

Going to Court:

Litigating Your FOIA Request

MAY I LITIGATE?

If you are not satisfied with the agency's decision on your FOIA request or if the agency has been nonresponsive, you have the right to file a lawsuit in federal court under the FOIA. Often, litigation will produce a strict schedule for review of the records and additional review by different agency officials of the agency's exemption claims. There are many considerations that may affect your decision to litigate your FOIA request. The following is a brief introduction, and is not intended to be a comprehensive guide to FOIA litigation.²⁴

Keep in mind that you cannot litigate a denial of information in response to an MDR request. (See ch. 4 for more information about appealing MDR denials.)

**FIGURE 6.1:
ADDITIONAL RESOURCES FOR FOIA LITIGATION**

This chapter is not a comprehensive guide to FOIA litigation. Please consult the following sources and/or an attorney for additional information:

- *Litigation Under the Federal Open Government Laws 2008* (Harry A. Hammitt, et al, 2008).
- *Department of Justice FOIA Guide* (March 2007), http://www.usdoj.gov/oip/foia_guide07.htm.
- *Resources for FOIA Legal Research on the Internet* (from Public Citizen), http://www.citizen.org/litigation/free_info/foic_lr/.

SHOULD I LITIGATE?

Bringing a lawsuit requires a commitment of time and resources. A private attorney will often require you to provide an upfront retainer for his or her work. If you are successful in your suit, it may be possible in some cases to recoup the attorney's fees from the government. Although you may litigate a case without an attorney, it may be difficult to make an impact on your own if you are not familiar with case law and court procedures.

In making the decision to litigate, remember that judges do not look kindly on frivolous cases. You must consider whether your dispute is worth bringing to court. How important are the records you are seeking? Is the agency engaging in a pattern or practice that is systematically interfering with your research and that is in violation of the law? Are you able to gain support from other organizations or FOIA requesters to help explain to the court the importance of the case? Do you know enough about the denied records to make a compelling case in court?

WHAT ISSUES MAY I LITIGATE?

Under the FOIA and the Administrative Procedure Act, a requester may litigate when he or she believes that the agency has improperly withheld agency records that should have been disclosed. In addition, requesters may litigate over fee questions (such as when the agency charges excessive fees or denies a fee waiver) or any other agency decision that impairs the requester's ability to obtain the requested information (for example, excessive delay, unreasonable interpretation of the request, inadequate search for records, etc.).

WHEN MAY I FILE A FOIA LAWSUIT?

Before bringing a FOIA lawsuit, the requester first must exhaust his or her administrative remedies, which means receiving the agency's denial, filing an administrative appeal, and receiving a denial of the appeal. Alternatively, you may file a lawsuit without having filed an administrative appeal if the agency fails to comply with any of the FOIA's time limits (twenty working days to respond to an initial request or to respond to an administrative appeal). In some cases it may be effective to go to court immediately after the twenty-day initial request deadline has passed. However, in most cases it is productive to talk with the agency and wait a reasonable time for the agency to process the request rather than going to the time and expense of litigation before the agency has made its final decision.

There is a maximum time limit for filing a FOIA lawsuit (called a "statute of limitations"). The statute of limitations says that you may not go to court to challenge an agency's decision on your FOIA request if more than six years have passed since the agency's response to your appeal (or since the date your administrative remedies were exhausted, i.e., twenty business days after filing, if there has been no agency action on the request). It is important to note that when an agency does not respond to a request at all and no administrative appeal is filed within six years, the statute of limitations has expired, and the requester will not be permitted to file a lawsuit. However, the requester may simply refile the same request and then litigate the agency's failure to respond and/or subsequent denial.

WHERE MAY I FILE A FOIA LAWSUIT?

The FOIA provides that a requester may file a FOIA lawsuit in the federal district court where the requester lives or works or in the district where the records are located (i.e., the agency office that has the records), or in the district court in Washington, DC.