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Freedom of Information Act (FOIA) Processing Changes Due to COVID-19: In Brief

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As federal agencies adjust their operations in light of the COVID-19 pandemic, activities related to the processing and release of government information are also changing. Agencies such as the Federal Bureau of Investigation within the Department of Justice, the U.S. Postal Service, and the Centers for Disease Control and Prevention within the Department of Health and Human Services, among others, have announced changes to their processing of Freedom of Information Act (FOIA) requests due to the pandemic.

Government information requests through FOIA may be impacted by COVID-19 in two ways. First, certain types of information related to the outbreak may be eligible for expedited consideration; FOIA requests are to be expedited as soon as practicable in cases in which the person requesting the records demonstrates a compelling need. Second, processes for locating information may change due to employees working remotely or on administrative leave.

This In Brief report provides an overview of the typical FOIA request process and usual conditions for requesting expedited processing of a request. The report then provides analysis of the impact of agency procedures in response to the pandemic on government information availability, and concludes with a survey of announced agency processing alterations.

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Recently, the Federal Bureau of Investigation (FBI) announced that it would only accept mailed Freedom of Information Act (FOIA) requests and not those submitted electronically due to the COVID-19 pandemic.¹ Conversely, the Centers for Disease Control and Prevention (CDC) has adopted a contrasting policy, saying that CDC would not be able to respond to mailed FOIA requests and that requests should be placed electronically.² These examples of differing policies, among others examples not mentioned, when combined with agencies' adoption of additional telework flexibilities, raise questions about how agencies will be responding to FOIA requests in the near future.³

This report provides an overview of the FOIA request process and actual and potential FOIA request processing changes within federal government agencies as a result of COVID-19.

Processing a FOIA Request

FOIA does not require requests for agency information to be submitted in a particular format, only that the request reasonably describes the records sought and complies with agency regulations. Most agencies accept requests via mail, email, web form, or fax. The statute also requires the affirmative disclosure of certain categories of agency information, such as “substantive rules of general applicability,” “rules of procedure,” and, since 2016, records requested three or more times.⁴

While the text of FOIA does not specifically dictate the method in which the public must request information from an agency, FOIA does prescribe how an agency is to respond to the request. From an administrative perspective, FOIA directs the amount of time an agency has to respond to a request, defines whether and how an agency may recoup costs for providing services in response to a request, and provides nine instances where an agency may exempt information from public disclosure.

After an agency receives a request, the agency is to inform the requester of its receipt. Generally, an agency is to respond to a correctly routed, simple request within 20 days with a determination of the scope of the documents the agency will produce and any exemptions it will apply to withhold records or information.⁵ Complex or incorrectly routed requests may be subject to additional days of processing, per the statute (5 U.S.C. §552(a)(6)). Also, agencies managing backlogs of FOIA requests do not always process requests within the statutory period.⁶ When completed, a written response may provide the information requested or some of the information requested with redactions per one of FOIA's nine exemptions, inform the requester that the agency does not have responsive records, or deny a request entirely due to one of the nine exemptions. Requesters may administratively appeal an agency's adverse decision.

¹ U.S. Federal Bureau of Investigation, “FBI Records: Freedom of Information/Privacy Acts (FOIPA),” March 26, 2020, at <https://efoia.fbi.gov/#home>. For more information on the Freedom of Information Act (FOIA), please see CRS Report R46238, *The Freedom of Information Act (FOIA): A Legal Overview*, by Daniel J. Sheffner.

² U.S. Centers for Disease Control and Prevention, “Freedom of Information Act.” March 26, 2020, at <https://www.cdc.gov/od/foia/index.htm>.

³ U.S. Office of Management and Budget, *Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19*, M-20-16, March 17, 2020, at <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf>.

⁴ While FOIA may be known predominately for its request-driven system of disclosure, the statute requires certain categories of agency information be proactively disseminated, or “affirmatively disclosed” to the public. U.S. Department of Justice, “Freedom of Information Act,” March 26, 2020, at <https://www.foia.gov/search.html>.

⁵ U.S. Government Accountability Office, *Freedom of Information Act: Federal Agencies' Recent Implementation Efforts*, GAO-20-406R, March 11, 2020, at <https://www.gao.gov/assets/710/705284.pdf>, p. 11.

⁶ CRS Insight IN11237, *Sunshine Week: Selected Issues for Congress*, by Meghan M. Stuessy.

COVID-19 Considerations for Locating Information

Government information requests through FOIA may be impacted by COVID-19 in two ways: (1) certain types of information related to the outbreak may be eligible for expedited consideration; and (2) processes for locating information may change due to employees working remotely or on administrative leave.

Expedited Processing of Requests

Pursuant to 5 U.S.C. §552(a)(6)(E), processing of FOIA requests is to be expedited as soon as practicable in cases in which the person requesting the records demonstrates a compelling need. Statute defines a “compelling need” as a case where

- the lack of expedited treatment could reasonably be expected to pose an imminent threat to someone’s life or physical safety; or
- there is an urgency to inform the public about an actual or alleged federal government activity, but only if the request is made by a person who is primarily engaged in disseminating information.

Agencies may also establish additional standards for granting expedited processing. Whereas agencies are to initially respond to most FOIA requests within 20 days, they must determine whether to grant expedited processing within 10 days.

Changes Due to Remote Work

Locating information responsive to a FOIA request requires employees and systems to search and review the information.⁷ Additionally, not all agency information is created or available in a digital format. Per the Department of Justice’s FOIA.gov portal,

There is no central office in the government that handles FOIA requests for all federal departments and agencies.... There are many different officials at these agencies who work hard every day to make sure that the FOIA works. There are the FOIA professionals who search for and process records in response to FOIA requests, FOIA Contacts and FOIA Public Liaisons who work with FOIA requesters to answer questions and resolve concerns, and Chief FOIA Officers who oversee their agency’s compliance with the FOIA.⁸

Because of the decentralized FOIA process at federal agencies, multiple physical and digital systems and many people may be involved in processing a single request. However, given the work flexibilities at many agencies due to COVID-19, some or all of the members of an agency’s FOIA team may currently be working offsite. If a record responsive to a request is only available on-site in a paper format, that record’s practical availability may be limited by these conditions.

Survey of FOIA Processing Changes for Selected Agencies

While challenges in locating responsive information may occur at any agency, responses to requests for information during the COVID-19 outbreak have varied. CRS performed a search of

⁷ CRS In Focus IF11272, *Freedom of Information Act Fees for Government Information*, by Meghan M. Stuessy.

⁸ U.S. Department of Justice, “What is the FOIA?” March 26, 2020, at <https://www.foia.gov/faq.html>.

federal department websites and their components. As of March 26, 2020, CRS identified statements by 13 agencies regarding COVID-19's impact on FOIA request processing.

Table 1 presents these recent statements regarding the impact of COVID-19 or simply changes in agencies' abilities to process FOIA requests, provides Code of Federal Regulations (C.F.R.) citations to each agency's policy regarding expedited FOIA requests, and notes whether the agency has made additional allowances for expediting requests. The table should be considered a snapshot in time, as agencies may update or change their statements.

Of the 13 agencies identified, 8 altered the transmission method by which a FOIA request should be submitted. Some statements also discuss current operating status, and mention anticipated delays due to COVID-19. Six of the identified agencies have additional allowances for expediting requests: U.S. Air Force, Department of Housing and Urban Development, Department of Labor, Department of Veterans Affairs, National Archives and Records Administration, and Office of Government Information Services. Of the six agencies that established additional allowances for expediting requests, five permit expediting cases where due process rights would be impacted, four permit expediting cases where there exist possible questions affecting public confidence in the federal government's integrity, one permits expediting due to humanitarian needs, and one permits expediting at the discretion of the agency's FOIA Officer. The exact language from the C.F.R. is provided in **Table 1** below.

Table I. Statements Made by Selected Federal Agencies Regarding the Impact of COVID-19 on FOIA Request Processing

As of March 26, 2020

Department, Agency	Statement on Request Processing	Expedited Request Regulations	Additional Expedited Request Allowances
Department of Defense, U.S. Air Force (USAF)	“All USAF Freedom of Information Act (FOIA) Offices will be minimally manned or closed due to the Coronavirus (COVID-19). We anticipate delays in processing your FOIA request during this time. Thank you for your patience.” ^a	32 C.F.R. §286.8	(A) Imminent loss of due process rights. Expedited processing is granted to a requester if loss of substantial due process rights is imminent. (B) Humanitarian need. Expedited processing is granted when the failure to obtain the requested information on an expedited basis could reasonably be expected to harm substantial humanitarian interests.
Department of Health and Human Services, Centers for Disease Control and Prevention (CDC)	“During the COVID-19 response, the CDC FOIA Office will be teleworking full time and will not be able to receive FOIA requests/correspondence by mail.” ^b	45 C.F.R. §5.27	—
Department of Health and Human Services, Food and Drug Administration (FDA)	“As of 3/12/2020, please submit all requests through our online portal (link below) rather than mail, fax, or courier, to ensure timely logging of your request.” ^c	45 C.F.R. §5.27	—
Department of Housing and Urban Development	“Due to impacts caused by the COVID-19 virus, there may be delays in processing requests (FOIA, Privacy Act, etc.). We apologize for any inconvenience this may cause. Please know that we are doing everything we can to mitigate delays.” ^d	24 C.F.R. §15.104	(iii) The loss of substantial due process rights.

Department, Agency	Statement on Request Processing	Expedited Request Regulations	Additional Expedited Request Allowances
Department of the Interior	<p>“The Freedom of Information Act (FOIA) offices in the bureaus/offices of the Department of the Interior are continuing to process FOIA requests to the best of their ability during the COVID-19 pandemic. To keep employees healthy and safe, the Department is maximizing telework flexibility and employing social distancing protocols. As a result of these precautions, most employees are working remotely and unable to collect hard copy records located in government facilities at this time. If your request is for hard copy records, the response to your request will very likely be delayed. In addition, employees may not receive FOIA requests that are sent by U.S. mail, overnight mail services, or facsimile in a timely manner. We recommend, therefore, that requesters submit requests through the Department’s online portal at https://www.doi.gov/foia/foia-request-form or the government-wide portal at https://www.foia.gov.”^e</p>	43 C.F.R. §2.20	—
Department of Justice	<p>“The Department of Justice's Office of Information Policy (OIP) no longer accepts requests or appeals through FOIAonline as of 5:00 PM EST Tuesday, January 28, 2020. For instructions on how to submit a request or appeal electronically, please see OIP's website.”^f</p>	28 C.F.R. §16.5	—
Department of Justice, Federal Bureau of Investigation (FBI)	<p>“Due to the emerging COVID-19 situation, the FBI is not accepting electronic Freedom of Information/Privacy Act requests or sending out electronic responses through the eFOIPA portal at this time. You may still submit a FOIPA request via standard mail. We apologize for this inconvenience and appreciate your understanding.”^g</p>	28 C.F.R. §16.5	—
Department of Labor	<p>“During the federal government’s maximum telework flexibilities operating status, we are still able to receive and timely log FOIA requests and appeals submitted through the Department’s designated email addresses (foiarequests@dol.gov and foiaappeals@dol.gov, respectively) as well as those submitted through the National FOIA Portal.”^h</p>	29 C.F.R. §70.25	<p>(iii) The loss of substantial due process rights; or</p> <p>(iv) A matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence.</p>

Department, Agency	Statement on Request Processing	Expedited Request Regulations	Additional Expedited Request Allowances
Department of Veterans Affairs	“Due to the current Coronavirus (COVID-19) and as a precaution to the public all VACO FOIA Service Office Staff in the National Capital Region are on telework status.” ⁱ	38 C.F.R. §1.556	(iii) In the discretion of the FOIA Officer, the request warrants such treatment; or (iv) There is widespread and exceptional interest in which possible questions exist about the government’s integrity which affect public confidence.
National Archives and Records Administration	“Due to the COVID-19 pandemic and pursuant to guidance received from the Office of Management and Budget (OMB), NARA has adjusted its normal operations to balance the need of completing its mission-critical work while also adhering to the recommended social distancing for the safety of our staff. As a result of this re-prioritization of activities, you may experience a delay in receiving an initial acknowledgment as well as a substantive response to your reference or FOIA request or appeal. We apologize for this inconvenience and appreciate your understanding and patience. Read more on how NARA is addressing COVID-19 (coronavirus) archives.gov/coronavirus .” ^j	36 C.F.R. 1250.28	(2) A reasonable expectation of an imminent loss of a substantial due process right; ... (4) A matter of widespread and exceptional media interest in which there exist possible questions that affect public confidence in the Government’s integrity.
National Archives and Records Administration, Office of Government Information Services (OGIS)	“In the interest of social distancing, all OGIS staffers are teleworking. While we are pleased that we are able to continue to function as the FOIA Ombudsman—reviewing FOIA policies, procedures and compliance of Federal agencies and resolving FOIA disputes between Federal agencies and requesters—this change affects how we communicate with our customers. While we continue to have access to submissions sent by email and we are glad to return your voicemails, please know that for the time being, we do not have access to submissions sent by U.S. mail, overnight mail services, or fax. As a result, our responses to mail and fax inquiries will be delayed. To ensure a more timely response to your inquiry, we strongly advise you to contact OGIS by email.” ^k	36 C.F.R. §1250.28	Same as National Archives and Records Administration, above.

Department, Agency	Statement on Request Processing	Expedited Request Regulations	Additional Expedited Request Allowances
United States Nuclear Regulatory Commission	“Due to COVID-19, NRC staff are working remotely and there may be additional delays in responding to FOIA requests. FOIA requests submitted by mail will not be considered received until FOIA staff is physically back in the office. Online and emailed FOIA requests will be processed as normal.” ^l	10 C.F.R. §9.25	—
United States Postal Service	“In order to support the effort to contain the spread of COVID-19, social distancing has resulted in minimal staffing. During this challenging time, you are strongly encouraged to submit a FOIA request or FOIA appeal via email or facsimile to prevent any delays in service. Please also include your email address with your FOIA request or FOIA appeal so that we may expeditiously provide you with any non-exempt responsive records.” ^m	39 C.F.R. §265.5	—

Source: U.S. federal government agency websites.

- a. U.S. Air Force, *Air Force Compliance Division*, March 26, 2020, at <https://www.foia.af.mil/>.
- b. U.S. Centers for Disease Control and Prevention, *Freedom of Information Act*, March 26, 2020, at <https://www.cdc.gov/od/foia/index.htm>.
- c. U.S. Food and Drug Administration, *How to Make a FOIA Request*, March 26, 2020, at <https://www.fda.gov/regulatory-information/freedom-information/how-make-foia-request>.
- d. U.S. Department of Housing and Urban Development, *Making a FOIA Request*, March 26, 2020 at https://www.hud.gov/program_offices/administration/foia/requests.
- e. Department of the Interior, *Freedom of Information Act (FOIA)*, March 26, 2020, at <https://www.doi.gov/foia>.
- f. U.S. Department of Justice, *FOIA Online*, March 26, 2020, at <https://foiaonline.gov/foiaonline/action/public/home>. Note that this announcement was made in January 2020, and does not mention changes due to COVID-19.
- g. U.S. Federal Bureau of Investigation, *FBI Records: Freedom of Information/Privacy Acts (FOIPA)*, March 26, 2020, at <https://efoia.fbi.gov/#home>.
- h. U.S. Department of Labor, *Freedom of Information Act*, March 26, 2020, at <https://www.dol.gov/general/foia>.
- i. U.S. Department of Veterans Affairs, *Freedom of Information Act (FOIA)*, March 26, 2020, at <https://www.va.gov/foia/>.
- j. National Archives and Records Administration, *Freedom of Information Act (FOIA)*, March 26, 2020, at <https://www.archives.gov/foia>.
- k. Office of Government Information Services, *OGIS is Open for Business—How to Reach Us*, March 26, 2020, at <https://foia.blogs.archives.gov/2020/03/19/ogis-is-open-for-business-how-to-reach-us/>.
- l. U.S. Nuclear Regulatory Commission, *Freedom of Information and Privacy Act*, March 26, 2020, at <https://www.nrc.gov/reading-rm/foia/foia-privacy.html>.
- m. U.S. Postal Service, *Freedom of Information Act*, March 26, 2020, at <https://about.usps.com/who/legal/foia/>.

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