The Open Government Advisory Group advises the Mayor on FOIA and other open government and transparency issues. The group includes subject matter experts from the government and members of the public with expertise in open government.

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WHAT IS AN AGENCY'S FOIA RESPONSIBILITY?

Each agency head must designate an individual as its FOIA Officer.

Each agency must post on its website the name, title, address, telephone number, and email address of its designated FOIA officer. See 1 DCMR §§ 401.2 - 401.3

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WHAT IS THE FOIA OFFICER'S RESPONSIBILITY

Agency FOIA Officers are responsible for tracking, managing and responding to FOIA requests for records in their organization's possession and control, and administering their organization's FOIA programs.

The agency's FOIA Officer must conduct or coordinate a reasonable search for records and respond timely to FOIA requests.

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FOIA Requesters and the FOIA Request

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Who May Request Records

- **ANY** person has a right to inspect, and at his/her/their discretion, to copy **ANY** public record of a public body except as expressly provided by the FOIA exceptions. (D.C. Official Code § 2-532(a)).

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How requests may be submitted



- A request for a record of an agency may be made orally or in writing and must be directed to the particular agency (1 DCMR § 402.1).
- A requester may be asked to submit in writing a request for records (1 DCMR § 402.2).
- Requests may be mailed, faxed or e-mailed (1 DCMR § 402.3).

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APPLICABLE REGULATIONS

1 DCMR § 400 et. seq. contains the rules and procedures to be followed by ALL agencies, offices, and departments of the District of Columbia, and ALL persons requesting records pursuant to FOIA.

The regulations can be accessed online at <https://www.dcregs.dc.gov/>

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The FOIA request must **BE** specific

- A request must reasonably describe the desired record(s). If possible, specific information regarding names, places, events, subjects, dates, files, titles, file designation, or other identifying information shall be supplied (1 DCMR § 402.4).

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What Might They Ask For?




- E-mail messages
- Text Messages
- Notes
- Databases
- Files
- Communications
- Camera Footage
- Video Footage
- Photographs

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What is considered a Public Record Under FOIA?



- Under FOIA, DC Government must provide public access to "public records" to maintain an open and transparent government.
- The term "public record" is defined in the DC Code.

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PUBLIC RECORDS

Includes all books, papers, maps, photographs, cards, tapes, recordings, vote data (including ballot-definition material, raw data, and ballot images), or other documentary materials, regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.

Public records include information stored in an electronic format (D.C. Official Code § 2-532(18)).

Electronic format now includes text messages and some applications.

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Includes records of some contractors

- This includes **ANY** record produced or collected pursuant to a contract with a private contractor to perform a public function. D.C. Official Code § 2-532(a-3)).

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AVAILABLE without a FOIA request

Records that must be available to the public without the need of a FOIA request include:

- Employee's salary, title and employment dates;
- Contracts expenditures;
- Budgets;
- Manuals;
- Policies;
- Rules;
- Opinions;
- Orders; and
- Meeting minutes of open proceedings of public bodies.

See (D.C. Official Code § 2-636)

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RESPONDING TO FOIA REQUESTS

EFFECTIVELY MANAGING THE FOIA PROCESS

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When an agency FOIA officer receives a FOIA request, the FOIA Officer should acknowledge receipt of the request via email message or other initial communication to a FOIA Requester.

DC has an automated system, **FOIAXpress**, that the public may use to make FOIA requests and DC agencies may use to process FOIA requests. The system automates the DC FOIA process.


The FOIA Officer should assign the FOIA request an internal tracking number or use some internal system to keep track of FOIA requests if your agency is not using FOIAXpress.

RESPONDING TO FOIA REQUESTS

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RESPONDING TO FOIA REQUESTS




An initial response correspondence typically includes:

- an introduction and acknowledgement;
- any clarifying questions (if needed);
- a discussion of fees (if possible);
- processing track designation (if possible);
- contact information for questions; a complimentary close (for example, "Sincerely");
- a written signature; and
- a typed name, agency, and your title.

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Timing for Final Responses to FOIA Requests




- For records other than body-worn camera recordings: **business days** (D.C. Official Code § 2-532(c)(1))

- For body-worn camera recordings: **25 business days** (5 calendar days in certain instances) (D.C. Official Code § 2-532(c)(2)(A))



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Extending Time to Respond

- In **unusual circumstances**, the agency may invoke an additional 10-day extension by written notice to the requester setting forth the reasons for extension and expected date for the determination (D.C. Official Code § 2-532(d-1)).

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WHAT IS AN UNUSUAL CIRCUMSTANCE?

Unusual circumstances are defined in D.C. Official Code § 2-532(d)(2) as:

- The need to search for, collect, and appropriately examine a **voluminous amount of separate and distinct records** that are demanded in a single request;
- The **need for consultation**, which shall be conducted with all practicable speed, with **another public body** having a substantial interest in the determination of the request or among 2 or more components of a public body having substantial subject-matter interest therein; or

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WHAT IS AN UNUSUAL CIRCUMSTANCE
(CONTINUED)?

Unusual circumstances are defined in D.C. Official Code § 2-532(d)(2) as:

- (C) For body-worn camera recordings covered by subsection (c)(2) of this section, the inability to procure a vendor that is able to perform the redactions within the 25-day time period provided under subsection (c)(2) of this section.

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How Do I Take The Extension?

If Using the automated system, the feature is included.

If outside of the system, contact the requester with written correspondence (email or letter) that details the specific statutory justification for the extension.

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WHAT IS THE CONSEQUENCE OF NOT RESPONDING TO A FOIA REQUEST ON TIME?




- D.C. Official Code 2-532(e) provides that failure to timely respond to a FOIA request is **deemed a denial** of the request.
- A requester can appeal the denial to the Mayor (Administrative Appeal) or to Superior Court. [D.C. Official Code § 2-537; 1 DCMR 412.1.]

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How to Deal With Problematic FOIA Requests




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WHAT IF I RECEIVE A REQUEST THAT IS OVERLY BROAD?


- 1 DCMR 402.4 provides that: "A request shall reasonably describe the desired record(s). Where possible, specific information regarding names, places, events, subjects, dates files, titles, file designation, or other identifying information shall be supplied."



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WHAT IF I RECEIVE A REQUEST THAT IS OVERLY BROAD?

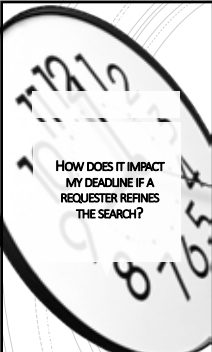


- 1 DCMR 402.5 states: "Where the information supplied by the requester is not sufficient to permit the identification and location of the record by the agency without an unreasonable amount of effort, the requester shall be contacted and asked to supplement the request with the necessary information. Every reasonable effort shall be made by the agency to assist in the identification and location of requested records."

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HOW DOES IT IMPACT MY DEADLINE IF A REQUESTER REFINES THE SEARCH?



- 1 DCMR 405.6 provides that "... a request is deemed received when the designated Freedom of Information Officer, or agency head in the absence of a designated Freedom of Information Officer, receives the request submitted in compliance with the Act and this chapter.
- When the Freedom of Information Officer, pursuant to 402.5, contacts the requester for additional information, then the request is deemed received when the Freedom of Information Officer receives the additional information."

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What if they NEVER Respond?

The advice OOG has given in the past is to contact the requester at least 3 times before closing the request for lack of response to a request for clarification (assume it is abandoned). ****NOTE: this is administrative advice and not in the DC Regulations****

We suggest the FOIA Officer contact the requester regarding the clarification at least three times and give them 2 weeks to respond each time.


After the third contact and the two-week time span, administratively close out FOIA request, if no response and assume the FOIA requester has abandoned the request. Make a note of this in your files and your attempts to contact the requester.

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• Under DC FOIA, there is no authority to treat as void requests that the District believes are **overly burdensome**. *Fraternal Order of Police, Metro. Police Labor Comm. v. District of Columbia*, 139 A.3d 653, 662-64 (D.C. 2016)

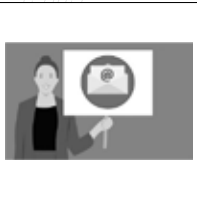
WHAT IF THE REQUEST I RECEIVE IS OVERLY BURDENSOME?



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VOLUMINOUS EMAIL PRODUCTIONS



- If you are required to review a large number of emails it may take longer than 15 business Days.
- Contact the Requester and work out a production schedule.
- Attempt to produce the first batch within 15 business days and according to the schedule agreed upon.
- It is still technically a denial and the requester may appeal, but you are acting in good faith to produce the record and fulfill the request.
- Unfortunately there is no remedy available (denial for being burdensome on government resources).

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SEARCHING FOR RECORDS

Effectively managing the FOIA process



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Involves all who maintain records

- All agency employees who maintain records must assist the designated Freedom of Information officer, as appropriate, with the identification and search of responsive records (1 DCMR § 401.5).

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Where Do I Start?

Each agency should have a "Records Officer" or a person that is designated or responsible for an agency's records. That employee should assist you with locating the record requested.

Examine your agency's organizational chart, as it may provide details as to who may possess a particular record.

If the request is for email or other electronic record that the Office of the Chief Technology Officer maintains, you may have to request it through your General Counsel.

Examine the agency Record Retention Schedule to make sure the record requested has not been archived.

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What am I Required to Do?

A FOIA OFFICER MUST CONDUCT AN ADEQUATE SEARCH FOR RECORDS RESPONSIVE TO THE FOIA REQUEST.

In assessing whether a District agency conducted an adequate search in response to a FOIA request, courts look not to "the fruits of the search," but to the "appropriateness of the methods used to carry out the search."

The issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but whether the search for those documents was **adequate**.

Hurralde v. Comptroller of Currency, 318 F.3d 311 (D.C. Cir. 2003).

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HOW DO I CONDUCT AN ADEQUATE SEARCH

An agency's search conducted in response to a FOIA request "need not be perfect, only adequate," and adequacy is measured by the reasonableness of the effort in light of the specific request. *Fraternal Order of Police, Metro. Police Labor Comm. v. District of Columbia*, 79 A.3d 347, 360 (D.C. 2013)

The search must be "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 748 F.2d 1476, 1488 (D.C. Cir. 1984), quoting *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1380-81 (D.C. Cir. 1983).

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AFFIDAVIT OR DECLARATION OF SEARCH FOR RECORDS

- When a requester challenges the adequacy of the agency's search (or, in litigation, when the District seeks summary judgment), the agency/District must establish beyond material doubt that it expended reasonable efforts to uncover all relevant documents by **setting forth sufficient information in its affidavits for a court to determine if the search was adequate.** *Nation Magazine, Washington Bureau v U.S. Customs Serv.*, 71 F.3d 855, 890 (D.C. Cir. 1995)
- The agency FOIA officer should, as a matter of business practice, create an affidavit or declaration that describes the agency's search for records.

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WHAT SHOULD MY AFFIDAVIT OR DECLARATION INCLUDE?




- Provide context for the request. Describe the structure of the agency's file or record-keeping system (electronic and/or paper, as applicable to the request).
 - Does the agency have a retention policy?
 - Was a search conducted even if the retention policy called for the disposal of the record?

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WHAT SHOULD THE AFFIDAVIT OR DECLARATION DESCRIBE?




- An agency must "describe at least generally the structure of the agency's file system which makes further search difficult." *Church of Scientology of Cal. v IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986)

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WHAT ELSE SHOULD MY AFFIDAVIT/DECLARATION INCLUDE?




- Explain how the agency's search was reasonably calculated to uncover all relevant documents.
- Detail both how the search was conducted and why it was conducted in that manner.
- If only one system is searched, make it clear that this system was the only possible place that responsive records were likely to be located.

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E-MAIL SEARCHES




How do I conduct an adequate search?

- "We do not know and cannot simply assume, in this age of computerized connectivity, **that it would be unreasonable for [the agency's] FOIA officer to search all of [the agency's] email accounts,** regardless of how many accounts that might be." *Fraternal Order of Police, Metro. Police Labor Comm. v. District of Columbia*, 139 A.3d 853, 866(D.C. 2016).

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SEARCHING FOR RECORDS



What should my affidavit include for email searches?

- For requests for involving email searches, explain how many email accounts exist and what the agency and/or OCTO's capacity is in terms of searching them.
- Consider having OCTO submit an affidavit/declaration detailing where and how it searched for responsive records. If it's unreasonable for OCTO to conduct searches of all (or a large number of) email accounts, OCTO must explain why.

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Fees

Make sure that each person assisting with the search for records keeps a log or other documentation of the time spent searching for records.

Agencies may charge fees for conducting record searches and producing records in response to a FOIA request.

There is no fee to submit a FOIA request. However, you may require a requester to pay fees in advance, if they have not paid past FOIA-related fees (unpaid FOIA fees).

May grant a public interest waiver of fees.

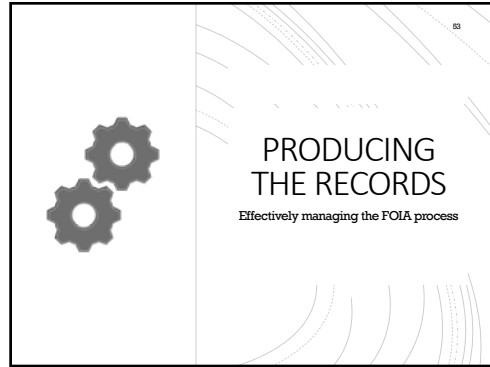
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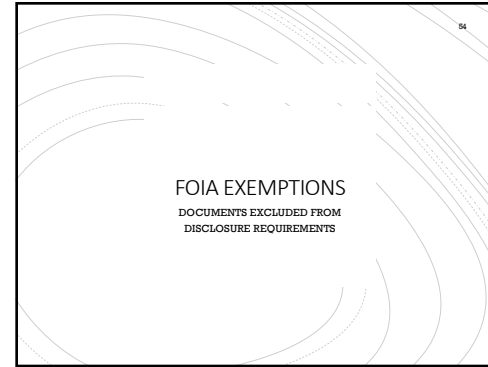
Examples of Fees

- Searching for records/Review of Records: Hourly rate based on the pay grade of the personnel who performs the search.
- Photocopies: \$0.25 per page.
- Document certification: \$1.00 per document to certify a document as true copy of an agency record.
- The direct cost of any service or material for which no fee has been established.
- A Requester may have to pay search and/or review fees even if the search does not locate any responsive records or if records are located but are withheld as exempt. See DC Official Code § 2-532 and 1 DCMR § 408.

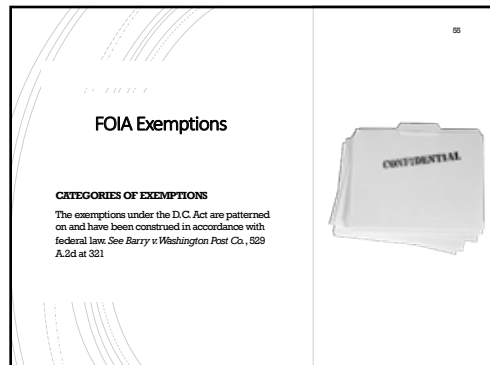
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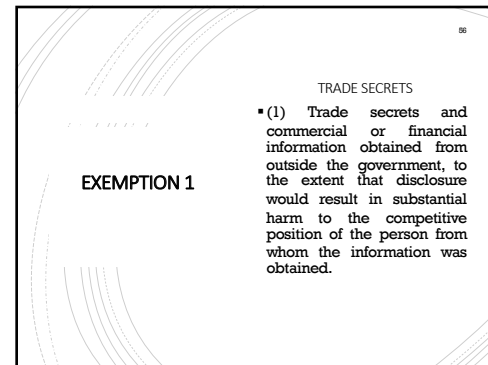
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PERSONAL PRIVACY

EXEMPTION 2

(2) Personal privacy: Information of a personal nature where the public disclosure thereof would constitute a **clearly unwarranted** invasion of personal privacy.

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Personal Privacy Exception Balancing Test

The FOIA Officer must perform a balancing test under this exemption: the individual's privacy interest in the material at issue must be balanced against the public interest in disclosing it, and this public interest must serve the "core purpose of shedding light on an agency's performance of its statutory duties."

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Privacy Exemption Balancing Test Examples

IN RE APPEAL OF THE WASHINGTON POST CO.

- The privacy interests of students and teachers under investigation for the consumption of alcohol substantially outweighs the public interest in their identifying information.

IN RE APPEAL OF WALTER THOMAS

- May disclose names, professional qualifications, and work experiences of successful job applicants, but refuse to disclose other private information, such as home telephone numbers and addresses, Social Security numbers, marital status and personal references, or any information regarding unsuccessful job applicants.

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BODY WORN CAMERAS

EXEMPTION 2A

- Any body-worn camera recordings recorded by the Metropolitan Police Department:
- (A) Inside a personal residence; or
- (B) Related to an incident involving domestic violence, stalking or sexual assault as defined by the D.C. Code.

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LAW ENFORCEMENT

EXEMPTION 3

- (3) Investigatory records compiled for law enforcement purposes including records of Council investigations and investigations conducted by the Office of Police Complaints.
- Disclose investigative techniques and procedures not generally known outside the government; or endanger the life or physical safety of law-enforcement personnel.

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AGENCY COMMUNICATION

EXEMPTION 4


- Inter-agency or intra-agency memorandums or letter which would not be available by law to a party other than an agency in litigation with the agency.

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EXEMPTIONS 5 & 6

- **EXEMPTION #5**
- Future examination test questions.
- **EXEMPTION #6**
- Other statutes, cannot be a regulation. Information specifically exempted from disclosure by statute (other than FOIA), provided that such statute: requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld.



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EXEMPTIONS 7-9

- **EXEMPTION #7**
- National security matters under federal law.
- **EXEMPTION #8**
- Antitrust investigations-D. C. Official Code § 28-4905.
- **EXEMPTION #9**
- Arson Investigations- D.C. Official Code § 8-417.

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EXEMPTION #10

- Emergency response plans.

EXEMPTION #11

- Social security and federal employer ID numbers; (D.C. Official Code § 47-2881.06).

EXEMPTION #12

- Whistleblowers, unless the name of the employee is already known. D.C. Official Code §§ 1-615.51; 2-233.01 *et seq.*

EXEMPTIONS 10-12

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EXEMPTION #13

- Homeland security records, D.C. Official Code § 7-2271.04.

EXEMPTION #14

- Sealed criminal records, Chapter 8 of Title 16.

EXEMPTION #15

- Critical infrastructure (applies only to entities regulated by the Public Service Commission).

EXEMPTIONS 13-15

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TEACHER EVALUATIONS

- Teacher evaluations D.C. Official Code § 38-2615(a).

EXEMPTION 16


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LEGAL EXEMPTIONS

ATTORNEY WORK PRODUCT

- Applies to documents prepared by or for an attorney in anticipation of litigation, no matter the status or stage of the litigation.




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LEGAL EXEMPTIONS

ATTORNEY-CLIENT PRIVILEGE

- Protects confidential communications between an attorney and client when the agency is the client and when privilege is necessary to obtain legal advice.



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LEGAL EXEMPTIONS

DELIBERATIVE PROCESS PRIVILEGE

- The method through which an agency creates policies, opinions, rules and regulations.
- To qualify for this exemption, the record must be both pre-decisional and deliberative. Pre-decisional documents are those "generated before the adoption of an agency policy. A document is deliberative if it is a part of the agency give-and-take—process—by which the decision itself is made.

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LEGAL EXEMPTIONS

Third-Party Communications & The Deliberative Process

- The deliberative process does not generally apply to communications that include third-parties. D.C. Code 2-534(a)(4) applies only to inter/intra agency documents.
- Communications that include third-parties may only be withheld under the deliberative process privilege, under the consultant corollary; if the third party has no independent interest (their interest is aligned with the government).

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LEGAL EXEMPTIONS

Third-Party Communications & The Deliberative Process

- "In the 'typical' case in which a court applies the consultant corollary, the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it." [The consultant's] only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 336 (2011).


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LEGAL EXEMPTIONS

Glomar Responses

- Acknowledging the existence of records would itself divulge protected information.
 - Agency can "neither confirm nor deny the existence of responsive records" (RCND response to FOIA).
- Search may not be required if all potential responsive records are entirely protected.
 - *Elliott v. Fed. Info. Ctr. v. NSA*, 679 F.3d 926, 933 (D.C. Cir. 2012)
 - *Moore v. NMI (DVA Index Sys.)*, 662 F. Supp. 2d 136, 139 (D.D.C. 2009)
- Use caution - requests can also include responsive non-exempt records.



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PRODUCING THE RECORDS



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PRODUCING THE RECORDS

- A FOIA response does not have to provide **ANSWERS** to requestor's questions disguised as a FOIA request in response to an individual's request for information. The agency's obligation in meeting a FOIA request is to provide access to its records. *Dugan v. DOJ*, 82 F. Supp. 3d 485 (2015).

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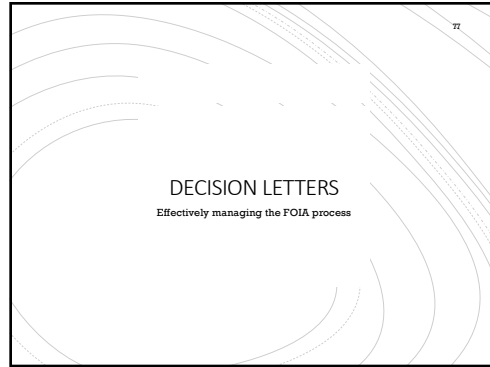
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PRODUCING THE RECORDS

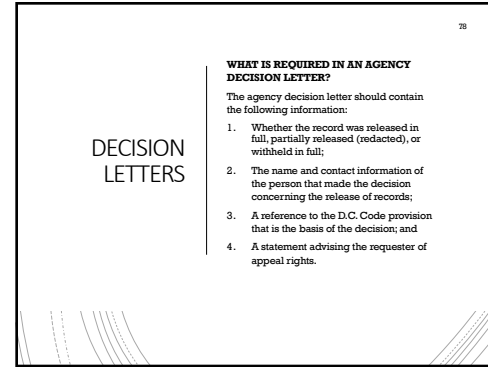
Do I have to create records?

FOIA **does not** require an agency to **CREATE** documents or opinions in response to an individual's request for information or to obtain records from another agency. *Dugan v. DOJ*, 82 F. Supp. 3d 485, 2015.

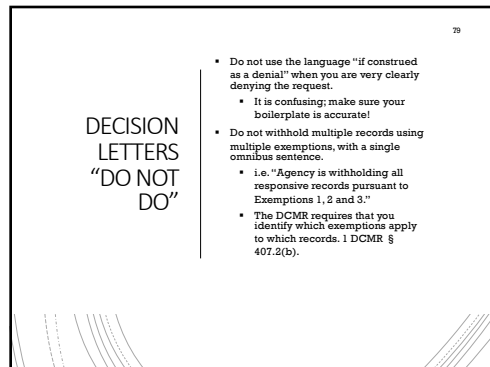
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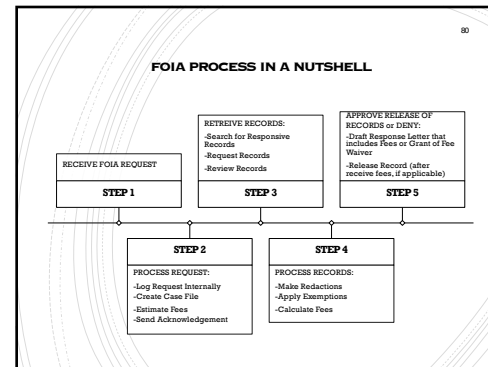
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CONTACT INFORMATION FOR THE OFFICE OF OPEN GOVERNMENT 81

OOG provides advice to agencies, members of public bodies, and the public on the Open Meetings Act and the Freedom of Information Act. For assistance, please reach us via telephone at 202-481-3411 or via email at opensoffice@dc.gov

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