The Contractor's Secret Weapon: Using FOIA When Asserting a Claim

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To paraphrase Sir Francis Bacon, "information is power."[1] Those who collect and analyze as much relevant information as possible often make more informed decisions, and generally are in a more commanding position. The converse also is true. Those with less information generally have less power because their analysis is hamstrung by a potentially incomplete and clouded picture.

When preparing an affirmative claim, government contractors frequently fall somewhere in between these two positions. Although contractors generally recognize when they have suffered harm due to an adverse government action, they do not always possess all the facts necessary to fully assess the viability of a potential claim, or even to recognize that a substantive basis for recovery may exist. Sometimes claims are raised years after the initial actions establishing entitlement take place. Memories fade, employees leave, and documents aren't always retained. And given the fears associated with facing a potential fraud counterclaim or forfeiture, contractors may be hesitant to allege certain facts or raise certain arguments if they are not fully supported by documents.

However, unlike contractors in the commercial space, those contracting with the federal government have an effective and relatively inexpensive tool at their fingertips to obtain pre-litigation discovery: the Freedom of Information Act (FOIA). Through FOIA, contractors can access pertinent information in a cost-effective manner prior to submitting a claim, and use that information to their advantage, e.g., to support their claim or to counter any potential government defenses. They also can use this information to assess whether a valid claim even exists in the first instance.

The first section of this article provides an overview of the weapon we call FOIA—from making a request to litigating a dispute under the statute. The second section discusses how a contractor can use FOIA to its advantage when preparing and asserting an affirmative claim against the government. In the final section, we offer a few practical tips for using FOIA effectively to obtain pre-litigation discovery.

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The Freedom of Information Act—A Primer

In a nutshell, FOIA provides a statutory right of access to federal agency records, with nine limited exceptions.[2] Enacted in 1966, its purpose "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[3] In other words, FOIA is "a means for citizens to know 'what their government is up to.'"[4] To accomplish this purpose, the law requires agencies to publish information about their rules and procedures in the *Federal Register*,[5] make certain records about final agency opinions and statements of policy available for public inspection and copying,[6] and, most significantly, respond to requests for agency records made by individual requesters.[7]

The Who, What, and Where of FOIA Requests

As discussed below, FOIA is such a formidable weapon, in part, because there are relatively few restrictions on who can submit requests, to whom those requests can be directed, what can be requested, and where the requests must be directed.

Who? FOIA permits "any person" to make a request for agency records. Borrowing from the broad definition of "person" included in the Administrative Procedure Act,[8] courts have interpreted "any person"—for the purposes of a FOIA request—to include individuals, partnerships, corporations, associations, and even aliens and foreign government agencies.[9]

FOIA also adopts a broad definition of the term "agency," allowing requests to be submitted to any agency within the executive branch, including independent regulatory agencies and select components of the Executive Office of the President.[10]

What? Courts also have adopted a broad definition for the term "records," defining the term to include paper documents as well as machine-readable materials.[11] The request itself must meet only two requirements: (1) it must "reasonably describe" the records sought; and (2) it must follow the agency's published regulations.[12] A request

"reasonably describes" the records if it enables agency staff to locate the record with a "reasonable amount of effort."[13] While an agency is expected to consider the context of the request,[14] it is not required to conduct an endless search or create new records.[15]

As a practical matter, the more specific and detailed the request, the more likely the requester will receive pertinent, responsive documents in a timely fashion. In contrast, requests drafted in the vein of broad discovery requests, using terms such as "all documents" and "related to," will take longer to respond to and are more likely to face scrutiny as "unreasonable."[16] (To that end, it is critical to perform some initial research and fact investigation to determine what facts—and documents—you really need to demonstrate and assess a potential claim.)

Finally, requesters may specify the desired format of the records, which can (and should) include a request for associated metadata if the documents requested exist in an electronic format.[17] The agency generally will honor such requests, if the record is readily reproducible in that form and format.[18]

Where? As required by the statute, each agency has its own specific regulations detailing how it administers its FOIA obligations.[19] This includes the requirements for each agency to designate a FOIA public liaison and operate a FOIA requester center as a resource to potential requesters.[20] Requests should be directed, if possible, to the specific agency, component, or subcomponent that is likely to have the sought-after records. For example, a request for records from the US Army Central Command (USARCENT) should be directed to USARCENT's FOIA Office and not solely to the Department of Defense FOIA Office or the US Army FOIA Office. Notwithstanding, it is acceptable to send a request to multiple offices to ensure complete coverage, and it also is permissible to send a request to the larger agency or component-level FOIA offices—especially when you are unsure which subcomponent is likely to control the requested records.

Agency Responses to FOIA Requests

Presumption of Disclosure. The emerging official position is that agencies should default to releasing records if possible. In 2009, President Obama announced that agencies should implement FOIA "with a clear presumption: [i]n the face of doubt, openness prevails."[21] Significantly, the Department of Defense (DoD) recently proposed revisions to its FOIA regulations to add, among other changes, a presumption of disclosure.[22]

The FOIA Exemptions. While disclosure and openness are the official position, the statute does permit agencies to exclude from production a limited number of categories of records. The nine enumerated exemptions permit agencies to withhold records if the records are: (1) classified; (2) related solely to internal personnel rules and practices; (3) specifically exempted by other statutes; (4) trade secrets or confidential financial information obtained from a person; (5) privileged or otherwise not usually discoverable in litigation; (6) personnel, medical, or similar files; (7) compiled for law enforcement purposes and the release would interfere with the investigation or the rights of the person being investigated; (8) certain banking records; or (9) documents containing certain information about gas or oil wells.[23] To avoid disclosure, the agency bears the burden of demonstrating that a specific record falls within one or more of the enumerated exemptions.[24]

When requesting records related to its own performance and contracts, a contractor often will find agencies relying on Exemption 5 to avoid disclosure of certain documents.[25] Exemption 5 encompasses all of the privileges that the government can assert in traditional litigation discovery to avoid disclosure including interagency or intra-agency records protected by the deliberative process privilege, as well as the attorney-client privilege, the attorney work product protection, and other recognized privileges.[26]

The deliberative process privilege is the most commonly invoked exemption, and permits agencies to withhold documents that are (1) pre-decisional, and (2) deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."[27] It is important to remember that the agency bears the burden of demonstrating that a record meets both of these prongs.[28] To do so, agencies must establish what deliberative process was involved and the role the withheld document plays in that process.[29]

Post-decisional documents, however, are not protected and must be disclosed, unless another exemption applies. These documents generally reveal policy statements and final opinions, implement an established agency policy, or explain an agency's prior actions.[30] Additionally, purely factual matters and factual portions of otherwise deliberative records ordinarily are not protected.[31] Therefore, if a document is only partially exempted from disclosure, agencies must release reasonably segregable portions of the record and redact the exempted portions.[32]

The Requirement for Reasonable Searches. Although agencies are not required to conduct unending searches, they are compelled to conduct searches that are "reasonably calculated to uncover all relevant documents."[33] This standard requires agencies to search all files where the records may be located.[34]

In the case of a dispute, the agency bears the burden of demonstrating that its search efforts were, in fact, reasonable.[35] This obligation usually is accomplished through declarations of people knowledgeable about the agency's filing system(s).[36]

Reasonable Charges. FOIA permits agencies to charge reasonable search, review, and duplication fees to cover its efforts responding to a request.[37] Accordingly, a proper FOIA request should indicate either that the requester will pay any fees incurred by the agency, or provide an initial authorization amount (such as $500) and request that the agency contact the requester prior to incurring additional fees. For searches the agency estimates will exceed $250,

the agency can request prepayment of the estimated search costs.[38] In our experience, agency estimates tend to be considerably higher than the actual amount of the fees incurred, and a refund often is made at the conclusion of the search and document production.

Agency Response Time. Theoretically, agencies must conduct searches and provide a determination to the requester within 20 working days.[39] A determination does not need to include a release of the responsive records, but must provide a time table for such release—it cannot simply state that records will be provided later.[40] The agency is entitled to a 10-day extension for "unusual circumstances."[41]

In reality, the response time can vary wildly based on the particular agency or component receiving the request and based on the complexity of the request.[42] For example, in Fiscal Year 2013, the Department of Homeland Security, on average, took 37 days to process a "simple" request and 93 days to process a complicated one.[43] Similarly, the DoD, on average, processed simple requests in 10 days and complex requests in 93 days.[44] As a result, it is usually a safe bet that the agency will not meet its statutory deadline. Contractors should expect such a result, and be prepared for a potentially prolonged delay.

Failing to meet its 20-day (or 30-day) deadline has two actual consequences that affect the requester.[45] First, the requester is not obligated to pay the search fees (or the duplication fees, if an educational requester) otherwise due.[46] Second, the requester is deemed to have constructively exhausted its administrative remedies and can file a lawsuit directly in federal district court.[47] The practical effect is that a contractor's access to the requested information is delayed, as extensions frequently are granted when the scope of the request is broad or truly requires additional time to identify responsive documents.

Focusing the Request. The agency also may ask the requester to modify its request. Although the contractor is not obligated to do so,[48] modifying the request and working with the FOIA officer to obtain the records sought may be the most efficient way of receiving at least some of the requested information.[49] Accordingly, the contractor must navigate the delicate balance of building a working relationship with the agency FOIA office to process the request expeditiously and preparing for potential litigation to enforce its statutory rights of prompt access (as discussed below).

Litigating FOIA Requests

If the agency's initial response does not produce the quantity or quality of records expected, a contractor may push back and appeal the decision. Each agency has unique administrative appeal regulations, but generally the applicable regulations provide for a short time period to file an appeal (usually 30 to 60 days), a *de novo* review by a senior FOIA official within the same agency, and require minimal paperwork.[50] In fact, in most cases, the agency will have provided no information about how it conducted its searches or why it was withholding documents. Thus, the administrative appeal is little more than a generalized letter arguing that the agency did not meet its burden to conduct a reasonable search and did not meet its burden to withhold documents. The agency is required to respond to an appeal within 20 working days.[51]

If the response to an administrative appeal is not satisfactory, the requester can file a lawsuit in federal district court.[52] The case is likely to move quickly to dispositive motions with little opportunity for discovery.[53] During litigation, the agency will be required to file search declarations outlining where it searched for records and justify each record withheld. Typically, such justifications are made through a *Vaughn* index, which is functionally similar to a privilege log.[54] These filings will provide the requester with substantive information to attack regarding the sufficiency of the search or the permissibility of the withholdings. Or they may provide a valid justification for withheld documents, and end the dispute. In any event, the requester will learn exactly what the agency did, and this information may come in handy when litigating a future discovery dispute during litigation.

Similarly, if the agency fails to meet its response deadline to either the request or the appeal, the requester has "constructively" exhausted its administrative remedies and can file suit.[55] Generally, filing a lawsuit prior to receiving a response will garner attention from the agency. It also will mean that an assistant United States attorney (AUSA) will be assigned to the case. While unlikely to engender any good will, filing a preemptive lawsuit in this manner will focus the agency's attention onto the request and may provide the requester an ally in the form of an AUSA to force the agency to comply with its FOIA obligations. Further, the agency will have additional pressure to respond properly and completely under the watchful eye of the court.

Even still, the agency response may not be immediately forthcoming. FOIA complaints must be answered within 30 days, although the agency is likely to request (and receive) one or more extensions.[56] If the sole issue in the litigation is the agency's failure to respond to a proper FOIA request, the agency (through counsel) may negotiate a production schedule with the requester directly or may file an *OPEN America* motion with the court. An *OPEN America* motion, named after the court case that established the doctrine, permits the agency to stay the proceedings to allow it to respond to a backlog of FOIA requests while the court retains jurisdiction over the case.[57]

Filing a lawsuit due to the agency's failure to respond, however, does not require the requester to litigate exhaustively every potential issue. It is possible that, for a modest cost, a requester can file a lawsuit to compel production, negotiate a small production of some relevant documents, obtain search declarations and *Vaughn* indices, and then voluntarily dismiss the lawsuit. The declarations and indices have significant value in and of themselves, because they provide a road map of the agency's search efforts and offer insight regarding which documents are being withheld and what other pertinent documents not covered by

prior FOIA requests exist. Armed with this knowledge, a contractor may be able to formulate additional (and more focused) FOIA requests leading to the production of more relevant documents. At the very least, this information may prove to be a valuable asset during the discovery phase in litigation.

Using FOIA to Your Advantage

Obtaining Pre-Claim Discovery

If you were told that you could obtain pertinent documents from the government to support your affirmative claim (or learn about a potential government defense) prior to (1) submitting a claim, (2) initiating an appeal, and (3) commencing discovery, would you take advantage of this opportunity? Of course you would.

As discussed above, FOIA provides the mechanism for a government contractor to access most, if not all, of the relevant documents a litigant can obtain during discovery and more. Using pinpointed requests, a contractor can seek out those documents that are most relevant to its claims of entitlement and which may bear on quantum.[58]

For example, if a contractor is arguing that the government constructively changed the contract, it will need to demonstrate that a government official with appropriate authority ordered or ratified the change. Sometimes a contractor may have difficulty demonstrating that a government official ordered the change, possessed the requisite knowledge, or had appropriate authority. Through FOIA, a contractor can request documents to help establish these types of elements of its affirmative claim.

If a contractor believes it was wrongfully terminated or that bad faith played a role in an adverse decision, it can request documents at the root of its suspicions.[59] Similarly, if a contractor believes the agency failed to follow its own undisclosed internal rules, it can use FOIA to request copies of the applicable agency policies or procedures in effect at a given time.

A contractor can easily explore any topic or theory it desires through FOIA because of FOIA's relatively limited restrictions. Under FOIA, a contractor is not limited to requesting relevant information reasonably calculated to lead to the discovery of admissible evidence, as it would be during a litigation. Instead, a contractor can ask for any information to explore any potential claim, such as those claims that it wouldn't dare raise unless it had specific evidence supporting its theories. (It can even commence a "fishing expedition" through FOIA, if it desires.)

Additionally, because an agency's document collection and review process arises out of a different set of circumstances than traditional discovery, it is possible that a contractor may obtain documents that are not identified and produced during the discovery phase of litigation.[60] This is especially true because FOIA is founded on a presumption of disclosure; whereas documents requested during litigation are often met with heavy resistance.[61] Obtaining documents through FOIA essentially gives the contractor two bites at the apple.

Assessing a Claim's Strengths and Weaknesses

As discussed above, contractors can utilize FOIA to receive relevant information in a cost-effective manner prior to submitting a claim. Gaining this information can provide a tactical advantage that must not be overlooked. For example, receiving such information in advance of filing a claim may allow the contractor to better assess the strength of an underlying or alternative theory of recovery before submitting a claim to the contracting officer. Alternatively, the documents received may reveal weaknesses in a proposed theory of recovery, such that a new approach should be considered or the claim should be abandoned.

It is much better to gain a more informed assessment of your claim *before* you appeal a contracting officer's final decision than wait until *after* discovery is well underway before a Board of Contract Appeals or the United States Court of Federal Claims (and you have started to incur significant legal fees). In that sense, contractors also should not be deterred by the costs to obtain documents through FOIA, as receiving the documents up front may pay dividends down the road.

Preserving and Collecting the Relevant Records

By requesting relevant records through FOIA before a claim is submitted or an appeal is commenced, a contractor also can guard against document destruction issues. Upon receiving a FOIA request, the agency must review its files and release relevant records to the requesting contractor, thereby mitigating the effects of any future document preservation issue or server failure on the part of the agency.

In addition, a pre-litigation FOIA request increases the chances that an agency will produce documents before archiving them in a potentially cumbersome back-up tapes/system. While archived documents technically are discoverable, the search capabilities of back-up tapes may be limited and quite costly. Once documents are archived, a party may have to jump over an extra hurdle to compel production—i.e., demonstrating that the potential benefits of receiving the documents outweigh the added burdens and expense of restoring the back-up tapes.[62] The contractor may be able to avoid having to access an agency's archive in litigation if it previously received many of the pertinent documents through FOIA. Or, at the very least, if the contractor needs to request documents in an agency's archive during litigation, the contractor should be able to present a more convincing argument about the importance of these additional documents if it already has examples of the types of documents placed in that archive.

Finally, in the event an agency states that it was unable to identify any documents responsive to a FOIA request, but later indicates during litigation that it cannot produce these same documents because they were destroyed after the FOIA request was submitted, a contractor may have a better argument to obtain a favorable adverse inference against the agency.

Driving Towards a Favorable Resolution

Of course, there is always a chance that documents produced in response to a FOIA request may reveal the proverbial "smoking gun" that fully demonstrates entitlement, thereby forcing the government's hand, potentially before the claim is filed.

But even if a smoking gun is not identified, finding documents (especially internal government documents) that strongly support a position, and citing them in the claim, should improve a contractor's chances of convincing the contracting officer to issue a favorable final decision. Similarly, a contractor with FOIA documents may be better positioned to resolve a dispute favorably through alternative dispute resolution at the contracting officer's level,[63] especially where the FOIA documents boslter the contractor's claim and/or reveal the true strengths/weaknesses of the government's potential defenses.[64]

Conclusion and Best Practices

As discussed above, FOIA may be a significant tool for contractors when raising an affirmative claim. Here are a few best practices to consider when using FOIA to obtain documents prior to submitting a claim or appealing a contracting officer's final decision:

Describe the requested records in as much detail as possible.

The more specific the request, the more likely the government will produce the documents you are seeking. For example, if you want e-mails between the contracting officer and the program manager about a specific subject matter, only ask for those e-mails. Consider providing a date range, requesting only documents with certain key words, and limiting the request to relevant custodians. If you only want an agency's internal policies in place during a certain time period, limit the request to that time period. Remember that if you are too specific and fail to get the full breadth of documents you wanted, you can always file a new FOIA request.

Request the format that you would like to receive the documents in, including if you would like to receive them electronically in a format other than PDF.

If you are requesting e-mails and would like to review them in their native format (e.g., .msg files), then you should specifically state this in your FOIA request. Requesting e-mails in their native format may be beneficial because it is generally easier to review attachments to e-mails when they are produced in native format. Similarly, if you want to review drafts of electronic documents, it may be beneficial to request the documents in Microsoft Word format in order to fully review any track changes or comments. While the agency may not always comply with such requests, they certainly will not comply if you don't make the specific request up front.

File requests early to permit time for delay or litigation, keeping in mind the Contract Disputes Act's statute of limitations.

Because of the time lag in receiving documents responsive to a FOIA request, a contractor should consider making the request as soon as feasible in order to receive the documents well before submitting a claim. To that end, a contractor also should keep the Contract Disputes Act's six-year statute of limitations[65] in mind when thinking about when to make a FOIA request. If you make a FOIA request hoping to receive documents to assess or support your claim, and you submit your request just before the statute of limitations period ends, you will likely not receive responsive documents in time. That said, you can still file a FOIA request after the claim is submitted. Given how long it sometimes takes to receive a final decision, it may be prudent to request additional documents that could be used in a subsequent litigation.

Submit requests to specific component or subcomponent FOIA office(s), while copying department-level FOIA offices.

Distributing the request to multiple offices will ensure every office with documents receives it. This also will help ensure that you receive all the pertinent documents.

Include the total amount of fees you are willing to preauthorize or acknowledge that you will pay all fees incurred.

Providing this information will help jumpstart your FOIA request as there won't be any initial delays associated with the agency asking how much fees you are willing to incur. A good starting point is a cap of $500, but, of course, this all depends on the breadth of your document requests. Additionally, a requester should not be intimidated by an agency's high initial cost estimate to collect and produce responsive documents. Often, the actual fees charged are much less than the estimate. Further, if the estimate is too high, you can work with the agency to reduce the scope of the FOIA request, thereby reducing the estimated fees associated with collection and production.

Diligently monitor responses and hold the agency accountable for its deadlines.

If you don't hold an agency's feet to the fire, the agency likely will not have a burning desire to respond fully to your FOIA request in a timely manner. Of course, the contractor must tactfully monitor the agency's progress so as not to create an acrimonious relationship. PL

Endnotes

1. "Knowledge is power [Nam et ipsa scientia potestas est]." Bartlett's Familiar Quotations 166:1 (17th ed. 2002).
2. 5 U.S.C. § 552 (2012).
3. Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).
4. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171–72 (2004) (*quoting* Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)).
5. 5 U.S.C. § 552(a)(1).
6. 5 U.S.C. § 552(a)(2).
7. 5 U.S.C. § 552(a)(3).

8. Administrative Procedure Act, 5 U.S.C. § 551(2) (2012) (defining "person" as "an individual, partnership, corporation, association, or public or private organization other than an agency").

9. *See, e.g.*, SAE Prods., Inc. v. Fed. Bureau of Investigation, 589 F. Supp. 2d 76, 80 (D.D.C. 2008) (using the APA definition of "person" when interpreting FOIA). *See also* Stone v. Export-Import Bank, 552 F.2d 132, 136–37 (5th Cir. 1977) (holding that a Soviet agency was a "person" for the purposes of FOIA). *But see* Intelligence Authorization Act for Fiscal Year 2003, § 312 (codified at 5 U.S.C. § 552(a)(3)(E)) (prohibiting agencies that are part of the intelligence community from disclosing records requested by foreign governments).

10. 5 U.S.C. § 552(f)(1). FOIA does not apply to Congress, the judicial branch, foreign governments, or entities that are not chartered or controlled by the federal government. *See, e.g.*, Dunleavy v. New Jersey, 251 F. App'x 80, 83 (3d Cir. 2007) (holding that FOIA does not apply to state agencies); Megibow v. Clerk of the U.S. Tax Court, 432 F.3d 387, 388 (2d Cir. 2005) (per curiam) (affirming lower court ruling that FOIA did not impose any obligations on Tax Court); Dow Jones & Co. v. Dep't of Justice, 917 F.2d 571, 574 (D.C. Cir. 1990) (finding that Congress is not an agency for the purposes of FOIA).

11. *See* Forsham v. Harris, 445 U.S. 169, 183 (1980) (adopting the definition of the Records Disposal Act, 44 U.S.C. § 3301). *But see* Nichols v. United States, 325 F. Supp. 130, 135–36 (D. Kan. 1971) (holding that tangible evidence relating to the Kennedy assassination was not "records").

12. 5 U.S.C. §§ 552(a)(4)(A), (a)(6)(E).

13. *See, e.g.*, Gaunce v. Burnette, 849 F.2d 1475, 1475 (9th Cir. 1988); Yeager v. Drug Enforcement Agency, 678 F.2d 315, 322 (D.C. Cir. 1982).

14. *See, e.g.*, LaCedra v. Executive Office for U.S. Attorneys, 317 F.3d 345, 347–48 (D.C. Cir. 2003) (holding that agency failed to "liberally construe" request).

15. *See, e.g.*, Lamb v. Internal Revenue Serv., 871 F. Supp. 301, 304 (E.D. Mich 1994) (holding that FOIA did not require agency to conduct legal research or respond to interrogatories).

16. *See, e.g.*, Dale v. Internal Revenue Service, 238 F. Supp. 2d 99, 104–05 (D.D.C. 2002) (finding that a search did not reasonably describe the records sought when it asked for "*any* and *all* documents . . . that refer or relate in any way" to the requested subject matter).

17. The agency likely will resist the request to include metadata. It remains an open question if agencies must produce metadata if requested. *Compare* Families for Freedom v. U.S. Customs & Border Protection, 837 F. Supp. 2d 287, 304 (S.D.N.Y. 2011) (stating that agency could not withhold information contained in metadata if not otherwise disclosed on the face of the document) *with* Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ., 905 F. Supp. 2d 161, 171–72 (D.D.C. 2012) (denying argument that agency produce metadata, in part, because initial request did not request production of records in electronic format with metadata). *See generally* Peter S. Kozinets, *Access to Metadata in Public Records: Ensuring Open Government in the Information Age*, Comm. Lawyer, July 2010, at 1 (arguing that release of metadata is required under FOIA).

18. 5 U.S.C. § 552(a)(3)(B).

19. *See, e.g.*, DoD Freedom of Information Act Program Regulation, 32 C.F.R. Part 286.

20. 5 U.S.C. 552(k)-(l). *E.g.* The Office of the Secretary of Defense and Joint Staff FOIA Requester Service Center, *available at* http://www.dod.mil/pubs/foi/foiareq.html.

21. Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009). *See also* Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), *available at* http://tinyurl.com/cjhyer. *But see* Danielle Ivory & Jim Snyder, *Testing Obama's Promise of Government Transparency*, Bloomberg.com (Sept. 27, 2012), *available at* http://tinyurl.com/d6zak4u (suggesting that the Obama administration failed to live up to its promises of transparency during its first term).

22. *See* DoD Freedom of Information Act (FOIA) Program, 79 Fed. Reg. 52,500, 52,503 (proposed Sept. 3, 2014) (to be codified at 32 C.F.R. § 286.5) (announcing DoD's adoption of "a presumption in favor of disclosure in all decisions involving the FOIA"). Comments were due on November 3, 2014.

23. 5 U.S.C. § 552(b). *See also* Dep't of Justice, Guide to the Freedom of Information Act 141-669 (2009 ed.), *available at* http://tinyurl.com/ofxu4bz (providing detailed discussions of each of the nine exemptions) (hereinafter "DOJ Guide to FOIA"); McKenna Long & Aldridge & Ronald A. Kienlen, Government Contract Disputes §§ 18:7–18:12 (West 2010-11 ed.) (discussing the FOIA exemptions that are most likely to impact a contractor in a dispute).

24. 5 U.S.C. § 552(a)(4)(B) ("[T]he burden is on the agency to sustain its action."). *See also* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989).

25. Exemption 5 protects "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." 5 U.S.C. § 552(b)(5).

26. Exemption 5 also encompasses other civil discovery privileges, such as the expert materials privilege and the presidential communications privilege. *See, e.g.*, Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108, 1114 (D.C. Cir. 2004); Nissei Sangyo Am., Ltd., Internal Revenue Serv., No. 95-1019, 1998 U.S. Dist. LEXIS 2966, at *2–3 (D.D.C. Jan. 28, 1998) (recognizing expert materials privilege under Exemption 5). *See also* Martin v. Office of Special Counsel, 819 F.2d 1181, 1185 (D.C. Cir. 1987) (holding that Exemption 5 "unequivocally" incorporates "all civil discovery rules into FOIA").

27. Vaughn v. Rosen, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975). *See generally* DOJ Guide to FOIA, *supra* note 23, at 366.

28. *See, e.g.*, Carter v. Dep't of Commerce, 307 F.3d 1084, 1089 (9th Cir. 2002); McKinley v. Fed. Deposit Ins. Corp., 744 F. Supp. 2d 128, 138 (D.D.C. 2010) ("To demonstrate that a document is predecisional, the burden is on the agency to "'establish[ ] what deliberative process is involved, and the role played by the documents in issue in the course of that process.'") (*quoting* Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).

29. *See, e.g.*, *Coastal States*, 617 F.2d at 867–68.

30. *See, e.g.*, Taxation Without Representation Fund v. Internal Revenue Serv., 646 F.2d 666, 677–78 (D.C. Cir. 1981); Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980); Judicial Watch, Inc. v. Dep't of Health & Human Servs., 27 F. Supp. 2d 240, 245 (D.D.C. 1998).

31. *See, e.g.*, Environmental Protection Agency v. Mink, 410 U.S. 73, 91 (1973) (holding that the deliberative process privilege could not be extended to cover "factual material otherwise available on discovery merely [because] it was placed in a memorandum with matters of law, policy, or opinion.").

32. 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").

33. Weisberg v. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). *But see, e.g.*, Citizens for Responsibility & Ethics in Washington v. Dep't of Justice, 535 F. Supp. 2d 157, 162 (D.D.C. 2008) ("The question is not whether other responsive documents may exist, but whether the search itself was adequate.").

34. *See, e.g.*, Truitt v. Dep't of State, 897 F.2d 540, 544–46 (D.C. Cir. 1990); Banks v. Dep't of Justice, 538 F. Supp. 2d 228, 238 (D.D.C. 2008).

35. *See, e.g.*, Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995); Oglesby v. U.S. Dep't of the Army, 920 F.3d 57, 68 (D.C. Cir. 1990).

36. *See, e.g.*, Miller v. U.S. Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1986) ("An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the

affidavits are relatively detailed, nonconclusory, and submitted in good faith."). *See also* Church of Scientology v. Internal Revenue Serv., 792 F.2d 146, 151 (D.C. Cir. 1986) (stating that agency affidavits should detail the general structure of the agency's filing system).

37. 5 U.S.C. § 552(a)(4)(A)(ii). FOIA groups requesters into three categories: news media, educational or noncommercial scientific institutions, and commercial requesters. *See* 5 U.S.C. § (a)(4)(A)(ii). Commercial requesters are required to pay search, review, and duplication fees while other types of requesters have reduced fee obligations.

38. 5 U.S.C. § 552(a)(4)(A)(v).

39. 5 U.S.C. § 552(a)(6)(A)(i). Courts generally are sympathetic to agency delays caused by high volumes of requests, as long as the agency handles the requests on a first-in, first-out basis. *See* Natural Res. Def. Council v. Dep't of Energy, 191 F. Supp. 2d 41, 42 (D.D.C. 2002) (suggesting that "it is commonly accepted that no federal agency can meet the impossibly rigorous timetable set forth in the statute").

40. *See* Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n, 711 F.3d 180, 188 (D.C. Cir. 2013). In its opinion, the court made clear that responsive documents must be produced within "days or a few weeks of a determination, not months or years." *Id.*

41. 5 U.S.C. § 552(a)(6)(B)(i). "Unusual circumstances" include the need to search and collect records from multiple offices, the need to examine voluminous records, and the need for consultation with other agencies. 5 U.S.C. § 552(a)(6)(B)(iii).

42. Agencies report backlogs separately for "simple" requests and "complex" requests based on their internal classification of the request. *See, e.g.*, Department of Homeland Security FOIA Regulations, 6 C.F.R. § 5.5(b) (distinguishing between simple and complex requests based on "the amount of work and/or time needed to process the request, including through limits based on the number of pages involved").

43. *See* www.FOIA.Gov/data.html (providing ability to create customized reports based on agency, component, and fiscal year). Additionally, one simple request to the Federal Emergency Management Agency took 923 days to process. *Id.*

44. *See* www.FOIA.Gov/data.html (providing ability to create customized reports based on agency, component, and fiscal year). A notable outlier, the National Security Agency took 3,061 days to process a simple FOIA request. *Id.*

45. The agency also is required to submit an annual report to the Attorney General detailing its compliance (or lack thereof) with its FOIA obligations. *See* 5 U.S.C. § 552(e).

46. 5 U.S.C. § 552(a)(4)(A)(viii).

47. *See Citizens for Responsibility & Ethics in Washington*, 711 F.3d at 182. *But see* Oglesby v. U.S. Dep't of the Army, 920 F.3d 57, 63 (D.C. Cir. 1990) ("[A]n administrative appeal is mandatory if the agency cures it failure to respond within the statutory period by responding to the FOIA request before suit is filed.").

48. Refusing to modify the request can be considered as one factor in determining whether "unusual circumstances" exist. *See* 5 U.S.C. § 552(a)(6)(C)(iii).

49. *See* Daniel E. Toomey & Joseph S. Ferretti, *The Freedom of Information Act: A Refresher and Primer for the Construction Lawyer*, 31-WTR Construction Law. 17 (2011) (arguing that the "you get more flies with honey" analogy is apt with regard to FOIA requests and providing advice for working with a FOIA officer short of litigation).

50. *See, e.g.*, 6 C.F.R. § 5.9 (outlining the administrative appeal requirements for the Department of Homeland Security).

51. 5 U.S.C. § 552(a)(6)(A)(ii).

52. 5 U.S.C. § 552(a)(4)(B). Venue of such a suit is proper in the District of Columbia, where the requester resides or has its principal place of business, or where the agency records are situated. *Id.* In order to properly file a FOIA suit, the requester must serve the Attorney General, the agency, and the local U.S. Attorney. *See* Fed. R. Civ. P. 4(i)(1)-(2).

53. *See generally* Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 Am. U. L. Rev. 217, 244–246 (2011) (discussing the unique summary judgment procedures in FOIA cases and the limited discovery permitted); DOJ Guide to FOIA, *supra* note 23, at 810. *But see* Local 3, Int'l Bhd. of Elec. Workers, AFL-CIO v. Nat'l Labor Relations Bd., 845 F.2d 1177, 1179 (2d Cir. 1988) ("Discovery in a FOIA action is permitted in order to determine whether a complete disclosure of documents has been made and whether those withheld are exempt from disclosure.").

54. Vaughn v. Rosen, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975). *See generally* DOJ Guide to FOIA, *supra* note 23, at 366.

55. 5 U.S.C. § 552(a)(6)(C). *See also Citizens for Responsibility & Ethics in Washington*, 711 F.3d at 185 (requiring agency to provide a determination to avoid constructive exhaustion of administrative remedies). *But see Oglesby*, 920 F.3d at 63 ("[A]n administrative appeal is mandatory if the agency cures it failure to respond within the statutory period by responding to the FOIA request before suit is filed.").

56. *See* 5 U.S.C. § 552(a)(4)(C).

57. OPEN America v. Watergate Special Prosecution Force, 547 F.2d 605, 615–16 (D.C. Cir. 1976). *See also* 5 U.S.C. § 552(a)(6)(C)(i).

58. Contractors also can use FOIA in anticipation of government claims by requesting audit reports or working papers, or to defend against *qui tam* False Claims Act litigation by obtaining information about public disclosure of the underlying allegation. *See generally* Mark J. Meagher & Tyson J. Bareis, *The Freedom of Information Act*, Briefing Papers 2d Series (2010).

59. If a FOIA request reveals bad faith on the part of the government, some courts have permitted the contractor to recover its costs for submitting its FOIA request under a theory of "reliance" damages under the breached contract. *E.g.* Chevron USA, Inc. v. United States, 116 Fed. Cl. 202, 229, 231–32 (2014).

60. *See* Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 Md. L. Rev. 119, 179 (1984) (collecting cases).

61. *See id.* at 167; *see also* Eden Isle Marina, Inc. v. United States, 89 Fed. Cl. 480, 501–02 (2009) (discussing potential waiver of records inadvertently disclosed by the agency in response to a pre-litigation FOIA request).

62. See, e.g., Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. 2003) (landmark e-discovery case regarding the burdensomeness of retrieving information on back-up tapes and using sampling and cost-shifting to minimize the burdens).

63. See FAR 33.204 ("The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR [alternative dispute resolution] procedures to the maximum extent practicable.")

64. This same principle also would apply to alternative dispute resolutions before the Boards of Contract Appeals or the United States Court of Federal Claims in the event discovery is limited. Additionally, using FOIA as a means of discovery could be particularly useful in the context of a prime contractor/subcontractor dispute subject to a mandatory alternative dispute resolution that limits discovery. See Toomey & Ferretti, note 49, supra. In such cases, FOIA could provide a unique (and perhaps the only) opportunity to obtain helpful documents about the parties' performance under the prime contract and other potentially useful documents related to the prime contract..

65. 41 U.S.C. § 7103(a)(4)(A).