



**PRACTICE ADVISORY<sup>1</sup>**  
**Updated February 2017**

**FOIA FOR IMMIGRATION LAWYERS**

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## I. INTRODUCTION

The Freedom of Information Act (FOIA) is a law that gives you the right to access information from the federal government. FOIA can be a useful tool in your immigration practice, whether you are advocating for a particular client or seeking to gain information on general agency operations. This practice advisory provides general information about FOIA, explains how to file a FOIA request, identifies the types of information that is exempt under the Act, and outlines the administrative and federal court remedies available when a request has been partially or fully denied. General information about the policies of immigration-related agencies or components is provided in the Appendix.

## II. GENERAL FOIA INFORMATION

### What is the Freedom of Information Act?

The purpose behind FOIA is to promote open, transparent government.<sup>2</sup> Because “disclosure, not secrecy, is the dominant objective of the Act,” the statute is liberally construed in favor of disclosure of information.<sup>3</sup> FOIA generally states that any person has the right to request records or information from federal agencies. It also establishes deadlines by which an agency must respond. FOIA can be a helpful tool for you if you wish to obtain federal agency records on your clients. For instance, an immigration attorney may wish to utilize FOIA when he/she seeks:

- A copy of a client’s “A” file;
- Information on a client’s entries into and departures from the United States; or
- Information about an agency’s policies on a particular issue.

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.<sup>4</sup> For FOIA purposes, a “person” includes an individual, partnership, corporation, association, or public or private organization other than an agency.<sup>5</sup> The statute does not require that a requester be a U.S. citizen and in no way discriminates based on immigration status.<sup>6</sup>

An “agency” for purposes of FOIA includes any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the U.S. Government (including the Executive Office of the President), or any independent regulatory agency.<sup>7</sup> 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.<sup>8</sup>

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<sup>2</sup> *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 quotation marks omitted).

<sup>3</sup> *Id.* at 361.

<sup>4</sup> 5 U.S.C. § 552(a)(3).

<sup>5</sup> 5 U.S.C. § 551(2).

<sup>6</sup> See “Frequently Asked Questions,” FOIA.gov, <https://www.foia.gov/faq.html>.

<sup>7</sup> 5 U.S.C. § 552(f); see 5 U.S.C. § 551(1).

<sup>8</sup> 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

## What information does FOIA require agencies to disclose proactively?

Agencies are required to proactively disclose certain information, which is to say they must make these records available to the public even absent a specific request for them.<sup>9</sup> Proactive disclosures include:

- Final agency opinions and orders rendered in the adjudication of cases;
- Specific policy statements; and
- Certain administrative staff manuals.<sup>10</sup>

Many agencies devote a section of their websites to proactive FOIA disclosures.<sup>11</sup>

## What kind of information can I request under FOIA?

You can request any record that is not made public under the proactive disclosure provisions. However, simply requesting a record does not mean that the agency is required to disclose it. FOIA includes three exclusions and nine exemptions. Information that falls within an exclusion is categorically unavailable, while information that falls within an exemption may be withheld at the discretion of the agency. See [Section III, below](#). 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.<sup>12</sup>

## What information is excluded from FOIA disclosure?

There are three categories of law enforcement-related records that are entirely *excluded* from FOIA disclosure. FOIA permits an agency to respond to a request for such records as if the records do not exist—thus, if agencies are exercising their authority to exclude a record from FOIA disclosure, you may never know that these records exist.<sup>13</sup> The three categories of excluded records are:

- Records compiled for law enforcement purposes that involve a possible violation of criminal law, where the subject of the investigation/proceeding is not aware of its pendency and disclosure of the records could reasonably be expected to interfere with enforcement proceedings;
- Records relating to informants maintained by criminal law enforcement agencies when the requester is not the informant; and

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for each state, and makes them available at <http://www.nfoic.org/state-freedom-of-information-laws>.

<sup>9</sup> 5 U.S.C. § 552(a)(2).

<sup>10</sup> *Id.*

<sup>11</sup> 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>.

<sup>12</sup> 5 U.S.C. § 552(a)(3).

<sup>13</sup> Edwin Meese, *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act*, at 18, 29-30 (1987).

- Classified records maintained by the FBI pertaining to foreign intelligence, counterintelligence, or international terrorism.<sup>14</sup>

### **What if I am seeking information on third parties?**

If you are seeking information regarding third parties (e.g., a client), you should submit with your FOIA request either:

- Written authorization signed by the third party permitting disclosure of the records to you; or
- Proof that the third party is deceased (e.g., death certificate, obituary).<sup>15</sup>

A declaration by the subject of the request will serve as authorization permitting disclosure. The particular agency may have an authorization form that can be used.<sup>16</sup>

### **How do I make a FOIA request?**

Depending on the agency from which you are requesting information, you either may make the request using a form that the agency has provided (for example, form G-639 for FOIA requests made to USCIS), or by a letter sent to the agency. Each agency has specific rules about where to send FOIA requests, and many have published regulations on FOIA disclosure.<sup>17</sup>

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<sup>14</sup> 5 U.S.C. §§ 552(c)(1)-(3).

<sup>15</sup> DHS previously made the submission of third party authorization mandatory. Pursuant to a regulatory change effective December 22, 2016, third party authorization is no longer 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). Third party 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).

<sup>16</sup> For example, USCIS recognizes an authorization that is submitted on Form G-639, block 3, or through a properly executed Form G-28. *USCIS FOIA Request Guide*, at 7, [https://www.uscis.gov/sites/default/files/USCIS/About%20Us/FOIA/uscisfoiarequestguide\(10\).pdf](https://www.uscis.gov/sites/default/files/USCIS/About%20Us/FOIA/uscisfoiarequestguide(10).pdf).

<sup>17</sup> *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).

## What should I include in my FOIA request?

Your request should include detailed information about the records sought, such as the date, title or name, author, recipient, and subject matter of the record.<sup>18</sup> 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. If an agency determines that your request does not describe records sufficiently, it may identify additional information that is needed or explain why your request is otherwise insufficient, or it may administratively close the request.<sup>19</sup>

## When should I expect a response to my FOIA request?

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.”<sup>20</sup> The 20-day period does not begin until the request is received by the FOIA office that maintains the records. An agency is not required to send the actual documents by the 20th business day; it simply needs to inform the requester of its determination about whether to comply with the request, notify the requester of the right to appeal its determinations, and then make the records “promptly available.”<sup>21</sup>

An agency may have an additional 10 days (or a total of 30 days) to respond in “unusual circumstances.” The statute specifies that “unusual circumstances” may be 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.<sup>22</sup>

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<sup>18</sup> 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.”).

<sup>19</sup> See, e.g., *USCIS FOIA Request Guide*, supra note 16, at 11 n.17. Pursuant to a regulatory change effective December 22, 2016, DHS has adopted a new policy that permits it to administratively close requests that it determines do not “adequately describe the records sought.” 6 C.F.R. § 5.3(c). In response to comments asking DHS to seek clarification before administratively closing a request (as required under the previous regulations), DHS refused, responding that “[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.” 81 Fed. Reg. 83,625, 83,627 (Nov. 22, 2016). DHS has additionally indicated that it will not close a request without notice. *Id.* In light of this change, you should ensure that your request is worded as specifically as possible.

<sup>20</sup> 5 U.S.C. §§ 552(a)(6)(A)(i), (B)(i).

<sup>21</sup> 5 U.S.C. § 552(a)(6)(C)(i).

<sup>22</sup> 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”).

If more than 10 extra days are needed, the agency will notify the requester in writing and provide an opportunity for the requester to modify or limit the scope of the request, or arrange for an alternate time frame for completion.<sup>23</sup>

### **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.<sup>24</sup> 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.<sup>25</sup> 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 records.<sup>26</sup>

### **Can I get my fees waived?**

All federal agencies will waive fees for the processing of FOIA requests where the component determines that the disclosure of the records requested will be in the public interest. To get a fee waiver, you must demonstrate that:

- Disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of the government, and
- Disclosure of the information is not primarily in the commercial interest of the requester.<sup>27</sup>

To request a fee waiver, include the waiver request in your FOIA request and explain why you are entitled to a fee waiver.

## **III. FOIA EXEMPTIONS**

Although agencies must make records “promptly available” upon receipt of a proper FOIA request, there are nine exemptions from this general rule. The exemptions discussed below are

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<sup>23</sup> 5 U.S.C. § 552(a)(6)(B)(ii). Requesters should be aware that USCIS routinely fails to meet either the 20 day or 30 day timeline. If a client is currently in removal proceedings, a request for his or her “A” file generally will be processed within six to eight weeks. Without an upcoming hearing, requests for “A” files may take as long as six months. *See Check Status of Request*, USCIS, <https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/foia-request-status-check-average-processing-times/check-status-request>.

<sup>24</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(I).

<sup>25</sup> *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).

<sup>26</sup> 5 U.S.C. § 552(a)(4)(A)(viii).

<sup>27</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

those most relevant to immigration law.<sup>28</sup> The exemptions are to be narrowly construed and the burden is on the agency to demonstrate that it has withheld information subject to an exemption.<sup>29</sup> Furthermore, the exemptions are discretionary—meaning agencies may, but are not required to, withhold covered information.<sup>30</sup> Exemptions may apply to part or all of a document; when a document contains both exempt and non-exempt material, an agency is required to disclose “any reasonably segregable portion” of the document.<sup>31</sup> When an agency determines that material is exempt from disclosure, it must indicate on the released portion of the record the non-disclosed material (typically in the form of a black box covering the redacted material) and list the specific exemption that covers the material.<sup>32</sup> A requester may appeal an agency’s decision to claim an exemption. See [Sections IV](#) and [V](#) below.

- **EXEMPTION 2: Records “related solely to the internal personnel rules and practices of an agency.”**<sup>33</sup>

Exemption 2 protects records relating to internal agency rules and practices that relate solely to personnel. From 1981 until 2011, this exemption was interpreted to cover a wide variety of “predominantly internal” agency rules and practices, which were broadly split into “Low 2” exemptions for trivial administrative matters and “High 2” exemptions for agency rules and practices whose disclosure would significantly risk circumvention of the law.<sup>34</sup> However, in 2011, the Supreme Court in *Milner v. Department of the Navy* struck down this interpretation of Exemption 2, narrowing it considerably.<sup>35</sup> Following *Milner*, in order to avoid disclosing material previously considered exempt under “High 2” as involving a risk of circumvention of the law, an agency now may attempt to claim that the material is exempt under [Exemption 7\(E\)](#) (internal law enforcement materials).<sup>36</sup>

Under *Milner*, agencies may only exempt records if the records satisfy a three part test which corresponds directly to the statutory language. First, the information must be related to personnel rules and practices, i.e., “records relating to issues of employee relations and human resources.”<sup>37</sup> Second, this information must relate solely, defined as “exclusively or only,” to the personnel

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<sup>28</sup> This practice advisory does not discuss Exemptions 1, 4, 8, or 9 because they rarely—if ever—are raised in immigration-related cases. 5 U.S.C. §§ 552(b)(1), (4), (8), and (9).

<sup>29</sup> 5 U.S.C. § 552(a)(4)(B).

<sup>30</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

<sup>31</sup> 5 U.S.C. § 552(b).

<sup>32</sup> *Id.*

<sup>33</sup> 5 U.S.C. § 552(b)(2).

<sup>34</sup> See generally *Crooker v. ATF*, 670 F.2d 1051 (D.C. Cir. 1981); *Stein v. DOJ*, 134 F. Supp. 3d 457, 470 (D.D.C. 2015) (summarizing history of Exemption 2’s interpretation).

<sup>35</sup> *Milner v. Dept. of the Navy*, 562 U.S. 562 (2011).

<sup>36</sup> *Id.* at 575 (“We cannot think of any document eligible for withholding under Exemption 7(E) that the High 2 reading does not capture”); see also *Jordan v. DOJ*, 668 F.3d 1188, 1200 (10th Cir. 2011) (“Exemption 7E is essentially the same as former High 2, with the added requirement that material be ‘compiled for law enforcement purposes.’”).

<sup>37</sup> *Milner*, 562 U.S. at 581.



rules and practices at issue.<sup>38</sup> Third, the information must be internal, i.e., "the agency must typically keep the records to itself for its own use."<sup>39</sup>

Practitioners who request records of internal CBP or ICE protocols may potentially receive a response invoking Exemption 2. If so, consider the broader context of the information to evaluate the strength of the agency's assertion that the records are both solely related to personnel and kept internally for their own use.

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

Exemption 3 applies to records exempted from disclosure by other statutes.<sup>40</sup> These other statutes are divided into three categories. Subsection A(i) includes statutes that absolutely prohibit disclosure of material (leaving no room for discretion). Subsection A(ii) includes statutes which "establish[] particular criteria for withholding" or "refer[] to particular types of matters to be withheld." In other words, Subsection A(ii) covers statutes which "necessarily contemplate some exercise of administrative discretion" in withholding material.<sup>41</sup> Subsection (B) includes any statute enacted after the date of enactment of the Open FOIA Act of 2009 which specifically cites to Exemption 3.

Exemption 3 is generally triggered by federal statutes,<sup>42</sup> but may be triggered by an executive order that is issued pursuant to a grant of authority in a federal statute. 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.<sup>43</sup> The Open FOIA Act of 2009 requires all statutes enacted after the 2009 Act to "specifically cite to" Exemption 3 in order to fall within the exemption.<sup>44</sup> 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.<sup>45</sup>

With respect to all such non-FOIA statutes, a court will consider whether the non-disclosure provision is mandatory or discretionary.<sup>46</sup> If the statute's non-disclosure provision is mandatory,

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<sup>38</sup> *Id.* at 571 n.4.

<sup>39</sup> *Id.*

<sup>40</sup> 5 U.S.C. § 552(b)(3) (as amended by the Open FOIA Act of 2009).

<sup>41</sup> *Association 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)).

<sup>42</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945 (D.C. Cir. 1979).

<sup>43</sup> *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").

<sup>44</sup> 5 U.S.C. § 522(b)(3)(B).

<sup>45</sup> *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.").

<sup>46</sup> *Medina-Hincapie v. Dep't of State*, 700 F.2d 737, 740 (D.C. Cir. 1983).

subpart (A)(i) applies and the only question remaining is whether the material falls within the scope of the provision.<sup>47</sup> If the statute's nondisclosure provision is discretionary, it falls under subpart (A)(ii) and the court will interpret the relevant nondisclosure provision and determine whether the agency properly invoked its discretion.<sup>48</sup> If the statute "establishes particular criteria for withholding," the court will determine whether the agency properly followed those criteria.<sup>49</sup>

Exemption 3 has been invoked in relationship to INA § 222(f), which limits disclosure of Department of State and diplomatic and consular records "pertaining to the issuance or refusal of visas or permits to enter the United States."<sup>50</sup> 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."<sup>51</sup> If you encounter an agency invoking Exemption 3 through INA § 222(f) to withhold material, determine whether or not the record actually pertains to any past or pending request for a visa, as section 222(f) has been limited to such visas.<sup>52</sup>

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<sup>47</sup> 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).

<sup>48</sup> 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.").

<sup>49</sup> *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).

<sup>50</sup> 8 U.S.C. § 1202(f).

<sup>51</sup> 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).

<sup>52</sup> Litigants have been successful in obtaining withheld records that were contained within consular databases (in this case, a record regarding a client's activities within immigration detention that was stored in the State Department's Consular Lookout and Support System visa database); the court relied on the fact that "there is no past or pending visa application," reasoning that the mere presence of the data in a consular database used to make determinations regarding visas was insufficient to block disclosure. *Immigration Justice Clinic of the Benjamin N. Cardozo Sch. of Law v. Dep't of State*, No. 12 Civ. 1874, 2012 WL 5177410, at \*1-2 (S.D.N.Y. Oct. 18, 2012).

- **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.”<sup>53</sup>**

Exemption 5 protects agency memoranda that traditionally would be protected in litigation. Information must satisfy two conditions to be withheld under Exemption 5. First, it must be generated by an agency of the federal government.<sup>54</sup> The Supreme Court has held that an outside consultant hired by an agency can satisfy the “agency” requirement, reasoning that “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.”<sup>55</sup> Second, it must be information that a private party would be unable to discover in litigation.<sup>56</sup> This second condition encompasses the three most common civil discovery privileges: the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.<sup>57</sup>

The deliberative process privilege protects documents that are (1) pre-decisional and, (2) deliberative.<sup>58</sup> Its “object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make [these decisions] within the Government.”<sup>59</sup> A document is pre-decisional if it encompasses recommendations or opinions on legal or policy matters created prior to the adoption of an official agency policy.<sup>60</sup> An agency need not point to a subsequently issued final decision to demonstrate that a document is pre-decisional; it merely needs to show that the document at issue played a role in the agency’s deliberative process.<sup>61</sup> Similarly, a document generally retains its pre-decisional classification even after a final agency decision is made.<sup>62</sup> 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.<sup>63</sup> 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

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<sup>53</sup> 5 U.S.C. § 552(b)(5).

<sup>54</sup> *Dep’t of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 8 (2001).

<sup>55</sup> *Id.* at 11 (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).

<sup>56</sup> *Klamath Water Users Protective Assn.*, 532 U.S. at 8.

<sup>57</sup> *Id.*; *Tax Analysts v. IRS*, 294 F.3d 71, 76 (D.C. Cir. 2002).

<sup>58</sup> *Public Citizen, Inc. v. Office of Mgm’t and Budget*, 598 F.3d 865, 875 (D.C. Cir. 2009).

<sup>59</sup> *Klamath Water Users Protective Ass’n*, 532 U.S. at 8-9.

<sup>60</sup> *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

<sup>61</sup> *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.”).

<sup>62</sup> *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979).

<sup>63</sup> *Sears, Roebuck*, 421 U.S. at 161.

the memo had been incorporated into its subsequently adopted policy regarding the authority of local law enforcement officers to enforce civil immigration laws.<sup>64</sup>

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.”<sup>65</sup> Although facts underlying opinions generally may be disclosed, they are protected if their disclosure would indirectly reveal the agency’s deliberation process. For example, in *Mapother v. Dep’t of Justice*, the court held that a 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.<sup>66</sup> While the report contained mostly factual information, this information had been extracted from larger documents and this process indirectly revealed the agency’s assessment of the information that was most important to its decision.<sup>67</sup>

- **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.”<sup>68</sup>**

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.” 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.”<sup>69</sup> Lower courts consequently have refined the types of information that are considered “similar files,” excluding records that

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<sup>64</sup> *Nat’l Council of La Raza v. DOJ*, 411 F.3d 350 (2d Cir. 2005).

<sup>65</sup> *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975); *see also 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); *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).

<sup>66</sup> 3 F.3d at 1537 (explaining that the deliberative process privilege “serves to protect the deliberative process itself”).

<sup>67</sup> *Id.* at 1539-40.

<sup>68</sup> 5 U.S.C. § 552(b)(6).

<sup>69</sup> *Dep’t of State v. Washington Post. Co.*, 456 U.S. 595, 602 (1982).

are predominantly related to the business of government,<sup>70</sup> or contain information which cannot be linked to any particular individual.<sup>71</sup>

Once the information in question passes the threshold test, the court examines whether disclosure would constitute a “clearly unwarranted invasion of personal privacy.” The first step here is to determine whether an individual has a substantial privacy interest in the information.<sup>72</sup> A substantial privacy interest for purposes of Exemption 6 is “anything greater than a *de minimis* privacy interest.”<sup>73</sup> The information need not be especially intimate or embarrassing to qualify as a privacy interest; generally, 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, such as criminal or medical history, qualifies for Exemption 6 protection.<sup>74</sup> 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.<sup>75</sup> Privacy interests also may exist even where there is no direct disclosure of identifying information, so long as there is an obvious causal chain between the disclosure and identifying information.<sup>76</sup>

Where there is no valid expectation of privacy, there will be no privacy interest at stake for the purposes of Exemption 5. 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.<sup>77</sup> Similarly, there is no privacy interest in

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<sup>70</sup> 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).

<sup>71</sup> 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”).

<sup>72</sup> *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763-65 (1989).

<sup>73</sup> *Multi Ag. Media LLC v. U.S. Dep’t of Agric.*, 515 F.3d 124, 1229 (D.C. Cir. 2008).

<sup>74</sup> 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).

<sup>75</sup> *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).

<sup>76</sup> *National Ass’n of Retired Federal Employees v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989) (“Where there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain.”).

<sup>77</sup> Availability of Information, 5 C.F.R. 293.311.

information already in the public domain.<sup>78</sup> Individuals who are deceased also are seen to have categorically diminished privacy interests.<sup>79</sup>

If the court determines that there is a privacy interest at stake, it will then weigh that interest with any public interest in disclosure.<sup>80</sup> The public interest must be significant; “the requester must show . . . an interest more specific than having the information for its own sake.”<sup>81</sup> 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.”<sup>82</sup> Where there is no significant public interest in disclosure, the information should be withheld under Exemption 6.<sup>83</sup> Where a significant public interest in disclosure outweighs the privacy interest, the information should be disclosed.<sup>84</sup> 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.<sup>85</sup>

In the immigration context, courts have weighed public versus private interests in a variety of ways. For example, the D.C. Circuit Court rejected a blanket redaction of the names of immigration judges who have had complaints filed against them.<sup>86</sup> In contrast, a district court upheld USCIS’s redaction of information regarding USCIS employees, including names, signatures, and database codes, notwithstanding plaintiff’s claim that the records would show USCIS misconduct in its unreasonable delay in notifying him of its asylum determination.<sup>87</sup>

- **EXEMPTION 7: Records or information compiled for law enforcement purposes.**<sup>88</sup>

Records protected under Exemption 7 must meet two requirements. First, the information must be compiled for law enforcement purposes. Once the information passes this threshold, the

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<sup>78</sup> 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).

<sup>79</sup> See, e.g., *Davis v. DOJ*, 460 F.3d 92, 97-98 (D.C. Cir. 2007).

<sup>80</sup> *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).

<sup>81</sup> *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 158 (2004).

<sup>82</sup> *Id.* at 172-173.

<sup>83</sup> See *Horner*, 879 F.2d at 879 (declaring that “something, even a modest privacy interest, outweighs nothing every time.”).

<sup>84</sup> *Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994).

<sup>85</sup> 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 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).

<sup>86</sup> *Am. Immigration Lawyers Ass’n v. EOIR*, 830 F.3d 667, 674-76 (D.C. Cir. 2016).

<sup>87</sup> *Gosen v. USCIS*, 75 F. Supp. 3d 279, 289-90 (D.D.C. 2014).

<sup>88</sup> 5 U.S.C. § 552(b)(7).

disclosure of the information must have—or must reasonably be expected to have—one of six enumerated effects.<sup>89</sup> The most relevant of these effects is discussed below.

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,<sup>90</sup> state<sup>91</sup> and foreign laws,<sup>92</sup> and national security matters.<sup>93</sup>

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.<sup>94</sup> 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.<sup>95</sup>

To determine whether a record is compiled for law enforcement purposes, the “emphasis [is] on the contents, and not the physical format of documents.”<sup>96</sup> Thus, information originally compiled

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<sup>89</sup> In relevant part, the statute reads, “[FOIA disclosure] does not apply to [ ] records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (E) 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.”

<sup>90</sup> 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).

<sup>91</sup> *Shaw v. FBI*, 749 F.2d 58, 64 (D.C. Cir. 1984) (federal investigation into commission of state crimes was “for law enforcement purposes”).

<sup>92</sup> *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).

<sup>93</sup> *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).

<sup>94</sup> 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).

<sup>95</sup> 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).

<sup>96</sup> *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

for a law enforcement purpose does not lose Exemption 7 protection if it is later recompiled into a non-law enforcement record.<sup>97</sup> However, information that is not initially obtained for law enforcement purposes may qualify for Exemption 7 protection if subsequently it is compiled for a law enforcement purpose.<sup>98</sup>

Once it is determined that the information in question was compiled for law enforcement purposes, the court turns to Exemption 7's second requirement: that the disclosure of such documents must have, or must reasonably be expected to have, one of the six enumerated effects that Exemption 7 seeks to prevent, listed in Exemption 7(A)-(F).

Exemption 7(E) is most relevant here as it is frequently encountered 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.”<sup>99</sup> Among the immigration-related records that courts have withheld under Exemption 7(E) are DHS criteria for ranking the priority of immigration enforcement,<sup>100</sup> fraud indicators used to evaluate H1-B applications,<sup>101</sup> CBP investigative memoranda,<sup>102</sup> documents relating to planning and carrying out ICE raids,<sup>103</sup> and CBP secondary inspection procedures at airports.<sup>104</sup>

Although Exemption 7(E) is broad, it is limited to “techniques and procedures” as well as “guidelines.” Because the statute is phrased in the disjunctive, 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.<sup>105</sup> Where it does apply, agencies do not

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submitted for a Congressional investigation was entitled to less protection than the original because the duplicate hadn't been used for the investigation).

<sup>97</sup> *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.”).

<sup>98</sup> *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989).

<sup>99</sup> 5 U.S.C. § 552(b)(7)(E). Where records contain names or identities of third parties, the agency may also invoke Exemption 7(C) for information which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” If your client is the subject of an active, ongoing law enforcement action, an agency may also withhold records under Exemption 7(A) for records which “could reasonably be expected to interfere with enforcement proceedings.”

<sup>100</sup> *Allard K. Lowenstein Int'l Human Rights Project v. DHS*, 626 F.3d 678, 681-82 (2d Cir. 2010).

<sup>101</sup> *Am. Immigration Lawyers Ass'n v. DHS*, 852 F. Supp. 2d 66, 77-80 (D.D.C. 2012).

<sup>102</sup> *Ahmed v. USCIS*, No. 11-CV-6230 CBA, 2013 WL 27697, at \*6 (E.D.N.Y. Jan. 2, 2013).

<sup>103</sup> *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).

<sup>104</sup> *Bishop v. DHS*, 45 F. Supp. 3d 380, 392 (S.D.N.Y. 2014).

<sup>105</sup> *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)



have to prove that circumvention *will* happen if the record is disclosed, only that the disclosure creates a “risk” of circumvention.<sup>106</sup>

Garden variety legal analysis—for example, summaries and analyses of pertinent case law—is not considered a technique, procedure, or guideline for purposes of Exemption 7(E).<sup>107</sup> Furthermore, courts have generally required that the technique or procedure not be well known to the public.<sup>108</sup> However, courts have held that, even when a procedure or technique is known to the public, the agency need not disclose *how* it uses the technique.<sup>109</sup> Courts have also held that publicly known techniques and procedures can be withheld from the public if disclosure would reduce or nullify their effectiveness.<sup>110</sup>

If you encounter an agency invoking Exemption 7(E), consider the context of the record you have requested. Is it 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?

#### IV. ADMINISTRATIVE APPEALS

The requester may appeal an adverse determination to the head of the agency or a designated department within the agency. Appeals must be made within a period of time determined by the agency, if the agency has set such a timeframe.<sup>111</sup> An appeal must be processed within 20 days, with the same limits and conditions as the original request.<sup>112</sup>

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

- First, you can challenge the agency’s delay in responding. This might prompt the agency to produce the documents more quickly or at least give you an estimate of when to expect the documents.

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(requiring showing of risk of circumvention for techniques and procedures); *Davin v. DOJ*, 60 F.3d 1043, 1064 (3d Cir. 1995) (same).

<sup>106</sup> *Mayer Brown, LLP v. IRS*, 562, F.3d 1190, 1192-93 (D.C. Cir. 2009).

<sup>107</sup> *Id.* at 1191 n.1.

<sup>108</sup> *See, e.g., Ruggiero*, 257 F.3d at 551 (holding that Exemption 7(E) "protects [only] techniques and procedures not already well-known to the public"); *see also*, H. Rep. No. 93-1380 at 229 (September 25, 1975).

<sup>109</sup> *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).

<sup>110</sup> *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).

<sup>111</sup> For example, the Department of Homeland Security requires that an appeal be filed within 90 days. 6 C.F.R. § 5.8(a)(1).

<sup>112</sup> 5 U.S.C. § 552(a)(6)(A)(ii).

- Second, you can 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.<sup>113</sup>
- Third, you can challenge any redactions that the agency may have made based upon the statutory exemptions. See [Section III](#) above.
- Finally, you can appeal 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.<sup>114</sup>

## 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.

### **What possible outcomes are there in District Court?**

If the district court determines that information was improperly withheld, it will order the agency to produce the records.<sup>115</sup> Generally, FOIA does not provide for other relief.<sup>116</sup>

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<sup>113</sup> In this situation, you may also consider filing a new FOIA request for the FOIA office’s documents relating to your original FOIA request, including processing notes and staffing sheets. USCIS in particular uses a “FOIA Search Staffing Sheet” for all FOIA searches, which includes time spent on the search, search terms used, relevant exemptions, and so forth. This sheet may be requested in a separate FOIA, and may contain pertinent information regarding the thoroughness of a search. See Jonathan R. Cantor, *2013 Chief Freedom of Information Act Officer Report to the Attorney General of the United States*, DHS 18 (2013), available at [https://www.dhs.gov/sites/default/files/publications/Final%20DHS%202013-chief-foia-officer-report-final\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/Final%20DHS%202013-chief-foia-officer-report-final_0.pdf) (summarizing FOIA procedures for all DHS agencies).

<sup>114</sup> 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.”).

<sup>115</sup> 5 U.S.C. § 552(a)(4)(B).

<sup>116</sup> See *Williams & Connolly v. SEC*, 662 F.3d 1240, 1245 (D.C. Cir. 2011) (“FOIA is neither a substitute for criminal discovery [] nor an appropriate means to vindicate discovery abuses). Practitioners who face repeated delays and violations of FOIA by an agency may be able to bring a “pattern or practice” suit. The Ninth Circuit recently addressed such a suit in *Hajro v. USCIS*, 811 F.3d 1086 (9th Cir. 2016) (holding that the plaintiff had standing to bring a “pattern or practice” claim but remanding on evidentiary grounds). There, the Court made clear that an agency’s repeated failure to timely respond to an attorney’s request “is sufficient injury under FOIA” to bring a pattern or practice claim, and an attorney who filed FOIA requests with this agency would have standing to bring such a claim. *Id.* at 1104-1105.

## Who are the plaintiffs and defendants in a FOIA lawsuit?

The plaintiff in a FOIA lawsuit is the FOIA requester.<sup>117</sup> 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 subsequent standing to bring a FOIA challenge.<sup>118</sup> The defendant in a FOIA lawsuit is the agency to which the requests were made, not the agency head or any other agency official.<sup>119</sup>

## When can I file in District Court?

There is a six year statute of limitations for challenging a FOIA decision.<sup>120</sup> The six year period begins when administrative remedies have been exhausted.<sup>121</sup> Before applying for judicial review, a requester generally *must* exhaust administrative remedies by filing an administrative appeal.<sup>122</sup> See [Section IV](#), above. Following an adverse determination of an administrative appeal, the requester may challenge the agency’s decision in federal district court.<sup>123</sup>

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.<sup>124</sup> 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.<sup>125</sup>

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<sup>117</sup> 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”).

<sup>118</sup> 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).

<sup>119</sup> 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”).

<sup>120</sup> 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).

<sup>121</sup> *Id.* at 56-57 (holding that a FOIA suit “first accrues” under the statute of limitations when all administrative remedies are exhausted).

<sup>122</sup> 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).

<sup>123</sup> 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/>.

<sup>124</sup> 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)]’”).

<sup>125</sup> 5 U.S.C. § 552(a)(6)(C)(i).

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,<sup>126</sup> comply with the agency's proof of identity regulations,<sup>127</sup> or pay required fees.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup>

### **How will the district court determine if the agency properly denied my request?**

District courts review an agency's invocation of an exemption de novo.<sup>131</sup> They have the authority to conduct in camera review of agency records to determine whether information was properly withheld under an exemption.<sup>132</sup> While the agency has the burden of justifying the use of an exemption, a court is to give substantial weight to certain agency affidavits.<sup>133</sup>

Discovery in FOIA litigation is limited.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> 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."<sup>137</sup>

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<sup>126</sup> *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").

<sup>127</sup> *Ramstack v. Dep't of the Army*, 607 F. Supp. 2d 94, 102-103 (D.D.C. 2009).

<sup>128</sup> *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).

<sup>129</sup> *Voinche v. U.S. Dep't of the Air Force*, 983 F.2d 667, 669 (5th Cir. 1993).

<sup>130</sup> 5 U.S.C. § 552(a)(4)(B).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801 (1984).

<sup>135</sup> *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

<sup>136</sup> *Dellums v. Powell*, 642 F.2d 1351, 1360 (D.C. Cir. 1980).

<sup>137</sup> *Hinton v. DOJ*, 844 F.2d 126, 129 (3d Cir. 1988).

## 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.<sup>138</sup> 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.<sup>139</sup>

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."<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> Thus, where an agency voluntarily decides to release previously withheld records in response to a lawsuit, a plaintiff may be eligible for fees.<sup>143</sup>

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."<sup>144</sup> 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.

### **APPENDIX: SPECIFIC AGENCY INFORMATION**

The following Appendix lists basic information about immigration-related agencies. Practitioners are strongly encouraged to verify agency policies prior to submitting a FOIA request. If you are

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<sup>138</sup> 5 U.S.C. § 552(a)(4)(E)(i).

<sup>139</sup> *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).

<sup>140</sup> 5 U.S.C. § 552(a)(4)(E)(ii).

<sup>141</sup> *See, e.g., Citizens for Responsibility & Ethics in Wash. v. DOJ*, 820 F. Supp. 2d 39, 47 (D.D.C. 2011).

<sup>142</sup> *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).

<sup>143</sup> *See, e.g., Judicial Watch v. DOJ*, 878 F. Supp. 2d 225, 231-232 (D.D.C. 2012).

<sup>144</sup> *Davy v. CIA*, 550 F.3d 1155, 1159 (D.C. Cir. 2008).

unable to determine the DHS component to which to submit 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 records you want.

- **US Citizenship and Immigration Services (USCIS)**

When seeking a client's A File, submit the FOIA request to USCIS in the manner detailed on [its website](#).<sup>145</sup> FOIA request should be made in writing or on Form G-639.<sup>146</sup> USCIS maintains a three track system for processing FOIA requests:

- **Track I: Simple requests**, for when the requester needs only one or a few documents;
- **Track II: Complex inquiries** that necessitate additional search and review time;
- **Track III: Notice to Appear Track** for individuals who are currently in immigration court in front of an immigration judge.

Average processing times for each track are posted on USCIS's website.<sup>147</sup> For Track III requests, you *must* include a copy of a hearing notice or a notice to appear showing an upcoming hearing on a date occurring after your request. Otherwise your request will be placed in Track II, which may significantly delay your receipt of the client's A File. Once you are assigned a tracking number, you may [check the status of your request online](#).

- **Customs and Border Protection (CBP)**

Documents that are frequently requested from CBP include records of travel to and from the United States, secondary searches or travel-related issues, and records of general Border Patrol operations and activities.<sup>148</sup> The best option for filing a FOIA request with CBP is to do it through CBP's [FOIAOnline system](#).<sup>149</sup> Once you submit a request online, you will be notified via email when records become available. If you wish to submit your request via mail, you may do so at the address [provided by CBP on its website](#).

- **Immigration and Customs Enforcement (ICE)**

Information that may be sought from ICE includes records on noncitizens or detainees (including records of arrests), information regarding human trafficking or smuggling, records of ICE investigations, information and statistics on specific detention facilities, and information

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<sup>145</sup> *How to File a FOIA/PA Request*, USCIS, <https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/how-file-foiapa-request>.

<sup>146</sup> Form G-639, available at <https://www.uscis.gov/sites/default/files/files/form/g-639.pdf>.

<sup>147</sup> *Check Status of Request*, USCIS, <https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/foia-request-status-check-average-processing-times/check-status-request>.

<sup>148</sup> For a list of records available through CBP FOIA, see *What Records Can CBP Provide Under FOIA*, CBP, <https://www.cbp.gov/site-policy-notices/foia/records>.

<sup>149</sup> *FOIAOnline*, CBP, <https://foiaonline.regulations.gov/foia/action/public/home>.

regarding ICE contracts. To submit a request to ICE, either use their [online FOIA Request Form](#) or send a written request to the [address provided on its website](#) or at [ICE-FOIA@dhs.gov](mailto:ICE-FOIA@dhs.gov).<sup>150</sup>

- **Executive Office for Immigration Review (EOIR)**

Information that may be sought from EOIR includes any immigration court records on a client, including transcripts of hearings, as well as agency statistics and policies. To file a request with EOIR, submit a request in writing to either the address [provided on EOIR's website](#) or to [EOIR.FOIARequests@usdoj.gov](mailto:EOIR.FOIARequests@usdoj.gov).<sup>151</sup> EOIR prefers that FOIA requests be submitted along with Form DOJ-361, Certificate of Identity.<sup>152</sup>

- **Department of Homeland Security (DHS)**

Information that may be sought from the Department of Homeland Security includes information from any of its specific components, including data from the Office of Biometric Identity Management (formerly US-Visit), the agency which maintains biometric entry records.<sup>153</sup> To file a request with DHS, submit a request via [their online system](#). A FOIA request filed online with this form will be forwarded to the component which you select. DHS has also made [a mobile app](#) available for both Apple and Android devices. DHS also makes available a list of all the FOIA contacts of its components if you prefer to submit a request in writing.<sup>154</sup>

- **U.S. Department of State (DOS)**

Information that may be sought from the Department of State includes information about consular processing, interactions with consular officials, and data on passport applications. The Department of State also maintains records of visa applications.<sup>155</sup> To file a request with the Department of State, either use [their online form](#), or submit a manual request following the instructions they [provide on their website](#).

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<sup>150</sup> *Submitting FOIA Request*, ICE, <https://www.ice.gov/foia/request>.

<sup>151</sup> *Freedom of Information Act*, EOIR, <https://www.justice.gov/eoir/foia-facts>.

<sup>152</sup> Form DOJ-361, [https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/cert\\_ind.pdf](https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/cert_ind.pdf).

<sup>153</sup> *Freedom of Information Act*, DHS, <https://www.dhs.gov/freedom-information-act-foia>.

<sup>154</sup> *FOIA Contact Information*, DHS, <https://www.dhs.gov/foia-contact-information>.

<sup>155</sup> See [Section III: Exemption 3](#) above regarding INA § 222(f)'s limitation on disclosure of information "pertaining to the issuance or refusal of visas." See also *How to Request Visa Records*, Dep't of State, <https://foia.state.gov/Request/Visa.aspx#Step-2> ("You should be aware that information the Department is allowed to release is severely limited and visa records are generally exempt from disclosure under the (b)(3) exemption to the FOIA.").