

Acquiring Records: Overcoming Denials

Society of Professional Journalists
and the Sigma Delta Chi Foundation
David Cuillier, Freedom of Information Committee
May 2011

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About the Trainer: David Cuillier, Ph.D., is a member of the SPJ Freedom of Information Committee and has been an SPJ newsroom trainer since 2005. He is an associate professor of journalism at the University of Arizona in Tucson, where he teaches public affairs reporting, computer-assisted reporting and access to public records. Before entering academia he was a public affairs reporter and city editor for a dozen years at daily newspapers in the Pacific Northwest. He is co-author with Charles Davis of *The Art of Access: Strategies for Acquiring Public Records* and researches the psychology of access. He provides news and tips about FOI at www.theartofaccess.com and <http://blogs.spjnetwork.org/foi/>, and he can be reached at cuillier@email.arizona.edu.

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.

Lowering Copy Fees

Sometimes agencies want to charge exorbitant fees for copies of records, which might be justified or it might be a revenue enhancement stream. Here are some tips for lowering or eliminating unreasonable fees:

1. Don't ask for copies. Look at the documents for free. In most states an agency can't charge for search fees, only for copies (check your state law).
2. Narrow the request to just the few pages that you really need.
3. Ask for a fee waiver as a researcher using the information for the public good (federal FOIA provides waivers for journalists, researchers, etc.).
4. Take photos or use a portable scanner (about \$100).

5. Ask for electronic files on CD or e-mailed for free.
6. Ask the agency for an itemized list of expenses to justify the costs. Here is what I consider reasonable: Add paper (.7 cents per page based on a box of paper from Office Depot), machine depreciation (.2 cents per page based on a Xerox WorkCentre 5225 that costs \$4,299 and produces 75,000 copies a month), and toner (.6 cents per page), and you get 1.5 cents per page. Call it an even 2 cents per page and the agency is still making a 25 percent profit margin.
7. Question high staff search fees, if in a state where that is charged – \$100 per hour is equivalent to paying someone \$208,000 a year to make copies.
8. Request to see a copy of the contract the agency has with a copy company. My employer pays a company less than a penny (.9 cents) per page to provide the machine, service it and refill the toner. It's all in a contract, which is public.
9. Survey local agencies to compare typical costs and expose the unreasonable.
10. Survey citizens to find out what they consider reasonable. Most people will say 10 or 15 cents per page copy. If a profit-oriented store can charge that, then surely a non-profit public agency can charge less.
11. If the unreasonable charge is for computer programming, call the company that makes the software and ask them if copying data should be time consuming. They often say it takes a few minutes.
12. Publicize the unreasonable copy fees. Find out if an agency provides free copies to lawyers or commercial requesters but overcharges citizens. Contact elected officials. Blog about it.
13. Team with other requesters to share the bill. Request the request logs to see who else requests records frequently from the agency.
14. Ask an ombudsman or state attorney general to talk sense into the agency.
15. Sue or lobby for laws specifying reasonable fees.

Soft Tactics and Principled Negotiation

Access laws are essential, but sometimes officials thumb their noses at them and suing is the only answer. But if you can get the records by persuasion, even better. Below are tips for getting sources to comply with requests, based on the theories and application of “principled negotiation.” These techniques are advocated by such experts as William Ury, co-founder of the Harvard’s Program on Negotiation and author of “Getting to Yes.” I suggest reporters always approach their sources in this frame of mind. With enough practice you’ll get a lot of agencies to comply without threats of litigation or hard tactics.

Argue interests, not positions

Argue for your interest (I wish to analyze ambulance response times to find trouble spots), not positions (I want your database). If the agency understands why you want the information they are more likely to be cooperative. Of course, you are not obligated by law to explain that and you might not want to tip them off. But in reality they can figure it out most of the time so being up front is a good option. Then, they can argue their interest (we don’t want to invade anyone’s privacy). You can work out a solution when you understand interests. Positions cause both sides to dig in.

Allow face saving

If you box an official into a corner early on they might feel like they have to stick to their guns no matter the cost, especially if they denied the information in front of their superiors and subordinates. Talking with the person informally first, before they commit to an action, gives the person more leeway to agree to your request. Or, suggest the legal department examine the issue and let them make the decision – that will relieve the official of the shame of changing his or her mind (e.g., “sorry folks, I had to say yes because the attorneys said I had to release it.”)

Use people skills

Allow officials to vent. Listen first, then repeat what you heard (whether you agree with it or not). Use “I” statements, not “You” statements. Talk to people informally side-by-side, not facing across a counter, creating psychological “opposition.” You want to look like the good, reasonable person. Let them look like the jerks.

Apply negotiation jujitsu

Bend like the willow, don’t break like the oak. Invite criticism and advice for how to analyze the information. If they say the record is a waste of time then ask what record would be a better use of time. Use questions instead of statements. Use silence after an unreasonable attack. Invent different options and alternatives, and end conversations with a compliment. Ultimately, if you find yourself getting angry or are denied, calmly write down what is said, thank the person, and say you need to do some more research. Leave and figure it out, then come back and discuss further.

Hard Tactics

Sometimes you apply the techniques of principled negotiation but an agency just doesn't want to play ball, or purposely chooses not to play fair. Then it's open season and time to apply hard tactics. Below are tips for getting sources to comply with requests, based on the six elements of persuasion by Robert Cialdini of Arizona State University. Also, other strategies are provided for pressuring an agency to release records. Do not use these techniques for evil. Only good.

1. Reciprocation

- **Rejection-then-retreat:** Ask for a lot, then cut it in half. "Can I see all your expenses in database format for the past 20 years? OK, how about starting with just the expense reports for the past five years?" The clerk will appreciate you for simplifying the request and may reciprocate by working faster and being more helpful. Request information that you can give up later, such as social security numbers. If it lands in court a judge might want you to concede something anyway. When it appears you are giving them something then they are more likely to reciprocate.
- **Get-to-know-you stories:** Don't ignore newsworthy positive stories. Occasionally government actually does something right. It's often useful to do a harmless newsworthy project first to get to know people and build trust (e.g., analyze pet license data for a feature on most popular dog breeds/ names), then work from there. When you do something positive to someone, psychologically they feel obligated to reciprocate and help you out even more. But don't make up stories or get buddy-buddy. Readers come first.
- **Be a helper:** Check in frequently after the request is filed and offer to help to make their jobs easier. Offer to help copy data or provide CDs for copying. They might not take you up on it but they might appreciate the gesture.

2. Commitment and Consistency

- **Everyone happy:** Ask, "How are you doing today?" When the person says fine, then he or she is more likely to help you. People don't want to appear stingy when they are fine and you are not.
- **Commitment:** Once commitment is made, people try to stick to it. Get commitment verbally: "Do we have an agreement?"
- **Ratcheting (low-balling):** Get a commitment for something small, then it opens the door for getting a "yes" on something bigger. This is the opposite of the reciprocation techniques. "How about if I could see a copy of what a police report looks like. OK, do you have what a case file would look like? What does it look like in your computer system? Any chance I could just get an electronic copy of your reports in Excel for the past year?"

3. Social Proof

- **Peer pressure:** We follow what we see everyone else doing (e.g., canned laughter). This is most effective when people are uncertain and when the reporter is similar to the person. “Boy, all the other towns in the county provide this information. I wonder why it isn’t open here?”
- **Patriotism:** Focus on the importance of what they have to offer to the community. That it’s their duty as Americans to keep government open and transparent, and the community will appreciate it.

4. Liking

- **Looks:** As much as we hate to admit, people often make decisions based on how a requester looks. Dressing well helps; looking shady usually raises suspicions and increases denials.
- **Similarity:** Dress like your sources. Act like your sources. Talk about similar interests.
- **Compliments** that are sincere help.
- **Association:** Disassociate yourself with negative media and people who use information irresponsibly (spammers, identity thieves). Go to lunch with people for a positive association with you and food.

5. Authority

- **Bigger gets better responses.** Journalists from bigger media have more “authority” and tend to get calls returned faster. If you work for a smaller organization, consider teaming up with reporters from other organizations. Cooperative requests can increase pressure for release and serve everyone’s interests.
- **Titles have authority.** Have the request letter co-signed by the managing editor or, depending on the importance of the information, the publisher. Or have the organization’s attorney send it.
- **Government allies.** Get people in government on your side to back you up. Get to know the state attorney general, your state records ombudsman, or others who might be respected in government.
- **Shallow but effective.** Symbols of authority are effective: titles, clothing, automobiles. Even height conveys authority.
- **Cite the law.** The law is authoritative, particularly if it has penalties for noncompliance. Include the citations in your requests and e-mails when you want to exert authority.

6. Scarcity

- **For a limited time only.** What you are offering is limited. “I don’t have time to wait until next week for you to check with the attorneys on this. My deadline is in six hours. Either I get the information or I’m going to have to write a story for tomorrow morning’s paper explaining that your agency is withholding it. I

would hate for you all to look like you are hiding something and are bad officials when I know you aren't. The public will appreciate it."

7. Pound lawbreakers into submission

Sometimes you run across a few bad apples in public service (just like there are some bad apples in journalism) who deliberately act in bad faith and deny valid public records requests to hide corruption or embarrassing facts. Remind them who's boss (the public):

- **Go to the top.** Go to the elected officials and ask them why the agency is hiding information. Sometimes elected officials, especially during an election year, would rather avoid a public battle with journalists.
- **Write about it.** Some journalists say it's inside baseball but that's hooey. When an agency says "no" to you, they aren't saying "no" to you. They are saying "no" to the thousands or millions of people in your community. Tell those people. Quote access experts and show why the agency is breaking the law. You would write a story if the agency broke other laws, right?
- **Wave the flag.** Use patriotism as leverage. Communists and Nazis favor secrecy, not god-fearing Americans. Are your officials pinkos and hate America, or are they good citizens?
- **Expose the deviant.** Get the same information from other agencies then ask the secretive officials why they are deviant. Nobody wants to be an outlier.
- **Rally allies.** Find people and groups who want the information and go tell them about the secrecy. It's even better if they are influential business owners, contributors or active citizens. When officials see it isn't a media issue, and they fear the wrath of constituents, they yield.
- **Heads on pikes.** Put together a list of all the other agencies in your state or elsewhere that lost public records battles and had to pay tens of thousands of dollars in lawyer fees (including the requesters' fees). Show them the news articles that made the agencies look bad. When officials see the very real drawbacks of secrecy (heads on pikes), they might wave the white flag.
- **Bury them.** If they deny your valid request and are being stubborn, flood them with more requests. If they are trying to hide one record, you can tell them that you wonder what else they are trying to hide. Make it much more work to deny you records than to comply. Wear them down.
- **Release the hounds (lawyers).** Have your attorney write a terse letter citing the relevant law. The letter, while perhaps unbudgeted, can demonstrate you are serious and will pay off down the road with more records.
- **Sue.** Sometimes all it takes is filing a lawsuit and an agency will cough up the information. In many situations you can recoup your attorney fees, even if you don't go to court. Check out the new NFOIC litigation fund (<http://www.nfoic.org/>) that will cover litigation to fight for records.

Top-10 Meeting Red Flags

1. **Retreats.** Just because a public body wants to meet at the beach or mountains for a retreat doesn't mean the open meetings law doesn't apply.
2. **Attorney-client privilege.** Some public bodies try to get around the open meetings act by claiming attorney-client privilege, calling the attorney into executive session anytime they want secrecy. Question such ploys.
3. **Stealth agendas.** If the agenda says minutes, old business, new business, begin challenging the public body for more information. If the agenda says the public body is closing the meeting to discuss "personnel" ask that members go on the record with specific details about meeting closure. Some states' laws demand "reasonable specificity" on the agenda.
4. **Boilerplate closures.** In some states, the Municipal League has encouraged city councils to include an "executive session" on their agenda as a matter of practice whether they really need it or not. Such a practice may encourage more closed meetings and violates the spirit of most open meetings laws.
5. **Electronic meetings.** Some states allow meetings to be conducted over the telephone or via video or audio conference. However, such meetings usually require that journalists and the public can listen or watch. Also be aware of the emerging trend to conduct public business via e-mail. Make sure the public bodies you cover aren't engaged in e-mail conversations about public business.
6. **No votes for executive sessions.** Laws sometimes require that a majority vote be taken to go into closed session. Keep public officials honest and demand votes be taken.
7. **Work meetings or committee of the whole.** In some places, public bodies hold regular "work sessions," "committee of the whole meetings" or "work meetings" before their regular meetings. In most cases, these are meetings to discuss matters informally and line up votes. These are still public meetings no matter what they are called.
8. **Vague times and locations.** Some boards have attempted to approve closed meetings for a non-specific time and location in the future. In some cases these have been used to bring in candidates for job interviews. Object strongly to such tactics to get around open meetings laws.
9. **Get the meeting documents.** Ask for the same information packets the members of the board or council receive. These are public documents and can help you be more thorough and accurate in your reporting.
10. **Diffuse the open meetings bomb.** If a discussion scheduled for a closed meeting looks like it might violate the law, make a phone call before the meeting and try to persuade public officials to discuss the agenda item in question in the open. Some states have FOI hotline attorneys who may be consulted.

Access Resources

Society of Professional Journalists

<http://www.spj.org/foi.asp?> and <http://blogs.spjnetwork.org/foi/>

Provides information about freedom of information. The “Open Doors” publication has document-based story ideas, check the guide to FERPA, and see the Sunshine Network with experts for each state. See the FOI FYI blog at <http://blogs.spjnetwork.org/foi/>

State coalitions for open government

<http://www.nfoic.org/nfoicmembers>

Nearly every state has a coalition for open government, which provides assistance in accessing records. Check the National Freedom of Information Coalition Web site for a coalition in your area. Also, NFOIC has a litigation fund for suing agencies over records.

Reporters Committee for Freedom of the Press

<http://www.rcfp.org>

This group explains how to use FOIA, provides an online request letter generator (for FOIA and state laws), and provides easy-to-understand explanation of state public records laws (<http://www.rcfp.org/ogg/>). Find guides to accessing health records and other information.

Student Press Law Center

<http://www.splc.org/>

This nonprofit center provides free legal assistance to student journalists. Check out the Web site for the publications and searchable database on a variety of student media law issues. It also includes a super FOIA letter generator that caters to each state.

The Art of Access blog

<http://www.theartofaccess.com>

The blog, by David Cuillier and Charles Davis, provides more tips and story ideas on accessing public records, as well as resources for requesters and teaching FOI.

State record ombudsman

About half the states have some sort of mediator or ombudsman to help requesters and agencies settle disputes over records. Check with your state attorney general’s office.

iDig Answers

<http://www.idiganswers.com>

“Hit records” provides hundreds of document ideas for stories and tips, by records expert and Florida journalist Joe Adams.

The National Security Archives

<http://www.gwu.edu/~nsarchiv/>

Tips for accessing public records through FOIA, as well as tons of federal records.

Citizen Access Project

www.citizenaccess.org

This Web site out of the University of Florida provides information about access laws in each state, including a rating for whether different aspects are good or bad.

Investigative Reporters and Editors

www.ire.org

This group has an online resource center (for members) that includes a searchable database of more than 20,000 investigative stories and a searchable database of 2,000 tip sheets. Also check out the Extra! Extra! daily stories: <http://www.ire.org/extraextra/>

Society of Environmental Journalists

www.sej.org

Environmental story archive that provides great ideas for data and FOIA requests.

Center for Investigative Reporting

<http://centerforinvestigativereporting.org>

Story blog with great ideas for document-based stories.

Freedom of Information Center

<http://www.nfoic.org/foi-center>

Information about access in all the states, including a listing of public records audits and studies. Out of the University of Missouri – Columbia.

WikiFOIA

<http://sunshinereview.org/index.php/Portal:WikiFOIA>

Provides information and news about access issues nationally.

Alltop Freedom of Information

<http://freedom-of-information.alltop.com/>

A compilation of FOIA blogs with top stories and postings.

State Sunshine blog

<http://openrecords.wordpress.com/>

State Sunshine blog with news about FOIA issues nationally. A good list of links.

Office of Government Information Services

<http://www.archives.gov/ogis/>

The federal agency, started in fall 2009, is the federal ombudsman for FOIA. Have a problem with an agency? Contact them and see if they can help.

OpenTheGovernment.org

<http://www.openthegovernment.org/>

An advocacy group with news and reports about access to federal records.

Sunshine in Government Initiative

<http://www.sunshineingovernment.org/>

Check the FOIA files for hundreds of stories produced with public records.

Google News Alerts

<http://news.google.com>

Go to Google News, click on “News Alerts” then set up alerts with keywords such as “public records request” and “freedom of information” and Google will send you links to stories that contain those keywords.