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FOIA Tip Sheet: Dealing with Denials at the Federal and State Level

1. Educate yourself beforehand! Familiarize yourself with the law and be able to speak the language of FOI. Demonstrating a basic understanding of your rights under the law (and respectfully asserting them) will help show the agency you will not stand for any manipulation or gamesmanship.

- Having a basic understanding of what records are open and what records (or portions of records) are closed is extremely helpful. The RCFP, VCOG and the Virginia FOI Advisory council all produce publications discussing what records you are entitled to under state law (RCFP also has similar publications dealing with federal FOIA).
- Under both Virginia state and federal FOI laws, an agency must cite to a specific statutory exemption to justify non-disclosure. Don't let agencies deny access without providing a specific citation. "It's not our policy to give those records out" is NOT a valid response to a records request without specific authority to withhold.
- Understand what fees can be charged and assert a right to challenge fee estimations if you believe they are excessive. Ask for an itemized breakdown of fee estimations. Fee structures under Virginia and federal law differ, but generally they must be "reasonable" and reflect the actual cost incurred in providing the documents (may include search, acquisition and duplication fees).

2. If you think an agency may deny your request (in whole or in part), file your FOIA request months (perhaps even years!!!) before you expect to need the records.

- Federal FOIA requires agencies to respond to a records request within 20 days but in practice that deadline is almost never met. Appeals and litigation can draw out the process much further. In short, if you anticipate trouble, expect long delays and plan accordingly.
- Virginia law generally requires agencies to respond to a request within 5 working days. Although no formal administrative appeal process exists under state law, try lodging an informal appeal with the head of the agency. Also consider contacting VCOG (see items #5 and 6 under Resources heading below). Again, litigation can take time under state law as well, although FOI disputes are often given docket priority under federal law and required to be given priority under Virginia law.

3. Failing to respond to a request after the statutory time to comply is considered a constructive denial. You need not sit around and simply wait for a response. Take action! Contact the state official in charge of FOIA at the agency or the federal FOIA Liaison officer to see where your request lies in the processing queue. If an agency is not responding to your request or appeal in a timely manner, consider contacting OGIS at the federal level (see item #2 under Resources heading below) or the state FOI Advisory Council.

4. Generally, the reason you want access to the material is IMMATERIAL. Agencies cannot deny a request based on your intended interest in the records. Although there are some slight qualifications to this rule. Under federal law, for example, personal privacy exemptions do require requesters to demonstrate a particular need for the information in order to overcome privacy concerns.

5. An agency cannot deny your request simply because it is large or it will take some time to conduct a search. Complex requests may allow an agency to extend the time it has to comply with a records request or impact fees charged but is generally not a valid basis for denial. That said, carefully consider what you want beforehand and do not make vague or unnecessarily large requests. There is no point in overburdening agency FOI personnel who are working with limited resources to begin with.

6. "Where in the law does it say you are entitled to that record?" No. Actually, the law works the other way. Virginia and federal law state that all records subject to FOI laws are open unless they are specifically exempt from disclosure by law. Don't fall for this.

7. Battling substantive denials. Substantive denials come in two basic forms when dealing with agencies. If an agency cannot cite a specific statutory exemption, the records must be released (this is where having a basic understanding of the law is helpful). The more difficult and more frequent dispute is over whether a particular record or portion of a record falls within the scope of a statutory exemption. Despite the requirement under both Virginia and federal law that exemptions be narrowly construed, agencies often have a broad view of what is covered under a particular exemption. You do not have to accept it. Consider filing appeals and consulting with experts to craft a well-reasoned argument as to why an exemption does not apply. Also consider bringing your case to OGIS, VCOG or the state FOI council.

8. "We don't have those records." Maybe so, maybe not. Under Virginia law, an agency is required to let a requester know if it knows that another agency has documents responsive to your request. In any event, such "no documents exist" responses can be challenged. Generally, an agency has to conduct a "reasonable" search for documents which should include all places the document may be stored. Request to know who searched, when, where and how many times? Being familiar with what documents an agency creates or collects and maintains, as well as how documents are indexed, can help you better determine whether the agency conducted a reasonable search for the records.

Talk to more than one person in the agency (or former agency staff) about where the document may be. If you are sure it exists, give the agency as much information as you can about the document and its possible location.

Federal and Virginia FOI Resources

- 1) The Reporters Committee for Freedom of the Press: <http://www.rcfp.org>. The RCFP website contains a wealth of material on access to government records and meetings including: (1) publications regarding how to navigate the federal FOIA and federal open meetings laws; (2) the Open Government Guide, a comprehensive database comparing numerous facets of open records/meetings laws across the 50 states; and (3) an automatic FOIA request letter generator. While the RCFP exists to help journalists gather and disseminate news, all FOI publications posted on its website are freely accessible to the general public at <http://www.rcfp.org/foia/>.
- 2) The Office of Government Information Services: <http://www.archives.gov/ogis/>. The federal government agency specifically designed to help mediate disputes between requesters and agencies when individuals are having trouble gaining access to records. They provide free, non-binding, mediation services to requesters. The office can be a useful alternative to litigation for instances of agency delay, fee disputes and, at times, substantive denials.
- 3) U.S. Department of Justice, Office of Information Policy FOIA materials: <http://www.justice.gov/oip/oip.html>. Includes a variety of information regarding access to federal records including DOJ's FOIA Guide (2009) at: http://www.justice.gov/oip/foia_guide09.htm.
- 4) The Sunshine in Government Initiative: <http://www.sunshineingovernment.org>. A coalition of media groups dedicated to promoting openness in government.
- 5) The Va. Coalition for Open Government (of course!): <http://www.opengovva.org/>. Have a FOI question about Virginia open records laws? VCOG can help: <http://www.opengovva.org/ask-us-a-foia-question>.
- 6) Va. Freedom of Information Advisory Council: <http://foiacouncil.dls.virginia.gov/>. A state agency serving as the main resource for citizen and media inquiries about state open records laws that aims to help resolve disputes between requesters and agencies through advisory opinions. The council also conducts training seminars and published educational materials about the Virginia FOI act. It does not engage in mediation, however.