

Overcoming denials

If the agency denies your request, check with experts to see if the agency has a right to keep the documents secret. Here are some common agency denials and how to respond:

IF THE AGENCY SAYS...

"YOUR DESCRIPTION OF THE RECORD IS INADEQUATE"

This means you probably did not give enough specific identifying information. Give the agency the benefit of the doubt and rewrite your request. You can try to call or make an appointment with the official processing your request to get more help.

"THE RECORD DOES NOT EXIST"

If you are reasonably certain the records you've requested do exist, and if your request letter was clear and informative, you should try to do more research. Are there news reports, congressional hearings or court records that describe the information you want more clearly?

Rewrite your request, giving the agency more guidelines and clues for where they might find it. Try to be as patient and understanding as you can; some agencies are short staffed or have disorganized data systems.

"SOME OF THE INFORMATION IS EXEMPT FROM DISCLOSURE, SO WE WON'T GIVE YOU ANY OF IT"

The agency can't withhold an entire document or file because some portion(s) of it is exempt from disclosure. The agency must release any non-exempt material that can be reasonably extracted from the exempt portion(s).

"WE CAN'T GIVE IT TO YOU BECAUSE AN EXEMPTION SAYS WE HAVE TO KEEP IT SECRET"

FOIA exemptions are generally discretionary, not mandatory – an agency is not required to withhold all information. Agency officials can choose to waive the exemptions and release the material, unless another statute specifically restricts that disclosure. One exception is FERPA, but note that FERPA doesn't cover everything and they can release the records if identifying information of a student is blotted out.

"OUR PROPRIETARY SOFTWARE DOESN'T ALLOW US TO COPY DATA"

I don't know of any software that can't copy or export data. Maybe it exists, but it must be rare. Usually the person saying that is unfamiliar with the software and needs to confer with the agency computer technicians. If, after talking to their techies, they still stick to that story, find out the software maker and call them up. No doubt the company will want everyone to know how useful and versatile the software is and explain how to copy the data.

"COPYING THE DATA WITH FIELDS REDACTED WOULD CREATE A NEW RECORD, AND WE ARE NOT REQUIRED BY LAW TO DO THAT"

It is true that most laws do not require government agencies to create new records, only let you see or copy existing records. But you aren't asking for a new record – just a copy of their existing records with some information redacted. It's no different from getting a copy of a paper file with some information (fields) redacted with a black pen. Just because they blot out a name on a piece of paper doesn't mean it's a new record. Same theory applies to data. Copying data with some fields redacted, or even combining fields from different databases, is not creating a new record. It's copying existing data.

"OK, OK. HERE IS YOUR PILE OF RECORDS. THAT WILL BE \$1 MILLION, PLEASE."

Make them justify the expenses with a line-by-line explanation. You might be able to narrow your request to get fewer documents that would still serve your purposes. Arm yourself with what other agencies charge for copies, including for computer programming time. If many other agencies charge nothing or very little, then make that known, including by writing a story about it.

Look at the agency's FOI logs to find out if others have been receiving the same records. Ask for an extra copy. Ask for a backup copy of their data if they make backups. Get an outside expert to scrutinize their time estimates. The estimates are usually inflated and unreasonable. See page 25 for more tips on reducing copy costs.

"WE ONLY PROVIDE THIS INFORMATION TO RESEARCHERS. YOU CAN HAVE IT IF YOU SIGN THIS CONTRACT WITH US."

Some agencies give information to researchers provided they sign a contract with use restrictions, such as prohibiting identification of

individuals in the records. Few reporters are willing to sign such agreements. The problem is you might want to use the information for something else later and won't be able to. Also, fundamentally it designates journalists as above average citizens with special access, and it creates a new category of "public information." Either it's public or not. Some journalists advise only considering such agreements when the information is clearly not public but the agency is willing to release it for your story.

"WE DON'T KNOW WHY YOU WANT IT OR HOW YOU MIGHT USE IT. YOU MIGHT USE IT IN A WAY WE DON'T LIKE."

Tough noogies. In most states a records request cannot be denied based on who the requester is or how the information will be used (except in the case of commercial mailing lists in some states). If they ask why you want the information you can tell them: "I wouldn't want to determine the story before I have all my facts. I'm just doing my job at gathering information." If you request records routinely from an agency (weekly), then it will be no big deal and they are less likely to question you.

"WE JUST DON'T WANT TO GIVE IT TO YOU"

The agency must explain its reasons, usually in writing, for determining that an exemption applies to any particular information.

- You have the right to contest any exemption claim.
- The exemptions must be narrowly applied, since the FOIA was created to maximize public access to agency records
- You can file an administrative appeal to a higher agency official. And if this fails, you can file a lawsuit. The federal court must conduct a full judicial review of the agency's claims and it is up to the agency to justify its denial of your request.
- Even if the agency releases substantial portions of the material you've requested, you can appeal the decision to "sanitize" the rest. You can also request a detailed justification for each deletion.
- While you are haggling with the agency, try to get the information from another agency. Some records are kept by multiple agencies (for example, boating accident data kept by state agencies and the Coast Guard).
- Use principled negotiation and hard tactics, as detailed on the following pages.