

A Second Look: Appealing Agency Denials

MAY I APPEAL?

FIGURE 5.1: ADVERSE DETERMINATIONS THAT MAY BE APPEALED

- Agency withholding requested record or any portion of requested record
- Agency failure to comply with twenty-day time limit for responding to request
- “No records” response or failure to conduct an adequate search
- Denial of request for preferred fee status
- Denial of fee waiver request
- Denial of request for expedited processing
- Charging of excessive fees
- Rejection of request based on failure to adequately describe requested documents
- “Glomar” response—agency says it can neither confirm nor deny the existence of requested records
- Determination that requested records are not subject to FOIA because they are not agency records or are operational files

The FOIA permits a requester to appeal “any adverse determination.” An adverse determination is a decision by the agency denying part or all of a FOIA request, including any procedural denials that may prevent the requester from obtaining the requested records.

Most commonly, appeals are filed when an agency withholds records or provides records with redacted portions. In these situations, your appeal will challenge the agency’s determination that the withheld information fits within one of the nine FOIA exemptions. But you also may appeal when an agency does not find any records, delays its response beyond the statutory time limit, makes an improper decision to charge fees, or otherwise impedes your access to the records you requested. (See fig. 5.1.)

Whenever an agency makes an adverse determination, it must inform the requester of

the reason for the denial and the requester’s right to appeal. In addition, agencies must provide the names and titles of the official(s) responsible for the decision. Even if an agency does not state in the denial letter that you have appeal rights, you can still appeal if you believe the agency has made an “adverse determination.”

Denials of information requested through the MDR process may also be appealed to the agency and MDR appeals generally will follow the same format as FOIA appeals (see chap. 4). Because MDR appeals primarily challenge the agency’s decision not to declassify and release classified information, use the same arguments as for FOIA Exemption 1 appeals (see pp. 38-40, below).

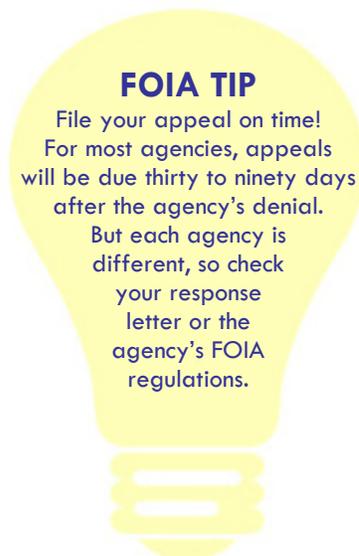
SHOULD I APPEAL?

In most cases, it is useful to file an appeal when the agency has denied any part of your request. The law requires agencies to respond by taking another look at the request, and the appeal generally triggers review by a different employee at the agency who may be more senior and therefore more willing to exercise discretion, or who may simply have a different perspective on the response. More often than not, a timely and well-written appeal results in at least some additional information being released.

If you plan to file a lawsuit in federal court challenging the agency's decision, you *must* first complete the administrative process by submitting an appeal—and you should be sure to file the appeal on time to ensure your right to litigate later. If you anticipate litigating your request, you may consider consulting an attorney about your appeal.

It is particularly important to ask the agency to review its decision when one or more documents have been withheld in their entirety. The FOIA requires agencies to release any segregable portions of a document that are not exempt from disclosure under one of the nine exemptions. Therefore, you should request that the appeal authority review the records to ensure that *all* portions of the withheld records are covered by the claimed exemptions.

In some cases, it may be reasonable to accept the agency's decision on your request. For example, you may have been uncertain about whether the requested record existed and the agency responded that it had no documents responsive to your request. Or, the document was released with only a few redactions, such as names removed for privacy reasons. In these circumstances, you should make a judgment as to whether filing an appeal is worthwhile, considering the likelihood of success, the importance of the requested documents to your work, and the negative implication of overburdening the agency unnecessarily.



WHEN MUST I APPEAL?

The deadline for filing an appeal is set in each agency's regulations and varies among agencies. Most agencies allow between thirty and ninety days after the date of the agency's denial letter to file an appeal, but some may provide a shorter time period. Read the agency's response letter carefully, and if it does not provide any details, call the FOIA Service Center or consult the agency's regulations or FOIA Web site for specific requirements (see app. 5). To guarantee that the agency considers your appeal, make sure to file it within the time limit provided. This is very important because an agency can reject any late appeal and you will lose your right to challenge the agency's denial of your request.

DRAFTING AN APPEAL

ESSENTIAL COMPONENTS OF AN APPEAL LETTER

The appeal must be in writing and in English and must follow any other procedural requirements set by the agency. Review the statement of appeal rights in the denial letter, as it may include additional requirements (such as to label the mailing envelope or fax cover as an “appeal”). Include the following items in your appeal letter:

- ❖ **Statement of Appeal.** State clearly that the letter is an appeal of the agency’s adverse determination.
- ❖ **Background on Initial Request and Agency Denial.** Include details about your initial request, identified by date and agency tracking number(s), and a description of requested and withheld material. Enclose copies of all relevant correspondence with the agency, including the initial request letter and agency response(s).

SAMPLE LANGUAGE: STATEMENT OF APPEAL AND BACKGROUND

This letter constitutes an administrative appeal under the Freedom of Information Act, 5. U.S.C. Sec. 552(a)(6).

I am writing to appeal the determination by the [agency] with regard to my FOIA request filed on [initial request date], [request tracking number], for records concerning [subject of request]. By letter of [agency response date], [describe agency denial: withheld records / denied expedited processed / no documents]. [Attach request letter and agency response].

“I am writing to appeal the determination by the Central Intelligence Agency (CIA) with regard to my FOIA request, filed on February 17, 2005, for several records referenced in the July 7, 2004, Senate Intelligence Committee’s Report on the US Intelligence Community’s Prewar Intelligence Assessments on Iraq (Req. No. 05-2137). By a letter of September 2, 2005, the CIA withheld four of six requested documents under exemptions (b)(1) and (b)(3) of the FOIA.”

- ❖ **Arguments in Support of Appeal.** There are a variety of different arguments that can be made in support of an appeal, depending on the nature of the request and the agency’s response. Consider whether policy (common sense) or legal arguments may be appropriate for your appeal. Some examples of policy arguments include:

- disclosure is in the public interest
- the information is already publicly available
- passage of time has reduced potential harm

Some examples of legal arguments include:

- the agency conducted an inadequate search
- the agency did not release all segregable portions of the records
- the agency improperly denied a procedural request

- one or more of the FOIA exemption(s) were improperly applied

More detailed information about potential arguments and strategies for making them are laid out below. Include as many alternative arguments for release as possible.

- ❖ **Supporting Materials.** Be sure to enclose any supporting documentation, such as portions of documents already released that show why additional material should be disclosed, news articles, or other documents that support your arguments. Be sure to reference the materials in your letter and identify them clearly (for example, by labeling them “Attachment A,” “Attachment B,” etc.).
- ❖ **Contact information.** Include your contact information (phone and/or e-mail) and offer to discuss your appeal with agency staff.

SAMPLE LANGUAGE: CLOSE OF APPEAL LETTER

I look forward to receiving your decision on this appeal within the 20-day statutory time limit. If you have any questions, or believe discussion of this matter would be beneficial, please contact me directly at joeschmoe@gwu.edu or (202) 555-2000.

CRAFTING APPEAL ARGUMENTS

Filing an administrative appeal does not require the assistance of a lawyer. In many cases you will be able to write a successful appeal based solely on your personal knowledge of the requested records and common sense about why those records should be released.

Nonetheless, keep in mind that a successful appeal will often include legal arguments. There is no single, settled interpretation for most provisions of the FOIA statute. Rather, over time courts have examined parts of the statute in the context of disputes between requesters and agencies and have explained the meaning of the law as they understand it. In some cases, different courts have come up with different interpretations of the same provision. What you argue in your appeal should be based not only on the text of the FOIA but also on the common understanding of what a provision means, including courts’ interpretations.

Must you read court opinions and cite cases in your appeal? Sometimes reading a court decision about a FOIA request similar to yours might help you to understand how the FOIA applies in your case and what the agency’s obligations are towards you (and therefore whether or not it has fulfilled those obligations). At the very least, it is useful to understand the meaning of a given provision or exemption as it is commonly interpreted from both the statute and the cases. Brief summaries of the key provisions are below, as well as information about additional resources that can help you to develop your legal arguments.

that permit agencies to evaluate an individual's privacy interests in not having information released and the countervailing public interest that counsels in favor of disclosure.

For these reasons, it is helpful if you can argue that there is a strong public interest in releasing the requested material. Some examples of requests where significant public interest may justify disclosure include information that is about current or recent US policy decisions that directly impact the public—the war in Iraq or the National Security Agency's warrantless wiretapping program—or materials that expose government wrongdoing, misconduct, or misuse of public funds. There may also be arguments in favor of discretionary release based on public health and safety, ongoing public debate, value to scholarly interests, and personal urgency. The possible public interest reasons are as varied as the issues agencies handle.

❖ **The Information Is Already Publicly Available**

Often, some information about the subject matter or specific program, policy decision, or event covered by your request is already known to the public. If some details about a secret government program have been disclosed, such as through a newspaper article, congressional testimony, or speech, the government can show no harm from releasing the information because any such harm would have already occurred. Moreover, the fact that details about the policy or program have been released without consequence is evidence that at least some of the information you are seeking should be released.

When the agency has withheld records in their entirety, search for publicly available information that might be relevant. For example, there may be newspaper articles on the topic or press conferences, speeches, or testimony where government officials have discussed it. In addition, portions of other released government documents or books written by former officials may provide more details. If you believe that some information in the denied records is in the public domain, argue that at least those portions of the records that cover the already-public information should be released.

When you argue that requested information is already publicly available, be sure to include any documentation of the previous public disclosures. Do not assume that the FOIA office will do this research for you. If a subject has been discussed repeatedly by agency officials, attach transcripts of testimony, speeches, or press conferences to show that broad disclosure has already taken place. Official acknowledgment will prove the most compelling to the agency. Even without knowing for sure what the requested documents contain, you can explain why you believe that certain factual information likely would be contained within the given records.

❖ **The Passage of Time Has Reduced Potential Harm**

If you are requesting historical information or information about a program or policy that is no longer in effect, you can argue that the information should no longer be protected because time has passed and therefore arguments about harm from disclosure are no longer relevant.

Depending on the type of information requested, you may argue that information about private citizens can be released because many of the individuals involved are no longer living, or that national security interests should not prevent disclosure because there would be no harm to current security interests. This is also a very useful argument to make in the context of internal agency deliberations or decision-making processes where disclosing predecisional or other

types of protected information would not cause harm if the final decision was made in the past and disclosure would inform the public about important historical government decision making.

LEGAL ARGUMENTS

❖ Inadequate Search or “No Documents” Response

An agency may respond by saying that it has “no documents” responsive to your request. This means that the FOIA officer did a search based on the information you provided in your request and did not locate the specific record(s) you asked for or did not find any records when searching using keywords taken from your request. A “no documents” response does not necessarily mean that the agency has no documents that satisfy your request, although this may be the case; it simply means the agency did not find any documents in its search.

Agencies are required to conduct a search that is “reasonably calculated to uncover all relevant documents.”⁵ This means the agency has to do a reasonably good job of selecting search terms and searching in the right places for the records you requested. In addition, agencies have a duty to interpret FOIA requests liberally, rather than second-guessing the requester’s intention to make the request narrower and more easily searchable.

You may either appeal a “no documents” response broadly or very specifically, depending on the nature of your request and the information you have. If you asked for a specific document, explain why you believe that document exists. For example, you may have seen the document or meeting referenced in a news article. Attach any supporting materials, such as a copy of an article or statement by an agency official that references the document.

If you asked for documents about a general subject and you have reason to believe that the agency has records about this topic, you can simply ask it to search again. To support your request, present any facts you have that support the claim that the agency *has* or *should have* records about this topic (e.g., representatives of the agency were present at a meeting on the subject, so they likely prepared briefing materials and other background information).

The agency may not have found responsive records because it did not search in the right places, either because of the organization of its records, its search capabilities, or its interpretation of your request. You might consider calling the agency to learn more about how it searched for the records. When drafting your appeal, try to determine which office, bureau, or component of the agency would have worked on the subject matter you are interested in and ask that a new search be conducted of all records in that office. You can learn about the organization of the agency and the responsibilities of its offices on the agency’s Web site or through other public sources. Include a list of any offices or bureaus within the agency where you think the documents might be located and a request that the agency search those files.

Before drafting your appeal, it is best to get more information about the nature of the document(s) you are seeking and/or the agency’s organization and filing system. For example, some agencies such as the FBI may search only in a central records database that likely does not reference all of the agency’s paper records or all records held by individual offices or components. Or the agency FOIA staff interpreting your request may select only particular offices or components to search, and they may not search broadly enough to locate the relevant records.

If your request concerns a recent matter that probably involved intra-agency e-mail correspondence, specifically state in your appeal that the agency should search all electronic files, including e-mail systems, for responsive records. Although agencies are required by law to search e-mail and electronic files just as they search paper files, some agencies do not have the capacity to do a keyword search across their entire e-mail system for relevant messages and may have to conduct a more targeted search.

❖ **Agency Did Not Release Segregable Portions**

The FOIA mandates that an agency must release any portions of a record that are not exempt, provided the nonexempt portions are “reasonably segregable,” i.e., they can be easily separated from the exempt portions for release. This segregability requirement applies to all documents and all FOIA exemptions. It means that when you request a record and the record is withheld in its entirety, the agency is obligated to justify why every word of that record is exempt. If some portion of the record does not fall within one of the nine exemptions, the agency must release the segregable nonexempt portions. In some cases, you will receive redacted documents with exempt portions blacked out.

Because many agency exemption claims are subjective, it is important to cite the segregability requirement in administrative appeals to ensure that the official reviewing the appeal considers whether additional material—even a few words or sentences—can be released without harm. Making a segregability argument in your appeal often will result in additional material being released. Keep in mind, however, that despite the segregability requirement, an agency may withhold nonexempt material if it is so intertwined with exempt material that disclosure would provide only meaningless snippets of information.

❖ **Improper “Glomar” Response**

In responding to a FOIA request, an agency may refuse to either confirm or deny the existence of records if doing so could cause harm. This type of refusal is known as a “Glomar response,” named for a case in which the CIA refused to confirm or deny the existence of records that would have revealed the CIA’s connection with a seagoing vessel known as the Glomar Explorer. The response is different from an ordinary FOIA denial, where the agency either says it has no responsive documents or that it is withholding responsive documents.

Glomar responses are most common when the request concerns national security or intelligence information. A Glomar response in the national security context is only appropriate when the fact of the existence or nonexistence of the record is itself properly classified. Cases where a Glomar response would be permissible include when disclosure of the existence or nonexistence of documents would reveal the agency’s interest in a person or activity, if that interest is a classified fact or would otherwise harm national security. Agencies also have used Glomar responses in the privacy context, where disclosure of the existence or nonexistence of records would result in an invasion of an individual’s privacy.

Glomar responses are difficult to overcome, both on appeal and in litigation. The easiest way to challenge a Glomar response is to show that the information requested has already been disclosed. Keep in mind that to succeed with this argument, the information requested must be virtually identical to the information previously released and the information must have been made public through a documented official disclosure, not simply public speculation or a leak. For example, if a CIA official has referenced a particular individual when publicly discussing an

investigation conducted by the agency and you file a request for all records about that individual, the CIA cannot Glomar your request because it has publicly acknowledged that the individual was part of an investigation and, therefore, that the CIA has some records about him.

Make sure to carefully consider the scope of your request and the agency's Glomar response. If your request was very broad—for example, covering records about an aspect of the warrantless wiretapping program, which has been publicly acknowledged—you can argue that the agency may not properly invoke Glomar (even if the response would be appropriate for a narrower request).

Beyond instances of prior public disclosure, courts generally have shown great deference to agency claims of potential harm to national security. If you do not feel that you can make any of the above arguments on appeal, it may be possible to redraft your request and file it again to attempt to avoid a Glomar response. If you file a broader request, the subject of which would encompass your initial, narrower request, the agency may be unable to Glomar because the existence or nonexistence of any documents about the broad subject matter would not be a protected fact. Keep in mind, however, that if a Glomar response is overturned on appeal or withdrawn, the requester will receive confirmation of the existence or nonexistence of documents but will not automatically gain access to the documents themselves if their contents are protected by a FOIA exemption.

❖ **Improper Denial of Procedural Request**

When you receive an adverse determination on a procedural matter, such as a request for expedited processing or a fee issue, you may file an appeal that essentially repeats the same arguments you made in your initial request. You should already have provided all of the required details—for example, why your request qualifies for expedited processing under the agency's standards or why you fall into a given fee category or deserve a public interest fee waiver. It is nonetheless useful to reiterate these arguments and file an appeal if your request is denied, because at most agencies a different official will review your appeal and may come to a different conclusion than the original reviewer.

You should also read the response letter to see if the agency gave any specific reasons for its decision to which you can respond. If you have any additional arguments or further support (e.g., a list of publications or examples to back up your claim that you are a representative of the news media), you should include those as well. If you intend to litigate the denial of a procedural request, you will be limited to the arguments you made at the administrative level. Thus, you should develop all of your arguments fully to the agency in the initial request and/or the appeal.

❖ **Improper Rejection of Request**

Sometimes, an agency will reject or refuse to accept a request because the agency believes that the records requested are not "agency records" within the meaning of the FOIA, or because the agency is not an "agency" subject to the FOIA, or for another procedural reason. A request to an intelligence agency may also be rejected because the agency claims that the requested records are contained in operational files that are not subject to search and review.

When an agency rejects your request, the response letter may or may not state that you have a right to appeal this decision. Even if the agency has not explicitly granted appeal rights, you

should file an appeal arguing that at least some of the information you requested is subject to the FOIA and that the agency should therefore process your request.

ARGUMENTS REGARDING SPECIFIC FOIA EXEMPTIONS

When an agency withholds information (either documents in their entirety or portions of documents), it is important to argue in as much detail as possible why the withheld information does not fall within the statutory exemption(s) cited by the agency. In some cases, it is useful to support your argument with case law interpreting the relevant exemption, which may narrow or clarify the reach of the exemption or imply that the particular information you requested is not covered by the cited exemption. Even if the document(s) have been withheld in their entirety and you do not know much about their contents, you can make general arguments about the exemption(s) that the agency has claimed.

Begin by determining which exemptions the agency has used to withhold the information. The agency is required to inform the requester of the reasons for withholding, and generally will do so in the denial letter. If some records have been released in redacted form, agencies are also required to indicate on the released records themselves which exemption(s) have been applied to each withheld portion. If it is not clear from the response letter and/or released records why the information you requested has been withheld, contact the agency to inquire before drafting your appeal. It is very important to make specific arguments that are tailored to the agency's justification for withholding.

❖ **Presumption of Disclosure**

The FOIA establishes a strong presumption in favor of disclosure of government records, placing the burden on the agency to justify the withholding of requested documents under one of the nine specific exemptions provided in section 552(b) of the statute. According to the Supreme Court, the FOIA is grounded in “a general philosophy of full agency disclosure unless information is exempted under the clearly delineated statutory language.”⁶ The Supreme Court also has concluded that the FOIA exemptions are limited and “are to be narrowly construed.”⁷

Keep these general principles in mind when crafting administrative appeals. If you don't feel that the agency has adequately justified its decision to withhold the information you requested, say so. Remind the agency in your appeal that it must interpret the exemptions narrowly and review each and every document in detail for protected material, rather than sweeping broad groups of records within the exemptions.

❖ **Exemption 1: National Security Information**

Exempts information that is “(A) specifically authorized under criteria established by an executive order to be kept secret in the interest of national security or foreign policy and (B) are in fact properly classified pursuant to such executive order.”

Classification is governed by an executive order issued by the president. The national security executive order currently in force is EO 12958, as amended.⁸ The FOIA provides that a document that has been properly classified under the executive order can be withheld from disclosure. In response to a FOIA request, an agency must review a classified document to

determine if it still requires protection. If the agency determines that the requested document is properly classified, a requester may challenge this decision on appeal.

Note that most MDR appeals will be similar to Exemption 1 appeals in that they challenge withholding of material based on security classification (see chap. 4). In most cases, MDR response letters will indicate not only that information has been withheld pursuant to EO 12958, but also in which classification category the information falls (see fig. 5.3).

You may be able to argue that the document(s) you requested should not be withheld under Exemption 1 for one of the following reasons:

- ***The information does not fall within the categories of information that may be classified under EO 12958, as amended.***

The executive order specifies eight categories of information that may be classified if disclosure of the information could cause damage to national security (see fig. 5.3; app. 7 for text). Agencies likely will not inform you about the specific rationale for classifying the information you are seeking, but if you feel that the information you requested would not fall within *any* of the specified categories, make that argument in your appeal.

- ***The information is old or outdated and no longer needs to be classified.***

Generally, when information is classified it must be designated for declassification after ten years, but more sensitive information may remain classified for up to twenty-five years. Records of permanent historical value are subject to automatic declassification when they reach twenty-five years old, unless they are specifically exempted. Although age alone is not proof that a record should be declassified, it is one consideration in determining whether the record can be released. Therefore, if you know that a document you are seeking is more than ten or twenty-five years old, argue that the original sensitivities have eroded and protection is no longer required because release would not cause harm to national security today.

- ***A prohibition on classification in EO 12958 applies.*** Under the executive order, information may not be classified to “conceal violations of law, inefficiency, or administrative error;” “prevent embarrassment to a person, organization, or agency;” “restrain competition;” or “prevent or delay the release of information that does not require protection in the interest of the national security.”⁹ In addition, scientific research not related to the national security may not be classified.¹⁰

FIGURE 5.3: CLASSIFICATION CATEGORIES

Information cannot be considered for classification unless it concerns:

- military plans, weapons systems, or operations
- foreign government information
- intelligence activities (including special activities), intelligence sources or methods, or cryptology
- foreign relations or foreign activities of the United States, including confidential sources
- scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism
- United States Government programs for safeguarding nuclear materials or facilities
- vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism
- weapons of mass destruction

- ***The information has not been properly marked or treated as classified.*** The executive order requires that a document be properly marked as classified with the name of the classifying authority and office that classified it, the level of classification, the reason for classification (i.e., the category), and the declassification date. If only a portion of the record is classified, the classified and unclassified sections or paragraphs must be clearly marked. This requirement is particularly relevant if an agency releases a document redacted on the basis of Exemption 1. Examine the document carefully to determine if any of the withheld portions were not marked as classified or if the document itself lacks clear classification markings.
- ***The information has been publicly disclosed or is otherwise publicly available.*** Information that has been publicly disclosed can no longer be considered classified because the agency cannot successfully argue that its release would cause harm to national security. If the information is found in other declassified documents or has been discussed publicly, such as in a book or memoir or another agency publication, you can argue that at least those segregable portions of the record that contain already public information should be released. Attach any supporting materials you have, including copies of declassified documents or publications that reference the material you are seeking.

❖ **Exemption 2: Internal Personnel Rules and Practices**

Exempts information “related solely to the internal personnel rules and practices of an agency.”

Exemption 2 has two distinct components (Low 2 and High 2), either of which an agency may rely on to withhold information.

The “Low 2” Exemption covers internal agency matters in which the public could not reasonably be expected to have any interest. Examples of the type of information that can be withheld under this exemption include:

- Administrative file markings.
- File numbers, internal report numbers, access numbers, and routing codes.
- Computer codes for internal systems.

The best way to challenge the Low 2 Exemption is to argue that the requested material cannot be considered solely related to “internal personnel rules and practices” of the agency. Courts have concluded, for example, that internal databases of information and some instructions and communications between an agency and its staff or members of the public are not solely for internal use and therefore are not covered by Exemption 2. As part of this argument, you should try to show that there is, in fact, a public interest in the requested material such that it cannot be considered solely internal.

The “High 2” exemption covers internal agency matters where disclosure would risk circumvention of the law or an agency regulation. The most common circumstance where agencies attempt to use the High 2 Exemption is law enforcement. For example, an agency may withhold law enforcement manuals or internal instructions to staff about how to conduct law enforcement activities.

Although this interpretation of Exemption 2 has been recognized by some courts, it is not clear that this interpretation was intended by Congress when it enacted the FOIA. Therefore, it is

important to argue that the information you are seeking is not related *solely* to internal matters of the agency, but rather concerns the public and/or is of interest to the public.

When faced with a High 2 exemption claim, also consider another provision of the FOIA, which requires that “administrative staff manuals and instructions to staff that affect a member of the public” be made available for public inspection and copying automatically, without a FOIA request.¹¹ If you can argue that the material you are requesting is an internal manual, instruction, or guidance document that affects the public, cite § 552(a)(2)(C) to support your argument that Exemption 2 does not apply and that the information must be released.

❖ **Exemption 3: Information Exempt Under Other Laws**

Exempts information that is “specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.”

Exemption 3 is a complicated exemption because it actually encompasses a number of different exemptions that are set forth in laws other than the FOIA and directed at a category of information held by a specific agency or group of agencies. In order to effectively challenge an Exemption 3 withholding, you have to learn not only about the FOIA, but also about the Exemption 3 statute(s) at issue.

FIGURE 5.4: LOCATING AN EXEMPTION 3 STATUTE IN THE U.S. CODE

The U.S. Code is a multi-volume publication containing the text of all federal statutes.

Go to <http://www.gpoaccess.gov/USCODE/>
Search or browse for relevant section of United States Code.

How to read a citation to the U.S. Code:

50 U.S.C. § 403-3(1)(5)

/	\		\
Title number within Code	United States Code	Section and subsection of Code containing statute	

An agency denying information under Exemption 3 should indicate in the denial letter which statute was used to justify withholding. The first step is to locate and read the statute or portion of the statute cited by the agency (see fig. 5.4).

There are two ways to approach challenging an Exemption 3 denial. The first involves a complex legal argument that the statute claimed by the agency cannot properly be used as an Exemption 3 statute because it does not meet certain criteria developed by Congress and the courts. It is unlikely that you will be able to make such an argument successfully in your appeal unless you do in-depth legal research about the genesis of the statute and its formulation. The second approach is to learn about what types of information the statute covers and argue that the information you requested is not covered by statute and therefore cannot be withheld.

There are hundreds of Exemption 3 statutes that apply to agencies across the federal government. The following are examples of a few commonly used Exemption 3 justifications for withholding:

- **Intelligence sources and methods.** The National Security Act directs the CIA (as well as now the Director of National Intelligence (DNI)) to protect “intelligence sources and methods from unauthorized disclosure.”¹² Another portion of the statute says that the CIA and DNI do not have to disclose “the organization, functions, names, official titles, salaries, or

numbers of personnel employed by the agency.”¹³ These provisions may be used to withhold information regardless of whether the information is properly classified under Exemption 1.

- **National Security Agency information.** The National Security Agency (NSA) is exempt from disclosing information related to the organization or function of the agency or its employees.¹⁴
- **Information from international sources.** Another statute allows the Defense Department to withhold information provided by a foreign government or international organization, if the entity requests or requires that the information be withheld or kept confidential.¹⁵
- **Tax return information.** A statute that controls the dissemination of income tax return information permits the IRS to withhold tax returns and related materials under Exemption 3. Under this statute, as well, the IRS has no obligation to redact identifying information from a tax return and provide the redacted version. “Return information” under the statute includes a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions credits, assets, liabilities, and other data, but does not cover data that cannot be associated with a particular taxpayer.¹⁶
- **Grand jury records.** Under the Federal Rules of Criminal Procedure, agencies may withhold grand jury transcripts as well as information that would reveal the identities of witnesses or jurors or other details about the testimony, strategy, or deliberations of the grand jury.¹⁷

❖ **Exemption 4: Confidential Business Information**

Exempts “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”

In order to withhold information under Exemption 4, an agency must show that the information is either (1) a trade secret or (2) commercial or financial information, obtained from a person, which is privileged or confidential.

Trade Secrets

There is no definition in the FOIA for what constitutes a “trade secret,” but generally this term applies to plans, formulas, processes, and the like that are commercially valuable, used in business, and kept confidential. A narrow definition, adopted by some courts, defines trade secret as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”¹⁸

Confidential Commercial Information

The standard test for whether information falls within the second part of Exemption 4 has three parts. If you do not believe the information you are seeking satisfies one or more of these parts, you should argue that it cannot be withheld.

First, agencies may only withhold information that is “commercial” or “financial” in nature. These terms are defined in a straightforward way and essentially cover any information related to commerce or profit making of a business or corporate entity. Information about the operation of the business, including research, statistics, and sales, as well as information related

to the design, development, and sale of products, business methods, or technical specifications, are generally protected.

Second, the information must have been “obtained from a person” by the agency. The exemption applies only to information provided to the government by a nongovernmental entity or business. The government’s own confidentiality interests are protected by other FOIA exemptions. However, “person” is very broadly defined and includes individuals as well as all different types of private businesses, corporations, nonprofit organizations, and even foreign governments. But any government-prepared documents that are based primarily on information the government generated itself or gathered from outside sources (rather than on information provided by a “person”) are not exempt under this provision.

Third, the information must be “privileged or confidential.” Generally, agencies rely on claims that information is “confidential” because “privileged” information refers to specific legal privileges that are generally covered by Exemption 5.

There is, however, a strict test for determining whether information is “confidential” under Exemption 4. Information is confidential 1) if it has not been made publicly available or widely distributed within the agency *and* 2) if its disclosure would either “impair the government’s ability to obtain the necessary information in the future” or “cause substantial harm to the competitive position of the person from whom the information was obtained.”¹⁹ If you can argue that some of the information has been disclosed, make sure to include supporting materials that document the disclosure.

In determining whether the record is confidential, you must consider whether it was voluntarily submitted to the government and whether submission was required. That assessment depends on whether the agency possesses the legal authority to require submission of the information, such as through a statute, executive order, regulation, or “less formal mandate,” and whether the agency has exercised its authority to obtain the information. The test does not depend on whether the submitter is voluntarily participating in an agency program. If the information was voluntarily submitted, the agency will be considering whether the information is “of a kind that would customarily not be released to the public by the person from whom it was obtained.”²⁰

If the submission is required, then the agency will consider whether disclosure of the information would impair the government’s ability to obtain necessary information in the future. The agency will look at criteria such as whether the disclosure would cause substantial harm to the competitive position of the person from whom the information was obtained. As part of its assessment, the agency will notify the submitter of the information about your FOIA request and solicit the submitter’s views as to whether disclosure will cause substantial competitive harm. This notice to the submitter is currently authorized by EO 12600. As you may imagine, this process can be time consuming and will likely push the agency beyond the 20-day response deadline.

In some instances, when the submitter is unable to persuade the government of the risk from disclosure, the submitter may file a lawsuit to prevent the disclosure. This is called a “reverse FOIA” lawsuit. Finally, the agency will also consider whether disclosure will harm other governmental interests such as regulatory and legal compliance or program effectiveness.

Exemption 4 has been the subject of a great deal of litigation over the years, and the law differs somewhat in each jurisdiction. Thus, if you are likely to file an appeal of an Exemption 4 denial, you should consult specialized resources that describe the law in your jurisdiction.

❖ **Exemption 5: Privileged Inter- or Intra-Agency Communications**

Exempts “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.”

Exemption 5 protects information that is covered by established legal privileges, such as those that protect attorney–client and similar relationships, lawyers’ legal strategies, and deliberative materials prior to a final decision by government officials. Because Exemption 5 protects the government’s own privileges, disclosure of material covered by this exemption is discretionary, and an agency may choose to release potentially exempt information if it does not foresee harm from doing so.

Because of its vague language, Exemption 5 has been the subject of numerous lawsuits seeking to clarify its application. When information is withheld under Exemption 5, a requester challenging the denial must determine first whether the document itself falls under Exemption 5 and then whether the claimed privilege in fact protects the type of information requested. Some of the arguments that may be applicable to an appeal of an Exemption 5 denial are outlined below.

In its denial letter, the agency should state which part of Exemption 5 it has relied on to withhold the requested information. If you do not know which privilege the agency has applied (and the agency will not provide further explanation upon request), make relevant arguments under each of the privileges that you think could potentially be applied to the information you requested (for example, if the request involves an agency’s legal opinions on a given topic, challenge the withholding under the deliberative process, attorney–client, *and* attorney work product privileges).

Threshold Issue: Inter- or Intra-Agency Records

Exemption 5 applies to documents created by an agency to be transmitted internally within the agency or to another agency. The exemption has also been held to apply to documents generated by an outside party acting on behalf of the agency, such as a consultant.

If you believe that the records you are seeking were either provided to the agency by an outside party (for example, an application or other submission from a corporation or member of the public) or were created by the agency for an outside party (such as Congress or a foreign government), provide any evidence you have to demonstrate that the records are not inter- or intra-agency.

Privileges Covered by Exemption 5

Deliberative Process Privilege

The deliberative process privilege protects information that is both “predecisional” and “deliberative,” meaning advice, recommendations, and opinions that are part of a consultative decision-making process within the agency. This privilege is intended to encourage open and frank deliberations on policy matters and to ensure that proposed policies or rationales are not disclosed before they are finalized and adopted. When an agency withholds information

pursuant to the deliberative process privilege, you may be able to make one or more the following arguments:

- *The information is not “predecisional.”* Predecisional documents are protected by Exemption 5, but postdecisional documents are not. This means that final opinions or administrative decisions are not protected and must be disclosed if not otherwise exempt. Likewise, courts have held that all agency records that constitute the “working law” of the agency, such as orders, decisions, interpretations, instructions, or guidelines affecting the public cannot be protected by Exemption 5.

Drafts, proposed policies, or documents that are part of a back-and-forth process before the final decision is made may be withheld under this privilege. However, in order to be considered predecisional, a document must actually be part of the decision-making process, for example, containing recommendations or opinions about prospective policies.

If the agency expressly adopts or incorporates deliberative materials in making its final decision, those materials can no longer be protected. For example, if the Attorney General announces a new policy and describes a legal opinion on which the agency relied in making its decision about the policy, the legal opinion, although predecisional, can no longer be withheld because it was incorporated into the final decision.

- *The information is not “deliberative.”* Even if a document is predecisional, it can only be withheld under Exemption 5 if it contains deliberative material, such as opinions or recommendations, and not merely factual information. Factual information contained in a predecisional document must be released unless it is “inextricably intertwined” with the exempt portions.

Attorney–Client Privilege

The attorney–client privilege protects confidential communications between a client and his or her attorney, where the communication is based on confidential information provided by the client. The privilege has been held to apply to government attorneys; in this case, the agency is considered the client. The attorney–client privilege covers facts as well as advice contained in a protected communication.

In the government context, the attorney–client privilege protects only those communications between agency officials and attorneys that are based on confidential information from the agency and provided in order to obtain legal advice and that are maintained as confidential (generally meaning that they are not disclosed beyond senior agency officials). The privilege protects only those communications that concern a legal matter for which the agency client sought professional legal advice. Neutral legal analyses that do not constitute advice or legal conclusions that the agency applies in its dealings with the public are not privileged.

Keep in mind that while many attorneys work in federal agencies, not every agency document a government attorney creates is privileged, and only those that constitute *confidential legal advice* sought by the agency from its attorneys are exempted. When drafting your appeal, therefore, you may be able to argue either that the information was not maintained as confidential (particularly if you are aware that some of it was disclosed outside of the agency), or that it did not constitute professional legal advice from a government attorney to his or her agency client.

Work Product Privilege

The attorney work product privilege protects records prepared by an attorney for litigation, in particular where the records would reveal the litigation strategy. In order to withhold a record under the work product privilege, the agency must show that the document was prepared in anticipation of specific litigation (and not merely in the ordinary course of legal work at the agency), by an attorney representing the government. The courts have interpreted this privilege broadly, however, protecting a wide range of documents related to litigation.

If you believe that the record you requested does not relate to litigation or has segregable portions of clearly factual information that do not disclose any legal reasoning or strategy, argue for the agency to reconsider its decision on this basis.

Exemption 5 Waiver

In general, an agency may not withhold records under Exemption 5 if the agency has waived the privilege by disclosing the records to third parties or others outside of the executive branch. There are some exceptions to this rule, including where the agency has disclosed information to another agency or to a member of Congress or was compelled by a court order or subpoena to disclose the material. But it is generally the case that when an agency has disclosed the record publicly or has repeatedly referred to information contained in the record in a public forum, it can no longer assert the protection of Exemption 5. To appeal on this basis, be sure to include supporting information showing public references to the record or information at issue.

❖ **Exemption 6: Personal Privacy**

Exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

Exemption 6 protects from disclosure “personnel and medical files and similar files,” but only when disclosing the files “would constitute a clearly unwarranted invasion of personal privacy.” Therefore, the agency must conduct a balancing test before it may withhold information under Exemption 6. Although there is likely to be some invasion of privacy from the disclosure of personal information contained in government files, the agency may withhold the information only if it determines that the invasion of privacy is “clearly unwarranted” in light of the public interest in disclosure and other countervailing factors.

Although Exemption 6 can be used to withhold entire records, often records will be released but with personal information redacted pursuant to this exemption. If records responsive to your request are withheld in whole or in part under Exemption 6, there are several arguments that can be helpful in challenging the denial.

Types of Records

Despite the seemingly narrow language of Exemption 6, the universe of “similar files” beyond personnel and medical files that are eligible for protection has been interpreted broadly. In effect, any records that implicate privacy interests similar to those in personnel or medical files and contain detailed information about an identifiable individual may be withheld.

Clearly Unwarranted Invasion of Privacy

According to courts that have interpreted the “clearly unwarranted invasion of personal privacy” language of Exemption 6, the exemption requires agencies to balance the privacy interests against the FOIA’s purpose “to open agency action to the light of public scrutiny.”²¹ Moreover, the statute tilts the balance in favor of disclosure by requiring proof of a “clearly unwarranted” invasion of privacy.

On appeal, you should make an argument about the public’s interest in the information you are seeking and emphasize that the balance in your case clearly favors disclosure. The following specific arguments may be relevant:

- *Information about public officials.* The privacy interests of public officials are reduced compared to those of private citizens whose information is contained in government records. If you believe the information withheld contains personal details about a government official, argue that the public interest in release is strong because the FOIA allows the public to find out what their government is up to and because government officials have limited privacy interests, particularly with regard to their official conduct.
- *Business information.* It is generally the case that only individuals have privacy interests, so business information should not be withheld under Exemption 6. In addition, courts have held that disclosure of information about an individual’s business or professional activities does not implicate privacy interests and so would not be protected under Exemption 6.
- *Insignificant privacy interest.* Based on the facts you have about the requested information, you may be able to argue that the privacy interests at stake are insignificant compared with the public interest in disclosure. For example, courts have often found only minimal privacy interest in individuals’ names alone, including names of federal employees and identities of people who submitted comments, applied for federal grants, or made voluntary reports to the agency. Although phone numbers, social security numbers, or other personally identifying information about individuals will rarely be released, you may be able to argue that the release of individuals’ names does not invade privacy in some circumstances and, therefore, should not be redacted. Often, the names of agency officials or others involved are key to understanding how the government was making policy or conducting activities.
- *Significant public interest.* In general, the public interest considered on the other side of the Exemption 6 balancing test focuses on the public’s understanding of agency actions and policymaking processes as a way to exercise oversight and promote accountability. If you believe that the information at issue will help to inform the public about agency conduct or misconduct, argue why the public needs access to the information.

Keep in mind that you will generally not be able to satisfy this test if the information you are seeking is for personal or commercial purposes only. Conversely, if you can show that obtaining the information will help the public better understand government activities (a particularly useful argument for journalists and others who will disseminate the information broadly), you will have a good chance of satisfying the test if the privacy interests are comparatively insignificant.

❖ **Exemption 7: Law Enforcement Information**

Exempts “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information: (A) could reasonably be expected to interfere with 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, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (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, or (F) could reasonably be expected to endanger the life or physical safety of any individual.”

Threshold Issue: Records Compiled for Law Enforcement Purposes

Exemption 7 only protects records that are compiled for law enforcement reasons. The most important issue to consider when challenging an Exemption 7 claim is whether the record(s) at issue were in fact “compiled for law enforcement purposes.” In order to fall within Exemption 7, the records must be related to a civil or criminal investigation or an agency administrative enforcement proceeding. Criminal law enforcement agencies (like the FBI) can generally withhold documents related to investigations conducted under federal laws or to maintain national security, as long as the investigations reasonably fall within their law enforcement duties. Other agencies that do not have law enforcement powers (such as the CIA, which is prohibited from conducting domestic law enforcement activities) generally cannot use Exemption 7 to withhold records related to an investigation.

Even if the requested information was in fact “compiled for law enforcement purposes,” however, it is not exempted under Exemption 7 unless disclosure would lead to one of the specific harms set forth in the subparts of this exemption. When faced with an Exemption 7 denial, carefully consider whether the disclosure of the requested records would in fact cause one of these harms (discussed below); if not, they should be released.

Components of Exemption 7

Ex. 7(A): Interference with enforcement proceedings

Information may be withheld under Exemption 7(A) when disclosure could impede an investigation or harm the government’s case in an ongoing proceeding. An agency generally cannot withhold records related to an investigation that is complete and/or closed, unless the government intends to reopen the investigation later. In addition, the agency may only withhold information if there is actually an ongoing investigation or concrete likelihood of a future investigation, but not if it merely speculates that there might be an investigation.

Agencies may justify withholding based on a range of different potential harms, including where disclosure might discourage potential witnesses from testifying, provide the subject of the investigation or prosecution with information about the government’s case, or interfere with the agency’s ability to control the investigation.

Ex. 7(B): Interference with right to fair trial

An agency may deny a request pursuant to Exemption 7(B) if the information (1) relates to a civil or criminal trial or agency adjudication that is pending or imminent and (2) disclosure of the material would interfere with the fairness of the proceedings. This exemption places a higher burden on agencies than other subsections of Exemption 7, requiring a relatively strong showing that disclosure would give one side an unfair advantage or would prejudice the outcome of the case (for example, by affecting the judgment of jurors or the administrative authority in the case).

Ex. 7(C): Unwarranted invasion of personal privacy

This exemption is closely related to Exemption 6 and also requires a balancing of public interest against the potential invasion of privacy from disclosure. However, the standard for withholding is somewhat lower than Exemption 6, because Exemption 7(C) requires only a showing of “unwarranted invasion” of privacy rather than “clearly unwarranted invasion.”

Courts have generally found that this subpart of the exemption applies when a third party requests law enforcement records about a private citizen that are held by the agency and do not contain information about the agency or its activities.²² Examples of the types of records that can generally be withheld are rap sheets or other records information about the criminal history of an individual.²³ Agencies are also permitted to categorically withhold names and addresses contained in law enforcement records, unless that information is necessary to show that the agency engaged in illegal activity.

This exemption also applies to information that, if disclosed, would personally embarrass an individual referenced in a law enforcement file, especially information that would reveal the names of individuals investigated but not charged with criminal activity. In situations like these, the public interest supporting disclosure must be exceptional. As in Exemption 6, public officials may have a diminished expectation of privacy under Exemption 7(C).

Ex. 7(D): Confidential sources

To permit withholding under Exemption 7(D), the records must have been compiled by a law enforcement agency as part of the agency’s law enforcement duties. Pursuant to this exemption, a law enforcement agency may withhold records containing information furnished by a confidential source during the course of a criminal investigation. There is no time limit on how long confidential source information may be withheld, even if many years have passed or if the source is deceased. A “confidential source” can be an individual or an institution, such as a foreign, state, or local law enforcement agency. Exemption 7(D) will not apply if the confidentiality of the source has been breached, for example if the source appears to testify or the identity of the source is otherwise publicly revealed.

Ex. 7(E): Investigation techniques and procedures

This exemption does not protect *routine* investigative techniques and procedures that are already common knowledge (for example, ballistics tests, fingerprinting, eavesdropping, and wiretapping). Agencies may only withhold materials that would reveal unique or secret techniques and procedures or specific, unknown ways that existing techniques are being employed for law enforcement purposes. This exemption also does not apply to administrative staff manuals or instructions that affect members of the public, which fall within the FOIA’s automatic disclosure provisions.

Ex. 7(F): Danger to life or physical safety

This exemption applies when the release of law enforcement information may endanger individuals, including law enforcement personnel, informants and sources, and members of the public at large. Some courts have interpreted Exemption 7(F) broadly, finding that it may be used to withhold information that the agency believes could be used by terrorists to plan an attack. But at the very least, the information withheld must have been compiled for law enforcement purposes, and there must be a clear connection between the information and the potential harm.

❖ **Exemption 8: Financial Institutions Information**

Exempts information “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.”

Exemption 8 has been interpreted broadly to protect individual financial institutions as well as the integrity of the financial industry as a whole. Although there is no settled definition of “financial institutions,” it has generally been held to include banks, trust companies, investment firms, and securities exchanges; the term is not limited to depository institutions. The exemption can block disclosure even when the information does not relate to an institution’s financial soundness or stability or is not part of any investigation. Use of the exemption also is not limited to agencies that supervise the financial institution.

❖ **Exemption 9: Geological Information**

Exempts “geological and geophysical information and data, including maps, concerning wells.”

Exemption 9 is rarely invoked or litigated. Courts have found significant overlap with Exemption 4. Exemption 9 has been used to provide a near-blanket exemption for oil well materials, but the Interior Department has also cited it to apply to water wells. At least one court has held that this exemption is to be construed narrowly and applied only to technical or scientific information about wells, not proprietary information that may be otherwise exempted under Exemption 4.

APPEALS CHECKLIST

- May I appeal?** Determine whether the agency’s response is an “adverse determination”:
 - Records withheld in whole or in part
 - Delay
 - No records or inadequate search
 - Denial of fee waiver, preferred fee status, or expedited processing
 - Excessive fees
 - Rejection of request
 - Glomar response
 - Other decision that will impede access to records

- When must I appeal?** Most agencies allow at least thirty days; check response letter or agency regulations for exact deadline.

- Where do I send the appeal?** Find appeal authority information in response letter or call agency/check agency Web site to determine contact information for appeals.

- How do I draft my appeal?** Make sure to include the following in your appeal letter:
 - Statement of appeal
 - Background information about request and agency response, including copies of correspondence
 - Substantive arguments: policy and/or legal
 - Supporting materials
 - Contact information

- Have I made all applicable policy arguments?**
 - Public interest
 - Information publicly available
 - Passage of time

- Have I made all applicable legal arguments?**
 - Inadequate search
 - Insufficient segregation of nonexempt materials
 - Exemptions improperly applied

- Are there procedural issues for appeal?**
 - Glomar response
 - Denial of fee waiver or fee status request
 - Denial of expedited processing
 - Improper rejection of request