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# GUIDE TO REQUESTING ED RECORDS UNDER FOIA

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## INTRODUCTION

This guide is intended to assist you in making Freedom of Information Act (FOIA) requests for Department of Education (ED) records. It will get you started and provide you with a brief description of your rights and the manner in which ED will respond to your requests. The information contained herein is not intended to be definitive or exhaustive.

## POLICY

ED's policy is to implement the FOIA uniformly and consistently and to provide maximum allowable disclosure of records. Anyone can request ED's records, and if the requester correctly makes a FOIA request, ED will disclose the records unless they are appropriately protected from disclosure by one or more of nine exemptions contained in the FOIA statute.

## WHAT IS THE FOIA?

The FOIA is a Federal law that establishes the public's right to request existing records from Federal government agencies. The FOIA established a presumption that records of the Executive Branch of the United States Government are accessible to the people.

With the passage of the FOIA in 1966, the burden of proof shifted from the individual to the government so those persons seeking information no longer are required to show a need for information. The "need to know" standard has now been replaced by a "right to know" standard. The government now has to justify the withholding of requested records.

The FOIA sets standards for determining which records must be made available for public inspection and which records can be withheld from disclosure. The law also provides administrative and judicial remedies for those denied access to records. Above all, the statute requires federal agencies to provide the fullest possible disclosure of information to the public.

## WHO CAN FILE A FOIA REQUEST?

Any person can request ED's records – individuals, foreign citizens, partnerships, corporations, and associations, foreign, state or local governments. Exceptions to this rule are Federal agencies, fugitives and, foreign government or international governmental organizations or their representatives. Requesters are treated equally under the FOIA; however, in certain instances distinctions are made in order to determine fee category, fee waiver requests, and requests for expedited processing.

## WHAT IS AN AGENCY RECORD?

The FOIA does not define this term, but the courts have generally interpreted "agency records" to mean printed documents or other information-bearing materials (e.g., photographs or computer tapes) which (1) were created or obtained by a federal agency and (2) are, at the time of the request, within both the possession and control of the agency.

The FOIA does not require an agency to "create" a record in response to a request if the record does not exist at the time the request is made. Similarly, the FOIA does not require an agency to retrieve a requested record that is not in its possession at the time of the request. The term "control," as used to determine whether a record is subject to the FOIA, refers to the power of disposition by the agency over the materials at issue.

Agency records that are accessible under the FOIA may contain information relating to an incredibly diverse range of interests, including public health and environment, consumer product safety, government spending, labor, civil rights, business, taxes, history, foreign policy, national defense, and the economy.

## CAN I ASK QUESTIONS UNDER THE FOIA?

The FOIA does not require Federal Agencies to answer questions, render opinions, or provide subjective evaluations. Requesters must ask for existing records, such as those mentioned above.

## HOW DO I FILE A FOIA REQUEST?

FOIA requests can be submitted online, or via email, fax, or mail. To submit a request online, go [FOIA Request Form](http://www2.ed.gov/policy/gen/leg/foia/foia-request-form.pdf) at <http://www2.ed.gov/policy/gen/leg/foia/foia-request-form.pdf>.

Before a FOIA request can be processed, it must:

- Describe the specific records you are requesting in enough detail so that they can be located with a reasonable amount of effort. Generally, a record is reasonably described when the description contains sufficient file-related information (type of document, title, subject area, date of creation, originator, etc.); or the request contains enough event-related information (date and circumstances surrounding the event the record covers) to permit the conduct of an organized, non-random search.
- Include information that will enable the processing office to determine the fee category of the user.
- Give the address where the determination letter is to be sent.
- State your willingness to pay applicable fees. If you seek a fee waiver, provide a justification of how such a waiver request meets the criteria for a waiver found in the statute at 5 U.S.C. § 552(a)(4)(A)(iii).

Requests that are not filed in accordance with the requirements of the FOIA and the agencies regulations may not be deemed received until the requests have been identified as a proper FOIA requests by agency personnel. Therefore, until such time, there is no obligation on the part of ED to

meet time deadlines, search for records, or supply requested records. In addition, if a requester has failed to pay processing fees for previous requests, ED may refuse to process any subsequent requests made by that individual until the outstanding balance is paid.

## HOW CAN I EXPEDITE MY REQUEST PROCESSING?

The requester must demonstrate one of the following compelling needs to receive expedited treatment:

- Failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.
- Information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged federal government activity.
- Another reason that merits expedited processing is an imminent loss of substantial due process rights.
- Other circumstances that the Department determines demonstrate a compelling need for expedited processing.

## WHAT ARE THE REASONS FOR NOT RELEASING A RECORD?

You may not receive records from ED if:

- A reasonable search of files failed to identify responsive records.
- The request is transferred to another Federal Agency.
- The request is withdrawn by the requester.
- The requester is unwilling to pay fees associated with a request; the requester is past due in the payment of fees from a previous FOIA request; or the requester disagrees with the fee estimate.
- A record has not been described with sufficient particularity to enable the ED program office to locate it by conducting a reasonable search.
- The information requested is not a record within the meaning of the FOIA.
- The record is denied in whole or in part in accordance with procedures set forth in the FOIA.

## WHAT ARE THE FOIA EXEMPTIONS?

The FOIA requires that virtually every record in the possession of a Federal agency be made available to the public, unless the record or any portion of it is exempt from disclosure. The nine exemptions of FOIA or the three special law enforcement record exclusions ordinarily provide the only basis for withholding information. Records that meet the exemption criteria may be withheld from public disclosure, and need not be published in the Federal Register, be made available in the reading room, or be provided in a response to a FOIA request.

The Department of Justice<sup>1</sup> recognizes the continued agency practice of considering whether to make “discretionary disclosures” of information that is exempt under the Act, while at the same time emphasizing that agencies should do so only upon “full and deliberate consideration” of all interests involved. It reminds agencies “to carefully consider the protection of all [applicable] values and interests when making disclosure determinations under the FOIA.” For further discussion of [discretionary disclosures](http://www.usdoj.gov/oip/discretionary.htm), see [www.usdoj.gov/oip/discretionary.htm](http://www.usdoj.gov/oip/discretionary.htm).

The following nine FOIA exemptions are cited in the Act as 5 U.S.C. § 552(b)(1) through (b)(9):

1. Those documents properly classified as secret in the interest of national defense or foreign policy;
2. Related solely to internal personnel rules and practices;
3. Specifically exempted by other statutes;
4. A trade secret or privileged or confidential commercial or financial information obtained from a person;
5. A privileged inter-agency or intra-agency memorandum or letter;
6. A personnel, medical, or similar file the release of which would constitute a clearly unwarranted invasion of personal privacy;
7. Compiled for law enforcement purposes, the release of which
  - a. could reasonably be expected to interfere with law enforcement proceedings,
  - b. would deprive a person of a right to a fair trial or an impartial adjudication,
  - c. could reasonably be expected to constitute an unwarranted invasion of personal privacy,
  - d. could reasonably be expected to disclose the identity of a confidential source,
  - e. would disclose techniques, procedures, or guidelines for investigations or prosecutions, or
  - f. could reasonably be expected to endanger an individual's life or physical safety;
8. Contained in or related to examination, operating, or condition reports about financial institutions that the SEC regulates or supervises; or
9. And those documents containing exempt information about gas or oil wells.

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<sup>1</sup> The Department of Justice is responsible for coordinating and implementing policy development and compliance government-wide for the Freedom of Information Act.

## CAN I APPEAL A DENIAL?

Yes. If your request is initially denied in whole or in part under one or more of the above exemptions or denied for some other reason, you will be advised of your appeal rights and the proper procedures for submitting the appeal within 90 days.

## HOW LONG WILL IT TAKE FOR MY REQUEST TO BE PROCESSED?

In fairness to all requesters, ED processes requests in order by date of receipt and according to their complexity. ED divides requests between simple and complex queuing tracks. Whenever possible, an initial determination to release or deny a record is made within 20 working days after receipt of the request by the program office that is designated to respond. In the event of unusual circumstances the Department may extend the deadline for this initial determination by sending a written notice to the requester that includes the new deadline and a statement of circumstances justifying the extension. **5 U.S.C. § 552(a)(6)(B)**. Unusual circumstances is defined as: (1) the need to search and collect documents from offices separate from the office processing the request; (2) the need to search and collect a large volume of records; or (3) the need to consult with another agency (or a separate subdivision of the same agency) having a substantial subject-matter interest in the request. **5 U.S.C. § 552(a)(6)(B)(iii)**.

If the required extension exceeds ten business days, the Department must allow the requestor an opportunity to modify their request, or to arrange an alternative timeframe for completing its processing.

Under certain conditions, expedited access may be granted if there is a compelling need (see section How can I expedite my request processing?).

## DO I HAVE TO PAY FOR A FOIA REQUEST?

The FOIA allows fees to be charged to certain types of requesters, but it also provides that waivers or reduction in fees be given if disclosing the information is in the public interest. Public interest is defined as information which significantly enhances the public's knowledge of the operations and activities of ED. The FOIA requires that requesters be placed into one of the below categories:

- **Commercial** – Requesters who seek information for a use or purpose that furthers their commercial, trade, or profit interest are considered commercial requesters. Commercial requesters pay all fees for search, review, and duplication.
- **Educational** – Institutions of education, including preschools, elementary or secondary schools and institutions of higher learning, qualify as educational institutions. The records must be sought in furtherance of scholarly research. Educational requesters pay only duplication fees, unless it is determined that fees are waived or reduced in the public interest. The first 100 pages are provided at no cost.
- **Non-Commercial Scientific** – A non-commercial scientific institution is operated solely for conducting scientific research. The records must be sought in furtherance of scientific research. Like educational requesters, these requesters pay only duplication fees, unless it is determined that fees are waived or reduced in the public interest. The first 100 pages are provided at no cost.

- News Media – A representative of the news media is a person actively gathering news for an entity organized and operated to publish or broadcast news to the public. News media pay only duplication fees, unless it is determined that fees are waived or reduced in the public interest. Again, the first 100 pages are provided at no cost.
- “Other” Requesters – Requesters who do not qualify in another category are considered “other” requesters, and normally make requests for agency records for their personal use. “Other” requesters receive two hours search, all review costs, and the first 100 pages at no cost.

All requesters should submit a willingness to pay fees regardless of the fee category; however, this does not mean you will be charged fees. Fee waivers may be granted when disclosure of the records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. The following factors are weighed in making a fee waiver determination:

- The subject of the request.
- The informative value of the information to be disclosed.
- The contribution to an understanding of the subject by the general public likely to result from the disclosure.
- The significance of the contribution to public understanding.
- Disclosure of the information is not primarily in the commercial interest of the requester.
- The ability of the requester to disseminate the information.

## CONCLUSION

We trust this information will be helpful to you when pursuing FOIA requests with ED. If you have any questions, you may call the FOIA Hotline (202) 401-8365.