

Attachment B

Proposed Model Agency Determination Letter

Background

Under the Freedom of Information Act (FOIA), an agency’s substantive response to a request is called a “determination.”¹ The determination has both substantive and procedural ramifications for a FOIA request.² And in the case of an adverse determination, the requester has the right to file an administrative appeal.³ In fiscal year 2022 alone, the federal government received more than 15,000 administrative appeals, and ended the year with a backlog of more than 4,700.⁴

Although FOIA sets forth some procedural information that must be provided with a determination, the statute says almost nothing about communicating the substance of the agency’s decision.⁵ Consequently, there is great variation between agencies in terms of information provided in a determination letter, posing confusion in the administration of the statute that applies to all agencies. Among other things, determination letters that do not set forth basic information about an agency’s actions can stymie an efficient administrative process, needlessly taxing the resources of agencies and requesters alike.

For example, a requester that does not know how an agency conducted a search, or has no information about a complete denial, cannot meaningfully evaluate whether to file an administrative appeal, let alone what they should include in that appeal. In such circumstances, a requester may opt to file an administrative appeal as a matter of course, or to simply challenge every single redaction. Conversely, an agency that receives a broad appeal must re-evaluate the entirety of the determination, even if the issue(s) the requester would actually be concerned with—given proper context—are quite narrow. That means that appeal personnel are needlessly spending time reviewing issues that may not be of concern to the requester.

By providing more detail about the substance of a determination, requesters can file more targeted and informed administrative appeals. Indeed, supplied with information about an agency’s actions, a requester may not file an administrative appeal at all. Agencies, in turn, need not expend resources where they are not truly needed.

¹ 5 U.S.C. § 552(a)(6).

² See, e.g., *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180 (D.C. Cir. 2013).

³ 5 U.S.C. § 552(a)(6).

⁴ *Summary of Annual FOIA Reports for Fiscal Year 2022*, United States Department of Justice, <https://www.justice.gov/oip/page/file/1581856/download>.

⁵ Cf. 5 U.S.C. § 552(a)(6)(A)(i)(I) (agency must notify requester of the “determination and the reasons therefor”).

Please note that bracketed information in the draft is either illustrative or is intended to provide guidance to agencies to fill out, as applicable to individual requests.

MODEL DETERMINATION LETTER

[Requester name]
[Requester Address]

[Date]

Re: [FOIA Request Tracking Number]

Dear [Requester],

This letter responds to your [/your client's/your organization's] Freedom of Information Act (FOIA) request, which was submitted to [agency], and assigned tracking number [tracking number]. This request sought: [insert verbatim description of requested records or a summary thereof, or attach copy of request]

This is a [final/interim] response to your request. [if interim response, note when the next and/or final response is expected]

History of Request

This request was received by [agency] on [date] via [method of transmission, e.g., portal, email, fax, etc.].

A letter acknowledging the request was sent on [date].

[If applicable, note other information about administrative history of the request, including (but not limited to): (1) whether the request was narrowed/modified, (2) whether a "still interested" letter was issued/responded to; (3) whether there were prior consults/referrals to other agencies; (4) whether there was a request for/adjudication of fee category, fee waiver or expedited processing; (5) whether "unusual circumstances" were invoked and the basis therefore. Optionally, attach copies of relevant correspondence].

[Agency's] Search for Responsive Records

A search for records responsive to this request was initiated on [date] and completed on [date]. [If applicable, note if different date cutoff(s) were used in conducting search].

To locate responsive records, [agency] used the following methodology: [describe search keywords/terms, or other applicable search methodology].

The following locations or repositories were searched as they were determined to be reasonably likely to have records responsive to your request: [list search locations, databases, office names/divisions, custodians, etc.]

As a result of these searches, [###] pages [or volume/other descriptor] of responsive records were located. After completing its review, [agency] has identified a total of [###] pages [or volume/other descriptor] as responsive to your request.

[If applicable, note limitations on search, including (1) whether records were accessioned to NARA, (2) whether records were destroyed in accordance with a federal records schedule, (3) whether there were other limitations on searching for records (e.g., encrypted files).

[Agency's] Determination

Following [agency's] review of responsive records, [insert one of following based on whether full/partial grant/denial:]

[IF FULL GRANT]

[agency] has determined to grant your request in full. [number/volume of records/pages] are [will be] released. [If applicable, note when records will be released if not included with determination].

[IF PARTIAL GRANT/PARTIAL DENIAL]

[agency] has determined to grant your request in part and deny your request in part. [number of pages/volume of records] are [will be] released in full, [number of pages/volume of records] are being withheld in part, and [number of pages/volume of records] are being withheld in full. [If applicable, note when records will be released if not included with determination]

FOIA allows agencies to withhold information that is covered by one of nine exemptions, set forth at 5 U.S.C. § 552(b)(1)–(9), and if withholding of the information is either required by law or separately justified under the statutory foreseeable harm standard, 5 U.S.C. § 552(a)(8). That standard allows an agency to withhold information when it reasonably foresees that releasing it would harm an interest protected by one or more of the nine exemptions.

Each redaction in the record(s) that have been partially released to you contains an annotation with a number that corresponds to the applicable FOIA exemption. For example, a redaction that states “(b)(6)” corresponds to FOIA Exemption 6, which protects information about individuals in “personnel or medical files and similar files” when the disclosure “would constitute a clearly unwarranted invasion of personal privacy.”

The following information has been withheld from records responsive to your request:

[Note: the following are only examples of how an agency might describe withheld information and records. Agencies should aim to provide enough detail to afford a requester a meaningful opportunity to appeal. The level of detail provided will vary with regard to each request, type of information/record withheld, and the volume of withheld records. It is important to note that in instances where the agency withholds an entire record or records, the description below may be the only information the requester has upon which to file an administrative appeal.]

- EXAMPLE: Pursuant to Exemption 4, [agency] has withheld portions of 83 pages consisting of testing data submitted by a third party. Information may be withheld pursuant to Exemption 4 if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 4 because [. . .]
- EXAMPLE: Pursuant to Exemption 5 and the deliberative process privilege (noted as (b)(5)-DPP), [agency] has partially withheld 91 pages, consisting of the content portions of 36 internal emails with attachments, regarding recommendations on a new agency policy. Information may be withheld pursuant to Exemption 5 if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by the deliberative process privilege because [. . .]
- EXAMPLE: Pursuant to Exemption 5 and the attorney work-product privilege (noted as (b)(5)-AWP), [agency] has fully withheld 23 pages, consisting of a draft legal memorandum. Information may be withheld pursuant to Exemption 5 if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by the work-product privilege because [. . .]
- EXAMPLE: Pursuant to Exemption 6, [agency] has applied redactions to 14 pages for Social Security numbers and dates of birth. Information may be withheld pursuant to Exemption 6 if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 6 because [. . .]

[IF FULL DENIAL]

[agency] has determined to deny your request in full. [number of pages/volume of records] are being withheld.

FOIA allows agencies to withhold information that falls within the scope of one of nine exemptions, set forth at 5 U.S.C. § 552(b)(1)–(9), and if withholding of the information is either required by law or separately justified under the statutory foreseeable harm standard, 5 U.S.C. § 552(a)(8).

In response to your request, records have been withheld in full, as follows:

[Note: the following are only examples of how an agency might describe withheld information and records. Agencies should aim to provide enough detail to afford a requester a meaningful opportunity to appeal. The level of detail provided will vary with regard to each request, type of information/record withheld, and the volume of withheld records. It is important to note that in instances where the agency withholds an entire record or records, the description below may be the only information the requester has upon which to file an administrative appeal.]

- EXAMPLE: Pursuant to Exemption 3 and the Internal Revenue Code (26 U.S.C. § 6103(a)), which prohibits the release of tax information by an IRS employee, 18 pages of tax returns have been withheld.
- EXAMPLE: Pursuant to Exemption 4, [agency] has withheld 18 pages of product schematics submitted by a third party. Information may be withheld pursuant to Exemption 4 if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 4 because [. . .].
- EXAMPLE: Pursuant to Exemption 5 and the deliberative process privilege, [agency] has withheld 14 pages consisting of two memoranda: the first of which is an options paper on a new agency policy, and the second is a draft statement describing the options paper. Information may be withheld pursuant to Exemption 5 if [...]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 5 because [. . .].
- EXAMPLE: Pursuant to Exemption 7(A), [agency] has withheld 206 pages, consisting of 18 documents that concern an ongoing law enforcement investigation. Information may be withheld pursuant to Exemption 7(A) if [...]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 7(A) because [. . .]

Referrals

[If records have been referred to another agency, identify, if possible: (1) each agency to which records have been referred, (2) how many pages have been referred to which agency, (3) when the referral was made, (4) whether the referral is a consult or whether the other agency will provide a direct response, (5) the new FOIA tracking number, if any, and (6) contact information for the agencies to which a referral has been made]

Fees/Fee Waiver

For the purposes of this request, you [your organization/your client] was assessed as a [identify record requester category]. [If applicable, identify basis for/additional information relevant to fee categorization]

[Identify, if applicable, grant/denial of fee waiver request and basis thereof]

[Identify applicable fee types, amounts (including a breakdown of fees for search, review and duplication), and total]

Your Rights

You have the right to appeal any adverse portions of this decision by writing to [agency] at the address below. Your appeal must be submitted within 90 calendar days from the date of this letter. Please submit your administrative appeal by [insert administrative appeal instructions/contact information]. [insert additional administrative appeal requirements, if any]

A failure to file a timely administrative appeal may affect your rights with respect to this request.

You also have the right to seek assistance and/or dispute resolution services from the [agency's] FOIA Public Liaison (FPL) or the Office of Government Information Services (OGIS) with respect to this request. The FPL is responsible, among other duties, for assisting in the resolution of FOIA disputes within [agency]. OGIS, which is outside [agency], offers ombuds services, including dispute resolution services between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. Please note that OGIS's assistance does not replace the administrative appeals process. Please also note that contacting OGIS does not affect the deadline to submit an administrative appeal.

You may contact the FPL or OGIS at:

[FOIA Public Liaison Name]
[Mailing address]
[Telephone number]
[Email address]
[Fax number, if applicable]

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: 202-741-5770; toll free at 1-877-684-6448

Conclusion

If you have questions about this response, please contact [agency] at the following:
[insert contact info]

Sincerely,
[name and contact info]