

How to make a public records request

The Basic Rule

- ▶ Federal: 5 U.S.C. 552
 - ▶ “Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.”
 - ▶ You don’t have to be a citizen or resident of the U.S.
 - ▶ Only applies to federal agencies, not elected officials or judiciary
- ▶ Oregon State: ORS 192.314(1)
 - ▶ “Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided in ORS 192.338, 192.345, and 192.355.”
 - ▶ You don’t have to be a citizen or resident of Oregon
 - ▶ Applies to state agencies, local government bodies, *and* elected officials

Except...Exemptions

- ▶ Federal: 9 exemptions
- ▶ Oregon: 570+ Public Records Exemptions, many in ORS 192

FOIA Exemptions

FOIA: 9 exemptions (5 U.S.C. 552(b))

- ▶ (b)(1) EXEMPTION - Protects Classified Matters of National Defense or Foreign Policy
- ▶ (b)(2) EXEMPTION - Internal Personnel Rules and Practices
- ▶ (b)(3) EXEMPTION - Information Specifically Exempted by Other Statutes
 - ▶ Catch-all provision
 - ▶ List available on DOJ Office of Information Policy Website:
<https://www.justice.gov/oip/page/file/623931/download>
- ▶ (b)(4) EXEMPTION - Trade Secrets, Commercial or Financial Information
- ▶ (b)(5) EXEMPTION - Privileged Interagency or Intra-Agency Memoranda or Letters
 - ▶ Attorney Client, Work Product, Deliberative Process
- ▶ (b)(6) EXEMPTION - Personal Information Affecting an Individual's Privacy
- ▶ (b)(7) EXEMPTION - Investigatory Records Compiled for Law Enforcement Purposes
- ▶ (b)(8) EXEMPTION - Records of Financial Institutions
- ▶ (b)(9) EXEMPTION - Geographical and Geophysical Information Concerning Wells

FOIA Exemptions

- ▶ Not absolute: many contain a balancing test
- ▶ Some sunset after 25 years
- ▶ **Presumption is always in favor of disclosure**
- ▶ For more information:
<https://www.justice.gov/oip/doj-guide-freedom-information-act-0>

Oregon Exemptions

In Oregon:

- ▶ Over 570 exemptions
 - ▶ Most in O.R.S. 192.345 and 192.355
 - ▶ But also other federal and state non-disclosure laws
- ▶ Exemptions are not designed to protect public bodies from embarrassment or shield them from having their decisions scrutinized
- ▶ **Presumption is always in favor of disclosure**
- ▶ For full list of exemptions:
<https://justice.oregon.gov/PublicRecordsExemptions>
- ▶ For more information: Oregon DOJ Manual
<https://www.doj.state.or.us/oregon-department-of-justice/public-records/attorney-generals-public-records-and-meetings-manual-2014/>

Oregon Exemptions

- ▶ Not absolute: nearly all Oregon exemptions have a balancing test:
 - ▶ ORS 192.345
 - ▶ Records Exempt Unless the Public Interest Requires Disclosure
 - ▶ ORS 192.355
 - ▶ Each includes its own balancing test
 - ▶ Other statutes: read text for balancing test

Oregon Exemptions

What is a “public interest” in disclosure?

- ▶ Information that facilitates public understanding of how government business is conducted
- ▶ Of value to the public at large, not to a particular person at a particular time
- ▶ Court of Appeals: if a government action attracts significant attention or controversy, that may suggest a heightened public interest

Oregon Exemptions

Most exemptions don't apply after 25 years except:

- ▶ Medical Records
- ▶ Sealed Records
- ▶ Custody Records
- ▶ Student Records

Fees

- ▶ Under both FOIA and Oregon Public Records law, agencies can charge fees for:
 - ▶ Time spent searching/compiling
 - ▶ Time spent reviewing/applying redactions
 - ▶ Duplication costs
- ▶ Agencies set forth the rates for these in regulations (federal) or public records policies/administrative rules (state/local)
 - ▶ Oregon: DAS fee schedule: <https://www.oregon.gov/das/Policies/107-001-030.pdf>
- ▶ Agencies cannot make a profit, but they are entitled to recoup costs of processing requests
- ▶ Can be hundreds or even thousands of dollars
- ▶ Must provide an estimate of costs (under both FOIA and Oregon public records law)

Fees: FOIA

- ▶ FOIA:
 - ▶ Three favored categories of requester: Pay only duplication fees
 - ▶ News media
 - ▶ Educational institution
 - ▶ Non commercial scientific organization
 - ▶ Commercial requesters: pay review, search, and duplication fees
 - ▶ All other: pay search and duplication fees

Fees: Oregon

- ▶ Oregon:
 - ▶ If records will primarily benefit the public, agency *may* waive or reduce fees
 - ▶ Must show that this is a broad public interest, not private interest
 - ▶ Should show intent for an method of sharing documents with the public
 - ▶ Usually applies to news media

Deadlines

▶ FOIA:

- ▶ Expedited processing available: determination regarding expedited processing: 10 calendar days
- ▶ Determination on all other requests: 20 business days
- ▶ But... can claim additional time if there are unusual or exceptional circumstances... including broad requests
 - ▶ But agency must inform requester of circumstances or it can no longer charge some fees

▶ Oregon:

- ▶ 5 business days to acknowledge request
- ▶ 15 business days to respond or, at least, provide a reasonable estimated date of completion
- ▶ But... O.R.S. 192.329 allows a public body to take more time if compliance would be “impracticable” because of a lack of staff or volunteers, because compliance would demonstrably impede the public body’s ability to perform other necessary services, or the volume of public records requests being simultaneously processed by the public body.

Step One: Research

Why research?

- ▶ Saves time
 - ▶ Faster response
 - ▶ Less review time for requester
- ▶ Saves money

Step One: Research

- ▶ Does the document you are looking for exist?
 - ▶ Is it a government document?
- ▶ What government body has the document?
- ▶ What is the title of the document or how can you succinctly describe it?
- ▶ Is the document already in the public realm?
- ▶ Is there a public interest in the document?
 - ▶ Have there been news stories or prior investigations on this topic?
- ▶ Are there any public records exemptions which may apply?

Step One: Research: Is it a government document?

- ▶ Must be in the possession of the government body
- ▶ Must be related to government business
- ▶ Doesn't include:
 - ▶ Personal documents (even of government employees)
 - ▶ Corporate documents (unless submitted to/possessed by government body)
- ▶ Where to research
 - ▶ Google search
 - ▶ Libraries/archives
 - ▶ News media stories

Step One: Research:

What government body has the document?

- ▶ Is it a Federal agency?
 - ▶ If so, then make a request under the Freedom of Information Act
 - ▶ Only applies to federal executive branch agencies
- ▶ Is it an Oregon state agency, municipality, state elected official, or city body?
 - ▶ If so, then make a request under the Oregon Public Records law, ORS 192.
- ▶ Where to research:
 - ▶ Google search
 - ▶ Agency websites
 - ▶ News media articles
 - ▶ Ask the agency:
 - ▶ Federal Agency: FOIA liaison/FOIA Officer
 - ▶ Oregon State: Agency records officer: <https://sos.oregon.gov/blue-book/>

Step One: Research:

Is the document already in the public realm?

- ▶ Agency proactive disclosure websites
 - ▶ Federal agency: FOIA reading rooms/libraries
 - ▶ Oregon State:
 - ▶ <https://www.oregon.gov/transparency/>
 - ▶ <https://data.oregon.gov/>

Step One: Research: Is there a public interest in this document?

Public interest affects:

- ▶ Fees
- ▶ Balancing of exemptions
- ▶ Expedited processing (under Federal Freedom of Information Act, not Oregon Public Records Law)

Step One: Research

Are there any public record exemptions which apply?

Why bother?

- ▶ Because even if there are no responsive records, you can still sometimes be charged fees for search time
- ▶ Because if you know about an exemption then you can draft a request that works around it
 - ▶ CIA IG Reports
- ▶ Because counting out exemption material from the get go saves time

Step Two: Drafting

Elements of a public records request

- ▶ Addressee
- ▶ Introduction
- ▶ Background
- ▶ Documents Requested
- ▶ Fee Status
- ▶ Fee Waiver
- ▶ Expedited Processing
- ▶ Conclusion
- ▶ Your Contact Info and Signature

Step Two: Drafting: Addressee & Intro

- ▶ Addressee - where must the request be sent?
 - ▶ Research this - agencies have the authority to dictate how/where/to whom requests may be sent
 - ▶ Look to agency regulations (FOIA) or public records policies (Oregon)
 - ▶ Some agencies have a centralized email address or portal
 - ▶ If request isn't sent in designated way, it may legally be rejected
 - ▶ As specific as possible - component instead of agency
 - ▶ Name of records officer/FOIA officer, if available
- ▶ Introduction - who are you and what do you want?
 - ▶ Legal standard (5 U.S.C. 552 or O.R.S. 192)
 - ▶ Your name and/or affiliation
 - ▶ Name of the agency you are submitting to
 - ▶ One sentence summary of what documents you are seeking
 - ▶ Example: This letter constitutes a request under O.R.S. 192 and is submitted on behalf of The Oregon Times to the City of Salem, Oregon. The Oregon Times seeks documents containing the results of the City's July 6, 2018 water safety testing.

Step Two: Drafting: Background

- ▶ Establish that:
 - ▶ The documents exist
 - ▶ This agency/government body possesses these documents
 - ▶ If relevant, the public interest in the documents
- ▶ Must be:
 - ▶ Well-written - clearly explain the background of the issue, how you know these documents exist, and how you know this agency possesses these documents
 - ▶ Well-researched - good research supports later appeal and litigation
 - ▶ Authoritative - whenever possible, use citations to relevant news media, agency sources, legislative reports or hearings, studies, etc. Don't be afraid to use footnotes.

Step Two: Drafting: Documents Requested

- ▶ What specific documents do you want?
 - ▶ Allows for easier search
 - ▶ Narrowing saves time and money (for requester *and* agency)
- ▶ Try to avoid overly broad terms: all emails related to, all documents related to, all records related to
- ▶ Narrowing suggestions:
 - ▶ Include date range or specific dates (i.e.: reports produced between January 1, 2017 to December 31, 2018)
 - ▶ Limit email searches to specific officials (i.e. emails sent by Director Jane Smith....)
 - ▶ Offer search terms... but don't expect that agencies have access to Google type email searches
- ▶ When in doubt, reach out to agency via telephone
 - ▶ FOIA: FOIA Officer or Liaison
 - ▶ Oregon: Agency Records Officer (find in Oregon Blue Book - available online)

Step Two: Drafting: Request for fee reduction/waiver

- ▶ Should be included in initial request - not a place to cut corners
- ▶ Look for sample language online (Muckrock)
- ▶ FOIA: Show that you are a member of one of the three favored categories of requester
 - ▶ News media: a history of publication or an employment contract, citations to prior work
 - ▶ Educational institution: course syllabus, C.V., employment contract, prior academic publications, research proposal
 - ▶ Non commercial scientific organization: employment contract, website of organization, C.V., prior work
- ▶ If applicable make additional fee waiver argument - disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester

Step Two: Drafting: Request for fee reduction/waiver

- ▶ Oregon:
 - ▶ Show that the records will primarily benefit the public
 - ▶ Include information about your ability to disseminate information - prior publications, print media articles, blog articles (with demonstrated following)
 - ▶ Include information that establishes a public interest in this topic - prior media reports, investigations, etc. into the topic

Step Two: Drafting: Request for Expedited Processing

- ▶ Only under FOIA
- ▶ High standard:
 - ▶ Must show compelling need
 - ▶ Imminent threat to life or physical safety of an individual
 - ▶ If requester is a person primarily engaged in disseminating information [a news media representative] *and* there is an urgency to inform the public about an actual or alleged Federal Government Activity
- ▶ Must sign certification of facts asserted

Step Two: Drafting: Conclusion & Contact Info/Signature

- ▶ Restate relevant statute
 - ▶ FOIA: 5 U.S.C. 552
 - ▶ Oregon: O.R.S. 192
- ▶ Include reminder of deadline
- ▶ Include contact information - more is better: phone number and email, physical address
- ▶ Signature

Step Three: Following Up: Reaching Out

- ▶ Call to follow up
 - ▶ FOIA: FOIA Officer or Liaison
 - ▶ Oregon: Agency Records Officer (see Oregon Blue Book)
- ▶ Try to avoid adversarial situations
 - ▶ Offer to narrow
 - ▶ Be polite
 - ▶ Keep in mind that the records officer/FOIA officer is rarely the person who is actually conducting the search *or* making the substantive decisions
 - ▶ Decentralized agencies
 - ▶ Decentralized record keeping

Step Four: Review of Agency Decision

- ▶ FOIA & Oregon: can ask for review of:
 - ▶ Denial of fee reduction/waiver
 - ▶ Denial of request (including lack of response)
 - ▶ Exemptions Applied
 - ▶ Insufficient Search
- ▶ Pay attention to deadlines!

Step Four: Review of Agency Decision: FOIA

- ▶ Agencies have 20 business days to evaluate appeal
- ▶ Each agency has its own appeal procedures, look to agency FOIA regulation for information on:
 - ▶ Deadline for appeals
 - ▶ Where to send appeal
 - ▶ How to address appeal
- ▶ If you don't comply with regulations, appeal may be rejected (and you may lose your right of review)
- ▶ Under FOIA, you **MUST** exhaust administrative appeal remedies before you get court!

Step Four: Review of Agency Decision: Oregon

- ▶ Alternative Dispute Resolution through the Office of the Public Records Advocate
- ▶ Formalized review of denial of request or fee issues:
 - ▶ Records of state agency or non-elected official
 - ▶ Attorney General review
 - ▶ Appeal to Circuit Court
 - ▶ Records of Elected Official
 - ▶ Direct appeal to Circuit Court
 - ▶ Local governments and non-elected officials
 - ▶ District Attorney review
 - ▶ Appeal to Circuit Court

Step Four: Review of Agency Decision: Oregon

Office of the Public Records Advocate

Contact:

Ginger.mccall@Oregon.gov

<https://sos.Oregon.gov/public-records>

Step Four: Review of Agency Decision: Oregon

DA/AG Review

- ▶ Requester petitions Attorney General or District Attorney Office
- ▶ Attorney General/District Attorney must act within seven days of request
- ▶ Attorney General/District Attorney can inspect documents and can order release or uphold agency withholding
- ▶ Public Body bears burden of proof

Step Four: Review of Agency Decision: Oregon

Judicial Review

- ▶ Public body or requester may appeal DA/AG order
- ▶ Public body must comply or give notice of appeal within seven days
 - ▶ No similar time limit on requester
- ▶ Burden remains on public body
- ▶ If requester prevails, requester may be granted attorney's fees & costs

Step Four: Review of Agency Decision: Drafting Your Appeal

- ▶ Addressee
- ▶ Introduction
- ▶ Factual Background
- ▶ Procedural Background
- ▶ Argument
- ▶ Fee Reduction/Waiver
- ▶ Expedited Processing
- ▶ Conclusion
- ▶ Contact Information/Signature

Step Four: Review of Agency Decision: Drafting Your Appeal

- ▶ Addressee
 - ▶ FOIA: look at agency regulations
 - ▶ Oregon:
 - ▶ If state agency: attorney general
 - ▶ If other government body: district attorney
- ▶ Introduction:
 - ▶ State that this is an appeal under the public records law, restate legal standard, who you are, what agency you directed your request to, and what you are seeking

Step Four: Review of Agency Decision: Drafting Your Appeal

- ▶ Factual background
 - ▶ Can reuse request background section
- ▶ Procedural background, include the history of the request
 - ▶ What agency you sent it to
 - ▶ How you submitted the request (mail, email, etc.)
 - ▶ What date you submitted the request
 - ▶ Fee waiver/reduction or expedited processing request
 - ▶ Any agency response (on fees, records, exemptions)
 - ▶ Attach relevant correspondence as appendices

Step Four: Review of Agency Decision: Drafting Your Appeal

Argument

- ▶ Must be clear and well-researched
 - ▶ FOIA:
 - ▶ Look to DOJ FOIA Guide, legal precedent (use legal research tools if available)
 - ▶ Oregon:
 - ▶ Look to Oregon DOJ Public Records Guide (but beware that this was updated before the latest legislative changes)
- ▶ Use citations, if possible, to cases, regulation, agency policy
- ▶ Address all relevant issues - this is your one chance!
 - ▶ All exemptions, search issues, denials, failures to respond, etc.
 - ▶ Address fees/expedited processing issues below

Step Four: Review of Agency Decision: Drafting Your Appeal

- ▶ Fee Reduction/Waiver
 - ▶ “I renew my request for fee reduction/waiver...”
 - ▶ Reuse language from prior request
- ▶ Expedited Processing
 - ▶ “I renew my request for fee reduction/waiver...”
 - ▶ Reuse language from prior request
- ▶ Conclusion/Contact Info/Signature
 - ▶ Cite appeal statute
 - ▶ Reuse other language from request

Step Five: Litigation

Both FOIA and Oregon's Public Records Law allow for:

- ▶ Judicial review
- ▶ Attorney's fees - if you prevail

In Conclusion...

Do I really have to make all this effort? Can't I just type out a quick, one sentence email?

Yes, but, a properly formatted request saves:

- ▶ Money
 - ▶ Less agency time spent searching and reviewing (and billed for)
 - ▶ Less pages to duplicate
 - ▶ Greater likelihood of prevailing on a request for fee reduction/waiver
- ▶ Time
 - ▶ Time spent going back and forth on narrowing
 - ▶ Time spent reviewing extraneous documents
- ▶ Frustration and animosity

Feedback?

- ▶ What would be most useful to requesters?
- ▶ What are the most common issues that you see with records requests?
- ▶ What resources should we include on our website?
- ▶ What should we include in our trainings?
- ▶ How can we better reach relevant constituents?
- ▶ What changes should be made in the public records law or its implementation?