

NUTS & BOLTS OF THE FREEDOM OF INFORMATION ACT

FOR FOIA OFFICERS AND GOVERNMENT OFFICIALS

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PRESENTATION CONTENTS

- INTRODUCTION
- RESPONDING TO FOIA REQUESTS
- CONDUCTING SEARCHES FOR RECORDS
- FOIA EXEMPTIONS
- PRODUCING RECORDS
- FEES
- DECISION LETTERS

INTRODUCTION

WHAT IS FOIA?

- THE FREEDOM OF INFORMATION ACT (FOIA) IS A DISTRICT OF COLUMBIA LAW THAT GIVES THE PUBLIC THE RIGHT TO ACCESS INFORMATION FROM THE DC GOVERNMENT.
- UNDER FOIA, DC AGENCIES MUST RELEASE INFORMATION THAT IS REQUESTED, UNLESS THAT INFORMATION IS PROTECTED FROM DISCLOSURE.

INTRODUCTION

WHAT IS FOIA?

- THE FREEDOM OF INFORMATION ACT (FOIA) ALSO REQUIRES THAT DC AGENCIES PROACTIVELY PROVIDE CERTAIN INFORMATION. THAT INFORMATION SHOULD BE LISTED ON THE AGENCY'S WEBSITE UNDER THE "FOIA" TAB.
- DC GOVERNMENT HAS ALSO PROACTIVELY RELEASED HUNDREDS OF DATASETS, AVAILABLE ON [OPENDATA.DC.GOV](https://opendata.dc.gov).

INTRODUCTION

WHO HANDLES FOIA REQUESTS?

- THERE IS NO CENTRAL BODY WITHIN DC GOVERNMENT THAT HANDLES FOIA REQUESTS. INSTEAD, EACH DC AGENCY PROCESSES ITS OWN RECORDS.
- THE PRIMARY POINT OF CONTACT FOR FOIA IS THE AGENCY FOIA OFFICER.

RESPONDING TO FOIA REQUESTS
NUTS & BOLTS OF FOIA

RESPONDING TO FOIA REQUESTS

I RECEIVED A FOIA REQUEST; NOW WHAT?

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.

RESPONDING TO FOIA REQUESTS

I RECEIVED A FOIA REQUEST; NOW WHAT?

AN INITIAL RESPONSE TYPICALLY INCLUDES: AN INTRODUCTION; 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.

RESPONDING TO FOIA REQUESTS

I RECEIVED A FOIA REQUEST; NOW WHAT?

IF YOU ARE NOT THE AGENCY FOIA OFFICER AND YOU RECEIVE SOMETHING THAT LOOKS LIKE A FOIA REQUEST, SEND IT IMMEDIATELY TO THE AGENCY FOIA OFFICER AND/OR GENERAL COUNSEL.

RESPONDING TO FOIA REQUESTS

I RECEIVED A FOIA REQUEST; NOW WHAT?

SAMPLE E-MAIL

DEAR [NAME]:

MY NAME IS [INSERT NAME] AND I AM THE FOIA OFFICER FOR [AGENCY]. THE [AGENCY] RECEIVED YOUR FREEDOM OF INFORMATION ACT (FOIA) REQUEST, DATED [DATE], ON [DATE] AND ASSIGNED IT CONTROL NUMBER [TRACKING NUMBER]. PLEASE CITE THIS NUMBER IN ANY FUTURE COMMUNICATIONS WITH OUR OFFICE REGARDING YOUR REQUEST. IF YOU HAVE ANY QUESTIONS ABOUT YOUR REQUEST, PLEASE CONTACT MET AT [INSERT TELEPHONE NUMBER AND EMAIL ADDRESS].

RESPONDING TO FOIA REQUESTS

For records other than body-worn camera recordings: 15 business days
[D.C. Official Code § 2-532(c)(1)]



WHEN MUST I RESPOND TO A FOIA REQUEST?

For body-worn camera recordings: 25 business days.
[D.C. Official Code § 2-532(c)(2)(A)]



RESPONDING TO FOIA REQUESTS

WHEN MAY I EXTEND THE 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)).

RESPONDING TO FOIA REQUESTS

WHAT IS AN UNUSUAL CIRCUMSTANCE?

UNUSUAL CIRCUMSTANCES ARE DEFINED IN D.C. OFFICIAL CODE § 2-532(D)(2) AS:

- (A) THE NEED TO SEARCH FOR, COLLECT, AND APPROPRIATELY EXAMINE A **VOLUMINOUS AMOUNT OF SEPARATE AND DISTINCT RECORDS** THAT ARE DEMANDED IN A SINGLE REQUEST;
- (B) 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

RESPONDING TO FOIA REQUESTS

WHAT IS AN UNUSUAL CIRCUMSTANCE? (CONTINUED)

(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 PROVIDED UNDER SUBSECTION (C)(2) OF THIS SECTION.

RESPONDING TO FOIA REQUESTS

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 OR TO SUPERIOR COURT. [D.C. OFFICIAL CODE § 2-537; 1 DCMR 412.1.]



RESPONDING TO FOIA REQUESTS

WHAT IF I RECEIVE A REQUEST THAT IS OVERLY BROAD?

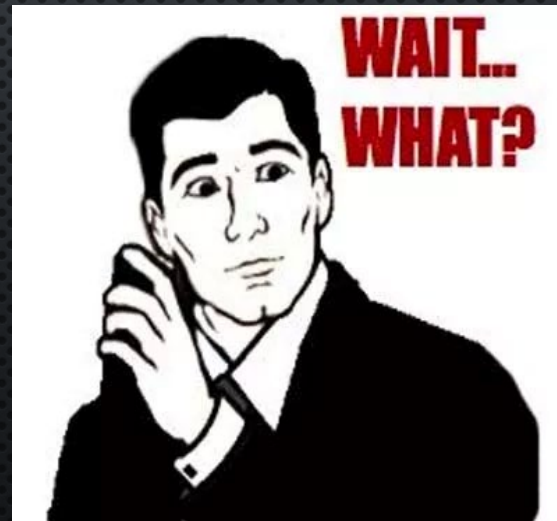
- 1 DCMR 402.4 PROVIDES THAT: “A REQUEST SHALL REASONABLY DESCRIBE THE DESIRED RECORD(S). WHERE POSSIBLE, SPECIFIC INFORMATION REGARDING NAMES, PLACES, EVENTS, SUBJECTS, DATES FILES, TITLES, FILE DESIGNATION, OR OTHER IDENTIFYING INFORMATION SHALL BE SUPPLIED.”



RESPONDING TO FOIA REQUESTS

WHAT IF I RECEIVE A REQUEST THAT IS OVERLY BROAD?

- WHEN A DISTRICT AGENCY HAS DIFFICULTY UNDERSTANDING A REQUEST, THE REGULATIONS PROVIDE THAT THE AGENCY MUST CONTACT THE REQUESTER AND ASK FOR INFORMATION NECESSARY TO RESPOND TO THE REQUEST.



RESPONDING TO FOIA REQUESTS

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.”



RESPONDING TO FOIA REQUESTS

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.”



RESPONDING TO FOIA REQUESTS

WHAT IF THE REQUEST I RECEIVE IS OVERLY BURDENSOME?

- 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 853, 862-64 (D.C. 2016)



RESPONDING TO FOIA REQUESTS

WHAT IF THE REQUEST I RECEIVE IS OVERLY BURDENSOME?

- COMMUNICATION IS KEY!
- REACH OUT TO THE REQUESTER AND FIND OUT IF HE OR SHE WILL AGREE TO A REASONABLE TIMELINE TO CONDUCT THE SEARCH AND PRODUCE THE RECORDS.



SEARCHING FOR RECORDS

NUTS & BOLTS OF FOIA

SEARCHING FOR RECORDS

HOW DO I CONDUCT AN ADEQUATE SEARCH?

- 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. *ITURRALDE V. COMPTROLLER OF CURRENCY*, 315 F.3D 311 (D.C. CIR. 2003)

SEARCHING FOR RECORDS

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)

SEARCHING FOR RECORDS

HOW DO I CONDUCT AN ADEQUATE SEARCH?

- THE SEARCH MUST BE “REASONABLY CALCULATED TO UNCOVER ALL RELEVANT DOCUMENTS.” *WEISBERG V. DEP’T OF JUSTICE*, 745 F.2D 1476, 1485 (D.C. CIR. 1984), QUOTING *WEISBERG V. DEP’T OF JUSTICE*, 705 F.2D 1344, 1350-51 (D.C. CIR. 1983).



SEARCHING FOR RECORDS

HOW DO I CONDUCT AN ADEQUATE SEARCH?

- 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)

SEARCHING FOR RECORDS

HOW DO I CONDUCT AN ADEQUATE SEARCH?

- 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)



SEARCHING FOR RECORDS

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).



SEARCHING FOR RECORDS

HOW DOES THE AGENCY PROVE IT CONDUCTED AN ADEQUATE SEARCH?

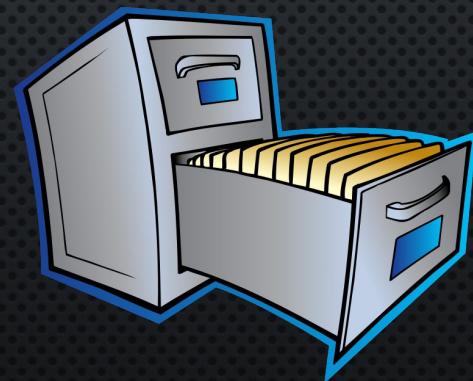
- THE AGENCY FOIA OFFICER SHOULD, AS A MATTER OF BUSINESS PRACTICE, CREATE AN AFFIDAVIT THAT DESCRIBES THE AGENCY'S SEARCH FOR RECORDS.



SEARCHING FOR RECORDS

WHAT SHOULD MY AFFIDAVIT 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?



SEARCHING FOR RECORDS

WHAT ELSE SHOULD MY AFFIDAVIT 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.



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.



FOIA EXEMPTIONS

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FOIA EXEMPTIONS

CATEGORIES OF EXEMPTIONS

THERE ARE 17 CATEGORIES OF INFORMATION THAT MAY BE EXEMPT FROM DISCLOSURE UNDER FOIA.



FOIA EXEMPTIONS

EXEMPTION #1

- (1) TRADE SECRETS AND COMMERCIAL OR FINANCIAL INFORMATION OBTAINED FROM OUTSIDE THE GOVERNMENT, TO THE EXTENT THAT DISCLOSURE WOULD RESULT IN SUBSTANTIAL HARM TO THE COMPETITIVE POSITION OF THE PERSON FROM WHOM THE INFORMATION WAS OBTAINED.

FOIA EXEMPTIONS

EXEMPTION #2

- (2) PERSONAL PRIVACY: INFORMATION OF A PERSONAL NATURE WHERE THE PUBLIC DISCLOSURE THEREOF WOULD CONSTITUTE A **CLEARLY** **UNWARRANTED** INVASION OF PERSONAL PRIVACY.

FOIA EXEMPTIONS

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.

FOIA EXEMPTIONS

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.

FOIA EXEMPTIONS

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.

FOIA EXEMPTIONS

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.

FOIA EXEMPTIONS

EXEMPTION #7

- NATIONAL SECURITY MATTERS UNDER FEDERAL LAW.

EXEMPTION #8

- ANTITRUST INVESTIGATIONS-D. C. OFFICIAL CODE § 28-4505.

EXEMPTION #9

- ARSON INVESTIGATIONS- D.C. OFFICIAL CODE § 5-417.

FOIA EXEMPTIONS

EXEMPTION #10

- EMERGENCY RESPONSE PLANS.

EXEMPTION #11

- SOCIAL SECURITY AND FEDERAL EMPLOYER ID NUMBERS; (D.C. OFFICIAL CODE § 47-2851.06).

EXEMPTION #12

- WHISTLEBLOWERS, UNLESS THE NAME OF THE EMPLOYEE IS ALREADY KNOWN. D.C. OFFICIAL CODE §§ 1-615.51; 2-233.01 *ET SEQ.*

FOIA EXEMPTIONS

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).

FOIA EXEMPTIONS

EXEMPTION #16

- TEACHER EVALUATIONS D.C. OFFICIAL CODE § 38–2615(A).

FOIA 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.

FOIA 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.

FOIA 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."

FOIA 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).

FOIA 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).

FOIA EXEMPTIONS

THIRD-PARTY COMMUNICATIONS & THE DELIBERATIVE PROCESS

- **EXAMPLES**

- ACCOUNTING FIRM HIRED BY AN AGENCY TO AUDIT A PROGRAM?
 - CONSULTANT COROLLARY
- CONTRACTOR WEIGHING IN ON A DECISION THAT AFFECTS ITS BOTTOM LINE?
 - NO CONSULTANT COROLLARY

FOIA EXEMPTIONS

GLOMAR RESPONSES

- ACKNOWLEDGING THE EXISTENCE OF RECORDS WOULD ITSELF DIVULGE PROTECTED INFORMATION.
 - AGENCY CAN “NEITHER CONFIRM NOR DENY THE EXISTENCE OF RESPONSIVE RECORDS” (NCND RESPONSE TO FOIA).
- SEARCH MAY NOT BE REQUIRED IF ALL POTENTIAL RESPONSIVE RECORDS ARE ENTIRELY PROTECTED.
 - *ELEC. PRIV. INFO. CTR. v. NSA*, 678 F. 3d 926, 933 (D.C. Cir. 2012)
 - *MOORE v. NAT'L DNA INDEX Sys.*, 662 F. Supp. 2d 136, 139 (D.D.C. 2009)
- USE CAUTION – REQUESTS CAN ALSO INCLUDE RESPONSIVE NON-EXEMPT RECORDS.



PRODUCING THE RECORDS

NUTS & BOLTS OF FOIA

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).

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.

PRODUCING THE RECORDS

REASONABLE REDACTION

- A RECORD MAY ONLY BE WITHHELD IN ITS ENTIRETY IF THE AGENCY DETERMINES THAT THE RECORD CANNOT BE REASONABLY REDACTED.
- A DOCUMENT MAY CONTAIN PARTS THAT ARE PROTECTED BY A PRIVILEGE, AND PARTS THAT ARE NOT PROTECTED – THE EXISTENCE OF THE PRIVILEGED PARTS CANNOT BE USED TO JUSTIFY WITHHOLDING THE NON-PRIVILEGED PORTIONS IF REASONABLE REDACTION IS POSSIBLE.

PRODUCING THE RECORDS

REASONABLE REDACTION

D.C. CODE 2-534(b) STATES:

(B) ANY REASONABLY SEGREGABLE PORTION OF A PUBLIC RECORD SHALL BE PROVIDED TO ANY PERSON REQUESTING THE RECORD AFTER DELETION OF THOSE PORTIONS WHICH MAY BE WITHHELD FROM DISCLOSURE PURSUANT TO SUBSECTION (A) OF THIS SECTION.

IN EACH CASE, THE JUSTIFICATION FOR THE DELETION SHALL BE EXPLAINED FULLY IN WRITING, AND THE EXTENT OF THE DELETION SHALL BE INDICATED ON THE PORTION OF THE RECORD WHICH IS MADE AVAILABLE OR PUBLISHED, UNLESS INCLUDING THAT INDICATION WOULD HARM AN INTEREST PROTECTED BY THE EXEMPTION IN SUBSECTION (A) OF THIS SECTION UNDER WHICH THE DELETION IS MADE.

IF TECHNICALLY FEASIBLE, THE EXTENT OF THE DELETION AND THE SPECIFIC EXEMPTIONS SHALL BE INDICATED AT THE PLACE IN THE RECORD WHERE THE DELETION WAS MADE.

PRODUCING THE RECORDS

REASONABLE REDACTION

- YOU SHOULD ENGAGE IN REASONABLE REDACTION, IF YOU ANSWER THE FOLLOWING THREE QUESTIONS IN THE AFFIRMATIVE:
 1. AM I WITHHOLDING AN ENTIRE RECORD?
 2. ARE PARTS OF THE RECORD NOT PRIVILEGED?
 3. IF I REMOVE THE PRIVILEGED PORTIONS, IS THE DOCUMENT STILL LEGIBLE?

PRODUCING THE RECORDS

REASONABLE REDACTION

QUESTION 1: AM I WITHHOLDING AN ENTIRE RECORD?

DID THE SEARCH FIND RESPONSIVE RECORDS?

IF THE SEARCH YIELDS NOTHING, THEN YOU ARE NOT WITHHOLDING A RECORD.

IS THE REQUESTER RECEIVING EVERYTHING FOUND?

IF THE REQUESTER GOT EVERYTHING FOUND, YOU ARE NOT WITHHOLDING A RECORD.

PRODUCING THE RECORDS

REASONABLE REDACTION

QUESTION 2: ARE PARTS OF THE RECORD NOT PRIVILEGED?

SO YOUR AGENCY IS WITHHOLDING AN ENTIRE RECORD. WHAT IS THE BASIS FOR WITHHOLDING IT?

IF YOU WERE TO PICK ANY RANDOM PART OF THE RECORD, WOULD THAT BASIS BE APPLICABLE?

IF YES, IT IS PROPER TO WITHHOLD IN ITS ENTIRETY.

IF NO, YOU SHOULD BE REDACTING AND PRODUCING THE RECORD.

IS THE REASON PERSONAL PRIVACY? DOES THE ENTIRE RECORD RAISE PRIVACY CONCERNS (E.G. A TAX RETURN) OR ONLY PARTS (E.G. A WORK EMAIL THAT HAS A POST-SCRIPT ABOUT A MEDICAL PROCEDURE)?

REDACTING PERSONALLY IDENTIFYING INFORMATION MAY PRESERVE PRIVACY AND PERMIT YOU TO RELEASE A REDACTED RECORD.

PRODUCING THE RECORDS

REASONABLE REDACTION

QUESTION 2: ARE PARTS OF THE RECORD NOT PRIVILEGED?

ARE YOU WITHHOLDING DUE TO ATTORNEY-CLIENT PRIVILEGE?

IS ALL OF THE DOCUMENT EMBRACED BY THAT PRIVILEGE?

WAS PART OF THE COMMUNICATION SHARED WITH A THIRD-PARTY?

IS THE REASON DELIBERATIVE PROCESS? DOES THE ENTIRE RECORD RAISE PRIVACY CONCERNS (E.G. A TAX RETURN) OR ONLY PARTS (E.G. A WORK EMAIL THAT HAS A POST-SCRIPT ABOUT A MEDICAL PROCEDURE)?

IS THE ENTIRE DOCUMENT PART OF THE DELIBERATION OR ARE PARTS OF IT DEFINITIVE STATEMENTS OF ALREADY ESTABLISHED POLICY?

DOES THE DOCUMENT CONTAIN PURELY FACTUAL INFORMATION – E.G. CHARTS AND GRAPHS? WAS THE RECORD IS SHARED WITH A THIRD PARTY?

PRODUCING THE RECORDS

REASONABLE REDACTION

QUESTION 2: ARE PARTS OF THE RECORD NOT PRIVILEGED?

ARE YOU WITHHOLDING DUE TO A COMMERCIAL INTEREST?

WOULD THE RELEASE OF THE ENTIRE DOCUMENT CAUSE HARM?

OR WOULD ONLY THE WITHHELD PARTS CAUSE HARM?



PRODUCING THE RECORDS

"non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

REASONABLE REDACTION

QUESTION 3:

<https://www.justice.gov/oip/blog/fold-update-oip-guidance-reasonable-segregation-obligation>

IF I REMOVE THE PRIVILEGED PORTIONS, IS THE DOCUMENT STILL LEGIBLE?

If you redacted all exempt portions, would you be looking at a wall of black ink? If so, then you don't have to engage in redaction.

Are there paragraphs or pages that would not be exempt? If so, then you redact and release.

PRODUCING THE RECORDS

ONCE I HAVE IDENTIFIED A RESPONSIVE RECORD, CAN I REDACT INFORMATION WITHIN THE RECORD THAT IS NON-RESPONSIVE? (A PRACTICE KNOWN AS “SCOPING”)

THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS HELD THAT ONCE THE GOVERNMENT CONCLUDES THAT A PARTICULAR RECORD IS RESPONSIVE TO A DISCLOSURE REQUEST, **THE SOLE BASIS** ON WHICH IT MAY WITHHOLD PARTICULAR INFORMATION WITHIN THAT RECORD IS IF THE INFORMATION FALLS WITHIN ONE OF FOIA'S STATUTORY EXEMPTIONS. *AMERICAN IMMIGRATION LAWYERS ASS'N V. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW*, 830 F.3D 667 (D.C. CIR. 2016).

WHAT DOES THIS MEAN? IT MEANS THAT DISCRETE INFORMATION WITHIN A RESPONSIVE RECORD CANNOT BE REDACTED ON THE BASIS OF NON-RESPONSIVENESS. IT CAN BE REDACTED ONLY IF A STATUTORY EXEMPTION APPLIES.



FEES

NUTS & BOLTS OF FOIA

FEES

- THERE IS NO FEE TO SUBMIT A FOIA REQUEST.
- THERE ARE FEES FOR SEARCHING, REVIEWING, AND REPRODUCING RECORDS.
- A FOIA REQUESTER MAY BE CHARGED FEES EVEN IF THE SEARCH DOES NOT LOCATE RESPONSIVE RECORDS OR AN EXEMPTION APPLIES.



FEES

FEE WAIVER

- RECORDS MAY BE FURNISHED WITHOUT CHARGE OR AT A REDUCED CHARGE WHERE A PUBLIC BODY DETERMINES THAT WAIVER OR REDUCTION OF THE FEE **IS IN THE PUBLIC INTEREST** BECAUSE FURNISHING THE INFORMATION CAN BE CONSIDERED AS PRIMARILY BENEFITING THE GENERAL PUBLIC. (D.C. OFFICIAL CODE § 2-532(b)).



FEES

- FOR **EDUCATIONAL, NONCOMMERCIAL SCIENTIFIC AND THE NEWS MEDIA**, AN AGENCY MAY ONLY CHARGE DUPLICATION COSTS.
- AN AGENCY MAY CHARGE **COMMERCIAL REQUESTERS** FOR SEARCH, REVIEW AND DUPLICATION COSTS.
- AN AGENCY MAY CHARGE **ALL OTHERS** FEES FOR SEARCH AND DUPLICATION COSTS INCURRED BY THE AGENCY.



FEES



- SEARCHING FOR RECORDS: \$16.00 TO \$40.00 PER HOUR BASED ON THE PAY GRADE OF THE PERSONNEL WHO PERFORMS THE SEARCH WITH THE FIRST HOUR FREE.
- CHARGES FOR INITIAL REVIEW OF DOCUMENTS: \$16.00 TO \$40.00 PER HOUR BASED ON THE PAY GRADE OF THE PERSONNEL WHO PERFORMS THE SEARCH WITH THE FIRST HOUR FREE.
- PHOTOCOPIES: \$0.25 PER PAGE.
- DOCUMENT CERTIFICATION: \$1.00 PER DOCUMENT TO CERTIFY A DOCUMENT AS A TRUE COPY OF AN AGENCY RECORD.
- THE DIRECT COST OF ANY SERVICE OR MATERIAL FOR WHICH NO FEE HAS BEEN ESTABLISHED.

[SEE DC OFFICIAL CODE § 532 AND 1 DCMR § 408]

DECISION LETTERS

NUTS & BOLTS OF FOIA

DECISION LETTERS

WHAT IS REQUIRED IN AN AGENCY DECISION LETTER?

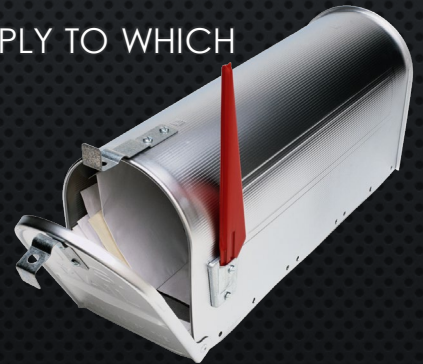
THE AGENCY DECISION LETTER SHOULD CONTAIN THE FOLLOWING INFORMATION:

1. WHETHER THE RECORD WAS RELEASED IN FULL, PARTIALLY RELEASED (REDACTED), OR WITHHELD IN FULL;
2. THE NAME AND CONTACT INFORMATION OF THE PERSON THAT MADE THE DECISION CONCERNING THE RELEASE OF RECORDS;
3. A REFERENCE TO THE D.C. CODE PROVISION THAT IS THE BASIS OF THE DECISION; AND
4. A STATEMENT ADVISING THE REQUESTER OF APPEAL RIGHTS.

DECISION LETTERS

Do Not Do: DECISION LETTERS

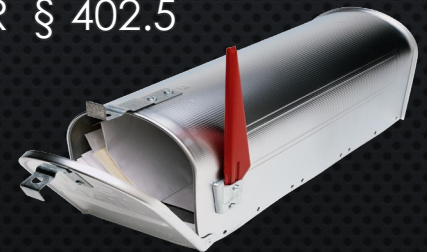
- DO NOT USE THE LANGUAGE “IF CONSTRUED AS A DENIAL” WHEN YOU ARE VERY CLEARLY DENYING THE REQUEST.
 - IT IS CONFUSING; MAKE SURE YOUR BOILERPLATE IS ACCURATE!
- DO NOT WITHHOLD MULTIPLE RECORDS USING MULTIPLE EXEMPTIONS, WITH A SINGLE OMNIBUS SENTENCE.
 - I.E. “AGENCY IS WITHHOLDING ALL RESPONSIVE RECORDS PURSUANT TO EXEMPTIONS 1, 2 AND 3.”
 - THE DCMR REQUIRES THAT YOU IDENTIFY WHICH EXEMPTIONS APPLY TO WHICH RECORDS. 1 DCMR § 407.2(b).



DECISION LETTERS

Do Not Do: DECISION LETTERS

- DO NOT ASSERT AN EXEMPTION WHEN YOU HAVE NOT CONDUCTED A SEARCH.
 - CHANGING ARGUMENTS ON APPEAL MAKES THE PROCESS LOOK BAD.
- DO NOT IGNORE A REQUEST FOR MONTHS AND RELY ON FOIA APPEALS BROUGHT BASED ON CONSTRUCTIVE DENIAL TO NOTIFY YOU THAT YOU ARE LATE.
 - WHEN THE RESPONSE DEADLINE COMES UP, YOU SHOULD BE ISSUING A LETTER EVEN IF THE SEARCH IS NOT YET COMPLETE. 1 DCMR 405.5
- DO NOT WAIT TO IDENTIFY AN OVERLY BROAD REQUEST.
 - IF THE REQUEST IS OVERLY VAGUE THEN YOU NEED TO REQUEST ADDITIONAL INFORMATION BEFORE YOU BEGIN YOUR SEARCH. *SEE* 1 DCMR § 402.5



CONCLUSION

NUTS & BOLTS OF FOIA

GOOD NEWS! DC FOIA IS AUTOMATED!

FOIAXPRESS CONTACT

THANG NGUYEN

IT SPECIALIST | CITYWIDE MESSAGING

OFFICE OF THE CHIEF TECHNOLOGY OFFICER

HELPDESK: 202-727-6272 | DESK: 202-478-5973

CELL: 202-304-7460



GOV

OFFICE OF OPEN GOVERNMENT

- THE OFFICE OF OPEN GOVERNMENT (OOG) IS AVAILABLE TO ASSIST YOU WITH ANY FOIA REQUEST.
- THE OOG ADVOCATES FOR FAIR AND EFFICIENT FOIA PROCESSING.
- THE DIRECTOR OF OOG SERVES AS THE CITY'S ADVISOR TO FOIA OFFICERS, AND PROVIDES FORMAL AND INFORMAL ADVICE TO AGENCIES SEEKING GUIDANCE AND COMPLIANCE



CONTACT INFORMATION

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THANK

YOU!