

Chapter

6

How to overcome denials

ACCESS ACTION AGENDA

- Understand the nature of “no”
- Respond to common denials
- Play hardball

With the power of state and federal public records laws, access should be simple: Just go and ask for the public records you need. We wish it were that easy.

To use FOI laws is to deal with denials, often offered up seemingly without reason and designed to buy time while you stew. Sometimes denial—repeated, mindless denial—can dampen the enthusiasm of even the hardest records requesters.

While overcoming denials every time might not be easy, it is achievable. Just ask Scott Reeder, a managing editor for the Franklin Center for Government and Public Integrity, a nonprofit news organization that covers state governments. When Reeder was the statehouse bureau chief in Illinois for The Small Newspaper Group, he requested documents from all of the state’s 876 school districts regarding teachers who had been disciplined. How many districts provided the records?

All 876. He did it through persistence and applying some of the techniques you’ll read about in this chapter.

First, Reeder mailed out request letters, which got about half the districts to respond. Then he faxed a second letter to get 25 percent more to provide the information. Then he hit the telephone, hounding superintendents until they complied with the law.

“One district I had sent more than 20 faxes and letters and they ignored me,” Reeder said. “So I got the cell phone number of the FOI officer and just kept calling. When he was at volleyball practice. At home for dinner. Finally he got exasperated and just handed over the data.”

After shaming some districts into complying (“Hmmm, about 860 districts provided the information, why won’t you?”), Reeder was down to a few holdouts, including Chicago officials who cited privacy as an exemption. So Reeder walked over to the office of the state Senate majority leader and asked if he could talk to the mayor’s office. “Within minutes the phone was ringing,” Reeder said. “It was the school district saying, ‘Mr. Reeder, we’ll have the information for you this Monday.’”

You, too, can get 876 school districts to comply with the law, or even that one recalcitrant sheriff’s office on your beat. This chapter explains how to respond when public officials illegally deny valid public records requests. It then describes common denial excuses and how to respond, including a list of strategies for turning “no” into “yes.” At the heart of the strategy is turning access requests into a bit of a game—rather than wallow in misery in the aftermath of a denial, FOI stalwarts told us again and again that they see denials as the beginning of the chase.

Understand the nature of ‘no’

Some government officials turn your “right to know” into their “right to no.”

As in “no way are you getting that document.”

That’s why it’s so important to understand the prevalence of denials, *why* some agencies deny valid records requests and what to do about it.

Denials gone wild

First, let’s start with the fringe denials, the loony ones that leave journalists fuming, gasping and occasionally laughing. Wacky denials illustrate how far some public officials will go to assert total control over their domains and say anything to thwart transparency.

Sticking their necks out. In 2002 Ryma the giraffe, a beloved public favorite at the Smithsonian Institution's National Zoo, died at age 16, long before the giraffe's life expectancy of 25 years. *The Washington Post* requested the medical and pathology records. While the zoo gave a general description of the death (Ryma apparently died of a digestive illness caused by eating bamboo), officials refused to hand over the specific records, saying that disclosure would violate the giraffe's privacy, as well as animal-zookeeper confidentiality. The Smithsonian was able to get away with the denial because a court ruled that the nonprofit organization is not subject to FOIA. In a similar case, the *San Jose Mercury News* lost a lawsuit in the 1990s after suing over pet licenses. The court agreed with Santa Clara County's argument that releasing pet license data would invade dogs' privacy.

Protecting porn profits. A public school teacher from Wisconsin was fired for viewing pornographic images on his classroom computer. When the *Milwaukee Journal-Sentinel* asked to see the computer files, the teacher went to court to stop the disclosure of the images, arguing the school couldn't release copies of the commercial porn images because it would infringe on the copyright held by the porn producers. In May 2007 the state Supreme Court ruled in the newspaper's favor, saying compliance with the public records law is fair use and therefore release of the pictures wouldn't violate copyright law and wouldn't financially hurt pornographers.

Adopt-a-highway. You know when you drive down a highway and you see those "adopt-a-highway" signs that state that the local Kiwanis club or the Jones family has adopted that section of the road to clean up? Ever wonder whether they actually do the cleaning for that prime free advertising? Jennifer LaFleur did when she worked for the *San Jose Mercury News*, so she requested the database of all the adopt-a-highway volunteers to find out how the program worked and who was involved. The state refused to make the list public, saying it would invade the volunteers' privacy for the public to know they had adopted a section of state highway—even though their names are posted on highway signs for everyone to see.

Secret Santa. We trust our government to protect us from terrorists and other bad people, so when they say information has to be kept secret

because of national security we assume that is true. Or is it? In 2003 the National Security Archive combed through declassified federal documents to find a December 1974 CIA "Weekly Situation Report on International Terrorism" that had been blotted out to protect national security. Yet when the declassified version was made public it revealed an internal office joke about a potential terrorism attack on the North Pole by the "Group of the Martyr of Ebenezer Scrooge" (see Figure 6.1). National security? Bah, humbug. More like an office holiday joke.

If public officials like these are so brazen at trying to keep public records secret with outrageous excuses, imagine how often they deny valid requests through seemingly benign reasons, through dubious reliance on exemptions and sometimes through good, old-fashioned stonewalling.

Prevalence of denials

OK, so we pointed out a few extreme examples of silly secrecy. Is secrecy really that much of a problem? You bet. Despite state and federal laws requiring government officials to honor public records requests, the reality is that many don't.

Secrecy has been on the rise for decades. About 200,000 documents are classified annually at the federal level, and tens of thousands of FOIA requests wait in backlogs, some pending since 1992.¹

Helen Thomas, a political columnist for Hearst Newspapers and a journalist since 1943, said that in her nearly 70 years in the field she has seen the government gradually get more and more secretive.

"We had a lot of access in the Johnson era and the Kennedy era. We used to walk down the street with Carter," Thomas said. "But more and more it's become difficult. There's too much secrecy in government, and I think the news organizations have gone along with it. I don't play ball like that. . . . People have a right to know."

Secrecy has become ingrained in our government, from the top down.

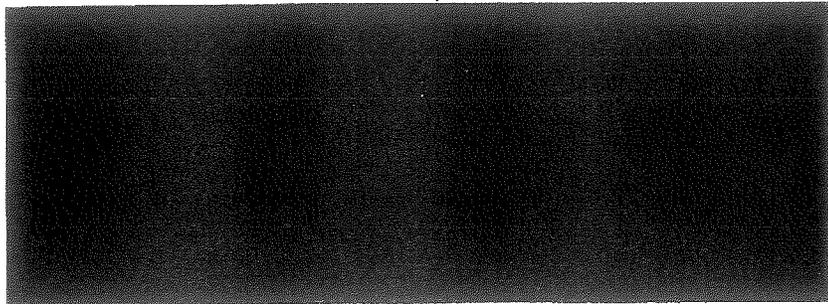
An examination of 32 state public records audits conducted from 1997 through 2004 showed widespread noncompliance with public records laws.² Citizens and journalists visited police stations, school districts and city halls and asked for different kinds of records. In many cases the responses were hostile and illegal. Among the 32 audits, agencies complied

FIGURE 6.1 Secret Santa: CIA weekly situation report on international terrorism

Classified version

~~SECRET~~
No Foreign Dissem/No Dissem Abroad/Controlled Dissem

VI. Terrorist Threats and Plans: Worldwide



Declassified version

VI. Terrorist Threats and Plans: Worldwide

Target: GOMP Courier Flight
Place Unspecified
Date: 24-25 December 1974

** A new organization of uncertain makeup, using the name "Group of the Martyr Ebenezer Scrooge," plans to sabotage the annual courier flight of the Government of the North Pole. Prime Minister and Chief Courier S. Claus has been notified and security precautions are being coordinated worldwide by the ECCT Working Group. (CONFIDENTIAL)

with the law only 59 percent of the time. That means four out of 10 times public officials illegally denied valid public records requests.

Cities were fine at handing out city council minutes—93 percent of the time. But good luck trying to get copies of crime logs—police agencies complied with the law only 29 percent of the time (see Table 6.1). If police don't follow the law, who will?

And if it isn't bad enough to simply say "no," some officials get downright rude. In a 1999 Illinois audit, after requesting a public record an auditor was pulled over by a sheriff's deputy and told, "You can't come to a small community like this and act like that." In another state, a sheriff crumpled up a request letter, tossed it in the garbage and told the citizen auditor, "I don't have to give you nuthin'." In some cases, people requesting public records have been detained by police and even cited for disorderly conduct.

Why in the world would our public officials act like that to citizens, their bosses, who have a right to ask for *their own* public records?

TABLE 6.1 Compliance varies by record type

Record type	Average compliance rate
City council minutes	93%
Restaurant inspections	86
Expense reports	74
Travel vouchers	74
Coach salaries	68
Superintendent contract	66
City employee overtime pay	60
Jail log	58
Crime incident report	55
Crime log	29

Source: David Cuillier.

Note: This analysis of 32 state public records audits, completed between 1997 and 2004, showed that average compliance rates varied depending on the type of record and agency.

Unfortunately, there are lots of reasons, including lack of staffing, orders from the top, entrenched secrecy and plain old arrogance.

According to research by Wendell Cochran of American University, about two-thirds of the time federal agencies deny FOIA requests citing privacy exemptions. About 15 percent are denied to protect ongoing law enforcement investigations, and 23 percent for other reasons. Only 1 percent of denials are attributed to national security.³

But those are just the *apparent* reasons. When a denial appears to be arbitrary, there are usually more subtle reasons at play. In Chapter 8 we'll go through in much more detail some of the reasons why officials hide records, but for now, regardless of the reason, you need to figure out what to do. It's time to respond and get those records.

Respond to common denials

So we know there's a good chance a public official will deny a valid public records request. So what do you do? Don't give up. The worst thing you can do is walk away because the agency will use the same excuse on the next person, including *you* the next time you request a public record. Instead, look at the initial denial as the beginning of your response rather than as the final answer.

Don't get mad, get busy

It can be difficult to stay calm when you're denied public records. Investigative reporting guru Don Ray tells journalists "don't embrace obstacles." Maybe the information is available elsewhere. Don't fume and focus on the denial. Focus on getting the information.

Sometimes journalists are quick to pounce on reluctant officials by threatening a lawsuit or writing nasty stories about denials. This may be necessary, but at the very beginning it might box the agency into a corner, forcing it into a win-lose scenario: roll over or fight. Most cornered animals fight. One way to prevent the agency from digging in its heels early on and battling all the way to court is to provide an easy escape hatch. Enable the agency to save face and it might drop the files in your hands and scuttle off unscathed.

An example of face-saving is acting like "Columbo," a humble and seemingly harmless character from a 1970s television detective show. Ray

said that when a low-level clerk denies copies of a record, there's a good chance that the clerk doesn't know whether it's public or not, but chooses to play it safe by denying access:

When they do that, I say, "No problem. I don't really need it that bad. Besides, I can leave earlier than I expected and get home sooner." I start to walk away and then put my hand to my forehead and do a "Columbo" move. I return and say, "I just realized that my boss is going to want to know why I came back empty handed. If you could be so kind, would you please tell me the law or regulation or court case that says the record isn't public?" They'll usually say, "I don't know." Then, I say, "Oh, well then maybe you'd let me talk to someone who knows. Could I ask your supervisor?" I'm never threatening—always nice and friendly. Usually, the supervisor comes and also doesn't know. Then I ask nicely for the supervisor's supervisor. By the time the chief clerk or the office manager comes to the desk the original clerk is intrigued. What often happens is that the head honcho person looks at the request and says, "It's public record. Make the copy for him."

As we discussed in Chapter 5, focus on the "interests" of what you want, and the interests of the clerk. Investigative reporter and editor Scott North of *The* (Everett, Wash.) *Herald* suggests journalists quickly identify the sticking point. "Identify the problem they had with the request, why they are reluctant to give it up," North said. "If it's not a problem for you, give it up and open the logjam. Sometimes instead of going at it at ramming speed, look at it as a maze."

Here are a dozen ways of working yourself through that labyrinth, of responding to those common denials.

If the agency says . . .

'Nah, it's our policy not to give that out.'

That's nice, but what does the *law* say? Have the agency provide its denial in writing, citing the relevant state or federal statutes that allow for the secrecy. In many states this written legal citation is required by law.

When an agency is forced to cite the exact law it often realizes that there is no such law. Once it provides the written denial, check the law yourself to make sure it's a valid exemption. Sometimes officials cite a law that does not apply. Or court rulings might interpret the exemptions narrowly, as they should, which might contradict the agency's application of the exemption. Still unsure? Run the denial by your state FOI coalition, a media attorney or a fellow FOI junkie.

'Chirrrp, chirrrp.' (Crickets chirping from the silence of the agency's nonresponse.)

You submit your request but don't get any response. Nobody calls you, e-mails you or sends you a letter. In many states the public records law requires a response within a certain time limit, usually from three to 10 business days. If the agency fails to respond it is breaking the law. Call to find out what happened. If you get the runaround, send another letter, this time to the head agency official and elected officials. Mention you have gotten no response from a previous letter, in violation of state law. Maybe even send it on your organization's letterhead, or better, from your organization's lawyer. If you have sources within the institution, enlist their help. Be firm and consistent, not militant. Ask them if they need a little more time rather than going straight for the jugular.

'The description of what you requested is overly broad or inadequate.'

Narrow your request so it is clear what they need to provide you. In some states officials can deny records requests that are overly broad. It helps to meet with staffers to find out exactly what records they have, down to the form number, so you can be specific in your request. Discuss in detail the ways that you could limit the scope of the request, and be willing to take suggestions from staffers in government, who can really be a great help in the process.

'The record doesn't exist.'

If you are sure the record does exist and your letter was clear, then give the agency more guidelines and clues for where it might find it. Try to be patient because some agencies are short staffed or disorganized, and the person you talked to might not even realize the agency has such records.

Find the right person who knows where the record is. Get past the clerk by asking who would have generated the document. Ask around: Don't take the word of a single employee at City Hall.

'We'll get back to you' (20 years from now).

Access delayed is access denied. If the records aren't available by deadline then that hurts the story, and a lot of public officials know that. Studies show that federal agencies in particular will delay FOIA requests for months or even years, with some of the longest requests pending more than 20 years.⁴ Help the agency speed its response by being specific in exactly what documents you need, and which ones you need first. If an agency is dragging its feet for no apparent reason, consider the request denied and ratchet up the heat.

'Some of the materials are legally exempt from disclosure, so we can't give you the record.'

The agency can black out, or redact, the exempt material but still let you see the other parts of the record that are public. In databases, this entails simply deleting exempt columns, such as Social Security numbers. Check the fields that are being redacted and make sure you really need them before you insist on getting them. Sometimes you can offer up a field you don't need to ease the negotiations and speed things along.

Pro tip



Play the patriotism card

When officials balk at giving out information, remind them of the heritage of openness in our past. This is true for tribes too. For a long time back our people knew everything that was going on in their community. That's our history. When we have a ceremony you tell the truth about your sickness so everyone will know exactly how to pray. Everyone knew who did something really good and who did something really, really bad, even if it was deviant. Then we can deal with it in the proper way—everybody can be brought back into harmony. Those are the Navajo teachings.

—Marley Shebala, reporter, *Navajo Times*

'Here you go, with a few redactions' (all blacked out).

Sometimes government agencies go overboard on redactions, blotting out everything whether it is exempt by law or not. If you feel they redacted more than they should have, but you don't know because you can't see the blacked-out material, first ask the nature of what they blacked out and what statute allows them to keep it secret. If you get vague excuses, ask for the justifications in writing with specific laws cited for blotting out the information. Some state public records ombudsmen can review the unredacted documents *in camera* (in private) to determine whether the agency followed the law. A judge could do the same if you sue. Another possibility is to request the same record from different agencies. Sometimes they redact different parts, enabling you to piece together the public material.

'Our hands are tied. An exemption in the law forces us to keep it secret.'

First, check with an expert to make sure the exemption is being applied correctly. If so, still see if you can work something out. Exemptions are usually discretionary, not mandatory. Agencies are not required by law to withhold the information, except in some circumstances. For example, some privacy laws require government to keep certain records secret, such as grades or medical records. But in most cases, officials can choose to waive the exemptions and release the material if they wish. In some cases the public interest overrides privacy or other competing interests.

'We don't have time to get that for you.'

While many public agencies are strapped for resources, this is not a valid or legal excuse for denying a public records request. Have them point out the "no time" exemption in the law. When they can't find it, offer to help them make photocopies and prioritize the records so they can provide them on a schedule. We've even offered to come sift through records—and been welcomed to do so.

'Where does it say in the law that I have to give you that record?'

Nowhere. But that's not how public records law works. Remember that the presumption is that government records are public unless there are

laws saying they are secret. So show the official the statute and ask where in the law it says the agency can keep the record secret. If you forward the request to the agency's attorney, that can clear things up fast.

'You can have the records if you sign this contract.'

Be very wary of contracts or agreements with agencies. Avoid signing them because they often allow the agency to withhold the information if it deems the use as "inappropriate." Some agreements even allow the government to come into a newsroom and look at the computer and records to make sure the information is being used appropriately. Either the records are public or they aren't. The law is the law. Don't let the government con you into data agreements that allow for intrusion and censorship.

'We don't know how you'll use it. You might not use it in a way we like.'

Tough noogies. In most states, records requests can not be denied based on who the requester is or how the information will be used. The exception is in the case of commercial mailing lists or business use, but news gathering is exempt from the commercial restrictions and higher copying costs. Access audits have demonstrated that officials get suspicious when requesters won't say who they are or why they want the record, so if it doesn't matter, feel free to tell them if you want and it might speed things along. However, if you don't want them to know, and they really have no business asking, then just respond, "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 the agency then it will be no big deal and the agency will be less likely to question you. Get in the habit.

'We think that legally we can keep it secret because of [privacy, national security, personnel, internal memos, under investigation, etc.]. So we'll agree to disagree and not give it out.'

Check with an expert. If the agency is right, get the information other ways. If it is wrong, it's time to turn up the heat.

BOX 6.1 Ten ways to reduce or eliminate outrageous copy fees

Sometimes an agency will provide records but charge thousands or millions of dollars to get copies. Most state public records laws require agencies to charge "reasonable" copy costs, often just for the paper, toner and machine use, not staff time. We guarantee you can work around unreasonable fees and get what you need on the cheap or even for free. Here are 10 ways:

1. Ask for a waiver because of the public good (federal FOIA law allows such a waiver of fees for the news media).
2. Instead of getting copies, bring a notepad and look at them for free.
3. Narrow your request by selecting only the documents that you really need.
4. Ask for the records in a digital format. Transfer the files onto a flash drive or CD-ROM, or have the files e-mailed.
5. Photograph the documents with a digital camera, or use a portable scanner. Bring your own photocopier.
6. Make the agency justify the actual costs of copying through a line-item list. Request the contract with its copy services company to see how much it pays per copy. If commercial copy businesses charge 10 cents a page, and make a profit, then a reasonable cost for a nonprofit government agency should be that or less.
7. If the agency won't provide justification, help it out with your own list:
 - Paper: Box of 10 reams (500 sheets each ream), at \$35.99 = 0.7 cents per page.
 - Machine: Xerox WorkCentre 5225 costs \$4,299 and produces 75,000 copies a month. Assuming two-year life, that's 0.2 cents per page.
 - Toner: \$172.00 for 30,000 pages, or 0.6 cents per page.
 - Electricity: Negligible.Total cost per copy: 1.5 cents. Now, that's reasonable!
8. Survey all the local agencies in your area and do a story about the inconsistency in fees and ways officials rip off the public. Interview average folks who pay the fees and ask elected leaders why they think it's necessary to overcharge citizens to access records they've already paid for through their taxes.
9. Contact your state public records ombudsman or attorney general's office to talk some sense into the agency.
10. Sue or lobby for legislation specifying lower, reasonable fees.

Play hardball

So you've haggled with officials and they still don't want to provide information you believe you are legally entitled to. It's time to ratchet up the pressure.

Go up the ladder

If a manager or clerk is denying the records request, go to the person's supervisor or the elected governing body of the agency. Sometimes line workers are reluctant to give something out because they fear getting in trouble from superiors. Those in charge have more authority. Also, those in charge have more to lose from the appearance of secrecy or a public records lawsuit. Ask each of the city council members or school board members what they think about the agency keeping the records secret from the public. Gain advocates for your position further up the institutional food chain, then call in the firepower.

Rally allies

Work with other journalists or other interested parties, such as genealogists, librarians, building contractors, private investigators or neighborhood gadflies. A unified front from diverse groups can be persuasive. Legislators also are good allies, as Scott Reeder found out in Illinois for his school district records project. Unions and nongovernment public interest groups can also make good allies on public records requests.

Find an attorney in your state attorney general's office or auditor's office who knows the open records law. Have that person talk to the agency. Also, find guides to public records produced by the state attorney general or the cities association in your state. Often those guides will explain how the record is public. E-mail the agency a page from the guide, or send it the whole document. Then the agency doesn't have to take your word for it; the agency is hearing it from authoritative government employees.

Shame the agency

Find out whether other agencies provide the records in question, and then shame the deviant agency into making it public. Maybe every school

district in the county or state provides teacher disciplinary reports but one. Peer pressure can be effective. Also, sometimes it helps to remind the agency about the purpose of the public records law, open government and transparency in a democracy. Wear a flag pin on your lapel and talk about freedom. This is America, after all, not Nazi Germany or Stalinist Russia.

A lot of officials don't realize that breaking the public records law puts an agency at risk. Point out other jurisdictions that denied public records, were sued and had to pay hundreds of thousands of dollars in penalties or attorney fees. In other words, secrecy creates a potential liability for the agency, not only in bad publicity but also in tax dollars. When you see in the news an agency lose a public records lawsuit, note the details in a running file and have that list on hand to provide to reluctant officials. Point out that you (and taxpayers) would hate the agency to become the state's next poster child of secrecy.

Pro tip

Find old documents to leverage new information



I was involved in a massive project on the Louisiana environment some years back that showed safety problems with oil and natural gas pipelines. The thing that popped out of the records was that inspections were not as frequent as they ought to be and that the risk factor in failure in some of these pipelines was a lot higher than we thought. There have been several pipeline explosions over the years that could have been prevented. Since then, reporters I've worked with have tried to get plans for water system security, which you can't get anymore—officials cite the new critical infrastructure exemption. A lot of times I think it's

just overreaction to a perceived threat, or basically they don't want to release information that will embarrass them. But I've found that sometimes you can get around that by finding older documents that may not be as up to date, but you can use them as a foundation for asking for more specific or penetrating questions. Sometimes small libraries that serve as repositories will have those documents still. You'll find that they've forgotten to remove those documents from the shelves. Or interview former agency officials—sometimes they'll still have a lot of documents with them and will let you see them. Just be as resourceful as possible. Don't limit yourself to the official agency that is responsible for that document. Documents get sent out all over the place. Sometimes you have to be imaginative.

—Sonny Albarado, projects editor, *Arkansas Democrat-Gazette*

File more requests

Some journalists assume that if an agency routinely denies a valid public records request then the officials must have something to hide. And if they are hiding this document, what else are they trying to keep hidden? That's why Eric Longabardi, an investigative television reporter, digs even deeper if he gets a denial.

"If they delay and are deliberately making things difficult, send 400 requests via e-mail in 10 minutes," Longabardi told a crowd at the 2007 Investigative Reporters and Editors national conference in Phoenix. "They'll want to get you off their back and they'll get you what you asked for."

Also, you might try lobbing some "FOI clusterbombs." Request the same documents from other agencies that might have them. Or think of other documents that would have the information you are looking for, maybe even from the same agency.

Mike McGraw of *The Kansas City Star* used this technique when he was trying to get records regarding food poisoning caused by tainted beef. The Centers for Disease Control (CDC) refused to provide records that included the names of food poisoning victims. So instead McGraw requested all correspondence between the CDC and attorneys regarding food poisoning. He then contacted the attorneys who represented the victims, and they were more than happy to get the reporter in touch with their clients.

Lawyers can be great sources of documents that might have been gathered during the discovery portion of a lawsuit, in preparation of making their cases. Find out if an agency or group has been sued, and then call the plaintiff's attorney to find out what records were gathered during discovery.

Another tip is to request e-mails and memos regarding your request to see if officials talked about why it was denied and mentioned other records they did not give you. The correspondence will give you a good sense of whether the agency actually denied the records for a legitimate reason or is trying to hide something. You may learn information that allows you to submit a new request that is more focused.

Write about it

One of the most effective ways of overcoming a public records denial is to tell people about it.

It's too bad more journalists don't follow through. Some hesitate to write stories when government hides information from the public, saying it's "inside baseball" or a conflict of interest to write about disputes between journalists and government.

We disagree. The government isn't saying "no" to the journalist. It's saying "no" to the thousands or millions of people in the community. As proxies for citizens, journalists are entrusted to tell the public when government keeps information secret. They have a duty to tell the public. Even a little story is better than nothing, and then the editorial writers can take it from there and slam the secrecy.

Other journalists say the public doesn't care.

We disagree again.

Survey research shows that people care about open government, especially when the documents concern tax dollars or public safety.⁵ Journalists must demonstrate, again and again, the value of public records in everyday life, and highlight attempts at unwarranted secrecy, every single time.

In Chapter 9 we explain in more detail how to write about FOI issues in ways that make sense and are not inside baseball. If you don't tell people about the secrecy, who will?

Appeal

Federal FOIA and a lot of state public records laws provide the ability to appeal a denial officially. In some cases it's not that helpful because you end up appealing to the head of the agency who might have been the same person who denied you the record. But in other cases the appeal is heard by the state attorney general or an outside commission.

Regardless, if that is an option in your state, take it. Always. It's free, it's easy and it can work.

American University professor Wendell Cochran looked at FOIA requests in 2006 among 15 federal agencies and found that among the 240,000 denials only 6,600 people appealed. Of those who appealed, a third got more information.⁶ It pays to appeal.

Pursue mediation

One way to work through disputes without caving in or going to court is through mediation. About half the states have some type of formal or

informal mediation process, such as a public records ombudsman or person within the attorney general's office, with varying degrees of success.⁷ Few have strong powers to compel the agency to provide the records, but often they can convince the officials to do the right thing and follow the law. Some state ombudsmen also have the power to review the documents in private to see if the agency's denial or redactions are justified.

For a great overview of the different states' ombudsman positions, see a report by Harry Hammitt for the National Freedom of Information Coalition at www.nfoic.org/white_papers.

In general, the idea is that if a requester and an agency disagree over a records request they can invite an independent third party to negotiate a solution. The difficulty of this process is that both sides have to agree to mediation, but the decision is not binding—whoever ends up losing doesn't have to concede.

Daxton "Chip" Stewart, a journalism professor at Texas Christian University, studies the use of mediation in resolving FOI disputes. With a law degree and a background in newspapers, Stewart sees the usefulness of journalists avoiding court if they can. Also, mediation can be used to build long-term working relationships between news organizations and agencies, without giving up the watchdog roles that journalists must play. That's why Stewart doesn't focus on formal mediation. Instead, he suggests journalists apply the general principles that make mediation work in an informal way.

A key element for working out disputes is trust. "That's hard for journalists," Stewart said. "It's not in their DNA to trust government officials, and maybe they shouldn't." Likewise, government officials often don't trust journalists, either. No wonder records requests so often end up in angst. The key, Stewart said, is to develop a trusting relationship with clerks to the point where "they call you and give you records you didn't know about." Or they might lower or waive fees.

Sue

The last resort for a denial is litigation, mainly because it takes so long and is expensive, ranging from \$250 to file a complaint in federal court to \$50,000 or more, depending on how high it climbs up the courts. Yet it's one of the most important and effective responses to a blatantly illegal

Pro tip**Threaten litigation if you can back it up**

It's often difficult to obtain information about issues relating to national security without litigation. But litigation, and sometimes even just the threat of litigation, can persuade a reluctant agency to process a request that it would otherwise ignore, or to release records that it would otherwise withhold. Many of the records that the ACLU obtained relating to surveillance and torture were obtained only after we brought suit.⁸ You shouldn't threaten litigation unless you can make good on the threat, but if litigation is an option, sometimes just letting the agency know that you're considering it is enough to make the agency a little more cooperative.

—Jameel Jaffer, director of the American Civil Liberties Union National Security Project

denial, and it is crucial that news organizations routinely incorporate the costs of litigation into their budgets. Sometimes the records themselves are not as useful by the time a case is litigated or settled, but simply filing the suit sends a strong message. Officials might think twice before denying you records in the future.

News organizations choose their cases carefully because they don't want to establish bad case law if they lose. So when considering litigation, make sure it's a slam-dunk win. In some states, the government may have to pay attorney fees, penalties or both if you win in court. If your news organization doesn't want to sue, look around for an attorney who might handle the case for free. The Student Press Law Center (www.splc.org) provides free legal advice to student journalists. Or team up with other organizations that might want to sue for the information.

Filing a lawsuit in federal court over federal FOIA is actually pretty easy and affordable. You don't need an attorney or that much money. The Reporters Committee for Freedom of the Press outlines the steps and even includes the forms to fill out (www.rcfp.org/fogg/index.php). The mere act of filing a lawsuit in federal court will often pry the records loose.

Michele Earl-Hubbard, an attorney in Washington state who litigates public records disputes, said the chances of winning increase if

journalists keep a detailed paper trail of their quest for documents. "The most important thing is good record keeping," she said. "Keep your requests and don't alter them. Make your requests in writing. Keep track of everything. If you talk to them, create a written record of what was said."

Earl-Hubbard also suggests journalists act politely and reasonably with agencies as they deal with denials. If it does go to court, a judge will notice if a reporter is being a jerk or has an ax to grind.

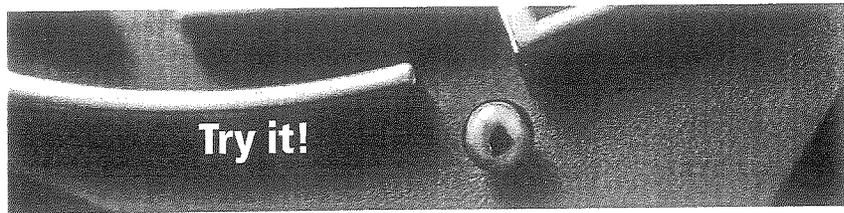
Make it easier for agencies to comply

Ultimately, the key to overcoming illegal denials is to be persistent and not back down, using a combination of some or all of the techniques provided in this chapter.

Rob O'Dell, City Hall reporter from the *Arizona Daily Star*, said tenacity is the key to getting what you need: "My philosophy is that you have to show them that it's going to be more work to deny the records than to comply with the request."

For example, sometimes an agency will say it can't get a record because it would take too long for a staff member to look through all the documents to find what you need. And the agency will say it will photocopy everything for you but at a high fee. So just look at the documents yourself. In response, O'Dell said, an agency might insist that it has a staff member on hand to make sure you don't damage or take documents. "I'll say, 'OK, I'll be there every day starting at 9 a.m.," he said. "On the first day's it's fine. The second day it's fine. The third day it's fine. But by the fourth day they'll come up to me and say, 'Is there another way we can do this?' They realize that maybe it's easier to just comply and give me what I asked for rather than have someone sit there with me all day."

O'Dell said that if you develop a reputation as someone who does not simply go away when denied, then you will be denied less. "You have to show that you are going to get the records, that you are consistent and that you aren't going to go away. If they know that you will keep coming and won't give up, then they will figure out a way to give you what you need."



Exercises and ideas for journalists, newsrooms and classrooms to improve your skills and foster FOI in your community.

1. Conduct an FOI audit

Show citizens the prevalence of illegal public records denials by conducting an FOI audit in your community, college campus or state. Audits show the extent of agencies not following the law and often lead to new legislation and openness. Gather other journalists and citizens together and develop a protocol for what records you will request and how you will do it. Choose records that yield good stories. Then publicize the audit results and make sure legislators get copies in case your state laws need strengthening. To get a sense of what other audits have accomplished, check out a list of some at the Freedom of Information Center (www.nfoic.org/audits-and-open-records-surveys). To get detailed tips and instructions for conducting your own audit, check out the FOI Toolkit produced by Charles Davis for the Society of Professional Journalists (<http://spj.org/foitoolkit.asp>).

2. Quantify the price of secrecy

Demonstrate the price of secrecy by developing two lists to share in your newsroom or as a class project, or even as a news story:

- Important public-interest stories that couldn't have been done without public records, or stories that won't be able to be done because of secrecy.
- Big payouts by the government in penalties and attorney fees after losing public records lawsuits.

These lists can be used when convincing an agency to provide records, writing about denials, pushing for better laws or arguing cases in court.

Provide a summary paragraph for each instance with the basic details and links to any stories or supporting materials. Compile the anecdotes for a story that can be published during national Sunshine Week, held every mid-March. For an example of stories that couldn't have been done without public records, see Jennifer LaFleur's 2003 report on "The Lost Stories" for the Reporters Committee for Freedom of the Press (www.rcfp.org/loststories).

3. Do a double take

For your next document-driven story, identify a document that is held by two different agencies, such as a boating accident report (e.g., your state boating safety commission and the U.S. Coast Guard), and request the same document from both agencies. Note how the different agencies handle the requests and compare what information each agency redacts and makes public. This will enable you to piece together a more accurate picture for your story and better understand the inconsistencies of how different agencies, and perhaps different people within agencies, provide records.

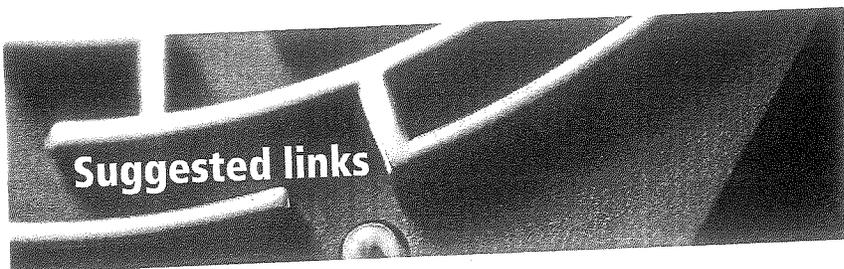
4. Dig those declassifications

Dig through declassified documents to get a sense for what is kept secret. Did it really need to be kept secret, or was it as benign as the Secret Santa memo? A great Web site that posts declassified documents is The National Security Archive, based out of The George Washington University (www.nsarchive.org).

5. Analyze the FOI logs

Request the FOI logs from an agency you cover or local jurisdictions that interest you, such as your city, university or school district. Request to see the logs for the past three years. Make sure the logs include dates and disposition—when the person requested a record from the agency, when the agency responded and ultimately whether the person got the records or not. Also try to get the reason for denial if the request was denied. Create a spreadsheet (if the log isn't already in one), and tabulate the average length of time it took the agency to respond, the percentage of

requests where the agency didn't respond within the time required by law, the percentage of requests that were denied and the most common reason for denial. See if the denial percentage is increasing or decreasing (trends), and compare to other similar agencies to find the most secretive one in your area. Write a story showing the state of access in your community, interviewing people who requested records.



Federal appeal/lawsuit forms www.rcfp.org/fogg/index.php
The Reporters Committee for Freedom of the Press has provided forms online to appeal a FOIA denial, as well as a form you can fill out to actually file suit yourself in federal court.

Federal FOIA ombudsman www.archives.gov/ogis
If you are stonewalled or denied by an agency, get help from the federal FOIA ombudsman, officially the director of the Office of Government Information Services. In addition to the Web site, you can e-mail at ogis@nara.gov or call 301-837-1996.

Learn about mediation www.nfoic.org/white_papers
Look at the report "Mediation without Litigation" by Harry Hammitt to find out if your state has a mediation system.

Students can get free legal help www.splc.org
The Student Press Law Center will provide free legal assistance to student journalists who have problems getting public records.