

## **THE PRESIDIO TRUST'S FOIA GUIDE**

### **I. INTRODUCTION**

#### **A. The Presidio Trust**

The Presidio Trust (“Trust”) is a wholly-owned federal government corporation. It was created by the U.S. Congress in order to manage the leasing, maintenance, rehabilitation, repair and improvement of approximately 80% of the former military installation known as The Presidio of San Francisco (“Presidio”). Among other things, the Trust is charged with administering the property under its jurisdiction in accordance with the Presidio Trust Act, 16 U.S.C. § 460bb appendix, as amended (“Trust Act”) and with the general objectives of the General Management Plan Amendment. In doing so, the Trust was also required to become financially self-sufficient before the end of the 2012 fiscal year.

#### **B. The Freedom of Information Act**

The Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, provides access to documents from the federal government. The FOIA requires federal entities such as the Trust to disclose certain records upon proper written request. The statute describes certain categories of documents that all federal agencies are required to disclose to the public, as well as certain categories of documents that are exempt or excluded from disclosure. The specifics of these FOIA provisions are discussed in greater detail in section II(F) below. The Trust’s regulations implementing the FOIA can be found at Part 1007 of Volume 36 of the Code of Federal Regulations and were first published on December 30, 1998 in Volume 63 of the Federal Register at pages 71,771 through 71,778.

#### **C. Obtaining Information from the Trust**

This FOIA Guide is designed to facilitate making FOIA requests to the Trust. The Trust’s FOIA regulations also provide additional guidance.

The FOIA requires the Trust to make several categories of documents available for public inspection and copying on the Trust’s electronic Reading Room (Web site). The documents available on the Trust’s Web site include copies of the following: (1) statements of policy potentially affecting the public and interpretations adopted by the Trust but not published in Federal Register; (2) administrative staff manuals and instructions that affect members of the public; (3) records previously requested under the FOIA that are of significant public interest and that the Trust believes others are likely to request; and (4) a record of the final votes of each member of the Presidio Trust Board of Directors in every Trust proceeding.

Requests for documents that are not available on the Trust’s Web site may be made following the procedures described in this FOIA Guide.

This FOIA Guide is not an exhaustive or definitive source of information about how to make a FOIA request to the Trust. It creates no rights in any third party. To the extent that anything in this Guide can be construed as inconsistent with the FOIA or the Trust's FOIA regulations, the FOIA and the Trust's FOIA regulations will control the Trust's responsibilities under the FOIA.

## **II. MAKING A FOIA REQUEST TO THE PRESIDIO TRUST**

### **A. Preliminary Considerations**

One must first determine whether it is necessary to make a FOIA request in order to obtain the records sought. In many instances, the documents sought may already be available on the Trust's Web site. Other documents may be available upon informal request. Questions about whether a document is available without making a FOIA request should be directed to the Trust's FOIA Officer at the Presidio Trust, P.O. Box 29052, San Francisco, CA 94129-0052, or via the internet at [foiarequest@presidiotrust.gov](mailto:foiarequest@presidiotrust.gov).

Under the FOIA, federal entities can only respond to requests for documents contained in their own records. Therefore, before making a FOIA request to the Trust, consideration should be given to whether the Trust is likely to have the records sought. Browsing the Trust's Web site or consulting the Trust's FOIA Officer may help a requester determine whether the Trust has the documents sought.

The Trust also cannot process requests on behalf of any other federal entity, including the National Park Service or the United States Army. If the entity to which a FOIA request should be directed can be reasonably determined from the request, the Trust will forward the FOIA request to that agency. In all other cases, the request will be returned to the requester.

### **B. Where to Make a FOIA Request**

FOIA requests must be submitted to the Trust's FOIA Officer at the Presidio Trust, P.O. Box 29052, San Francisco, CA 94129-0052. To facilitate processing, the envelope in which a FOIA request is contained and the FOIA request itself should be prominently marked "FREEDOM OF INFORMATION ACT REQUEST."

### **C. How to Make a FOIA Request**

A FOIA request can be made for any already existing record of the Trust, subject to the FOIA exemptions and exclusions discussed in section F below. The FOIA does not require the Trust to do research for a requester, analyze data, answer written questions or create records in order to respond to a request. If the Trust believes it will be less burdensome to create a new record than to disclose a large volume of unassembled material, the Trust may do so.

FOIA requests must be made in writing. The request must reasonably describe the record requested; a Trust employee familiar with the subject area of the FOIA request must be able to locate the requested record with a reasonable amount of effort. To facilitate searching

for a requested record, the requester should provide as much specific information about the requested record as is known, such as the subject matter of the record, the date the record was created, the place the record was created and the person or office that created the record.

FOIA requests also must provide certain information about the fees a requester is willing to pay. First, FOIA requesters must state the fee category (see section E(1) below) in which their request falls and the reasons why the request falls within this category. Second, FOIA requesters must state the maximum amount of fees they are willing to pay, and/or they must request a fee waiver (see section E(2) below).

If a request is for records about the requester, the requester must provide the Trust with his/her express written consent to disclose the documents. For such requests, a requester should consult the Privacy Act, 5 U.S.C. § 552a, as well as the Trust's regulations implementing the Privacy Act, which are found in Part 1008 of Volume 36 of the Code of Federal Regulations and which were published in Volume 63 of Federal Register on December 30, 1998, at pages 71,779 through 71,784.

#### **D. Time for Response**

##### **1. Regular Processing**

When the Trust's FOIA Officer receives a FOIA request, he or she will send a letter to the requester acknowledging the request.

Under the FOIA, the Trust must grant or deny a FOIA request within 20 working days after receiving a proper request. The 20 working day time limit does not begin to run until the request is actually received by the Trust's FOIA Officer. While the Trust's decision to grant or deny a request must be made within 20 working days, responsive documents, if any, may be sent out or made available for inspection and copying within a reasonable time after the 20th working day. Working days do not include Saturdays, Sundays or federal government holidays.

The FOIA allows the Trust, in certain circumstances, to extend the time limit for responding to a FOIA request. The time limit may be extended for up to 20 working days where the Trust must: (1) search for and collect records at locations separate from the Trust's main office; (2) search for, collect and examine a voluminous number of separate and distinct records; or (3) consult with another agency that has a substantial interest in the requested records. In the event that the Trust must extend its time to respond to a FOIA request, the requester will be notified in writing. Under usual circumstances, the notice will contain the reason for the extension and the date on which a response to the FOIA request is expected. In light of the extension, the Trust may offer the requester the opportunity to modify or limit the request. Alternatively, the requester may agree to a different timetable for processing the request.

When a determination on the request is not made within the deadline described above and the requester has not agreed to a different response deadline, the requester may treat the delay as a denial and may exercise a right of appeal. Section G(1) below provides a description of the administrative appeal process. If the requester's appeal is unsuccessful, the

requester may file suit against the Trust in the United States District Court for the Northern District of California to obtain a response. If, however, the court concludes that the requester has unreasonably refused to limit the request or to accept an alternative timetable for response, the court may find that the Trust's failure to comply within the statutory time period is justified. The court also may approve a delay if it concludes that the Trust is experiencing an unexpected, substantial increase in the number of requests received. In addition, the court may excuse the lack of a timely response if the Trust demonstrates that it has a backlog of requests that were received before the requester's, that it processes its requests on a first-come/first-served basis, and that it is making reasonable progress in reducing its backlog. In such cases, the court may postpone its consideration of the lawsuit until the Trust reaches the requester's request in its processing backlog.

## **2. Expedited Processing**

Under certain conditions the requester may be entitled to his/her request processed on an expedited basis. FOIA requests are expedited where there is: (1) an imminent threat to a person's life or physical safety; or (2) an urgency to inform the public about the federal government's activities by an entity primarily engaged in disseminating information.

Requests for expedited processing can be made at the time of the initial request or at a later time. Expedited processing requests must include a statement, certified to be true and correct to the best of the requester's knowledge and belief, explaining in detail the basis for expediting the FOIA request.

Within ten calendar days of receiving the request for expedited processing, the FOIA Officer will notify the requester of his/her decision to grant or deny the expedited processing request. If the request is denied, the denial will advise the requester of his/her right to appeal the decision administratively, and that any appeal will be handled expeditiously. See section G(1) below for a description of the appeal process.

## **E. Fees**

### **1. Schedule of Fees**

For the purpose of fees, the FOIA divides requesters into three basic categories: (1) commercial requesters; (2) educational and noncommercial scientific institutions and representatives of the news media; and (3) requesters who do not fall into either of these other categories. These categories are further defined in the Trust's FOIA regulations at 36 C.F.R. 1007.9. A requester must identify in the request which category the requester believes applies to the request, as well as the specific information on which the belief is based. If the requester does not do so, the Trust will hold the request in abeyance until it receives clarification.

Commercial requesters may be charged fees for searching, reviewing and duplicating records. Educational or noncommercial scientific institutions and representatives of the news media are charged only for duplication expenses, excluding the first 100 pages of photocopies or an equivalent cost for material duplicated by other means. Requesters who do not

fall into either of these two categories are not charged for reviewing records, but only for searches and duplicating, and there is no charge for the first two hours of search time or for the first 100 pages of photocopies, or an equivalent cost for material duplicated by other means.

Search charges are \$12.50 per quarter hour (or portion thereof) when the search and review is performed by administrative staff and \$21.25 per quarter hour (or portion thereof) when the search and review is performed by professional staff. The charges for duplication of 8.5" x 11" and 8.5" x 14" pages are \$0.25 per page for single-sided photocopies and \$0.50 per page for double-sided photocopies. Documents requiring special handling due to color, size, or age will be charged according to the direct costs to the Trust for their duplication. No fees are charged if the total amount chargeable is not greater than \$5.00. These fees may be changed by the Trust in the future.

A request must indicate the maximum amount of fees a requester is willing to pay. If the estimated total amount of fees is less than the amount (if any) a requester has indicated in the request, the Trust will proceed to process the request and bill the requester for the full amount of the fees. On the other hand, if the estimated total amount of fees is greater than the amount (if any) a requester has indicated in the request, the Trust will notify the requester in writing and offer the requester the opportunity to limit the request in order to reduce the fees. In short, unless a full waiver of fees has been granted (see section E(2) below) the requester must always state a willingness to pay fees as high as those anticipated by the Trust before the request will be processed any further.

There are two situations in which a requester may be required to pay fees in advance: (1) where the anticipated fees are likely to exceed \$250.00; or (2) where the requester has previously failed to pay a fee within 30 days of being billed for previous FOIA request fees. If the request is being processed in portions, and if the requester fails to pay a fee for one portion within 30 days of being billed for that portion, the Trust ordinarily will suspend processing of the remaining portions of the request until the requester has paid the current bill and advanced payment for fees expected for the remaining portions of the request.

## **2. Fee Waivers**

If a requester is advised or expects that a fee will be charged, the requester may request a waiver of those fees, in whole or in part. Fee waivers, however, are limited to situations where the requester can show that the disclosure of the requested documents is in the public interest because: (1) it is likely to contribute significantly to public understanding of the operations and activities of the government; and (2) it is not primarily in the requester's commercial interest. Requests for fee waivers from individuals who are seeking records pertaining to themselves usually are denied under this standard because such disclosures usually will not result in any increase of the public's understanding of government operations and activities. In addition, a requester's inability to pay fees is not a legal basis for granting a fee waiver.

It is not possible to enumerate all of the factors to be considered by the Trust in decisions on fee waivers. Nevertheless, some typical factors to be considered in determining

whether disclosure of information “is likely to contribute significantly to public understanding of the operations or activities of the government” are the following:

- *Does the record concern the operations or activities of the government?* The connection between the records and the operations and activities to which they are said to relate should be clear and direct, not remote and attenuated.
- *If a record concerns the operations or activities of the government, is its disclosure likely to contribute to public understanding of these operations and activities?* The likelihood of a contribution to public understanding will depend on consideration of the content of the record, the identity of the requester, and the interrelationship between the two.
- *If there is likely to be a contribution to public understanding, will that contribution be significant?* A contribution to public understanding will be significant if the information disclosed is new, clearly supports public oversight of Trust operations, including the quality of Trust activities and the effect of policy and regulations on public health and safety or otherwise confirms or clarifies data on past or present operations of the Trust. A contribution will not be significant if disclosure will not have a positive impact on the level of public understanding of the operations or activities involved that existed prior to the disclosure.

Similarly, some typical factors to be considered in determining whether disclosure “is primarily in the commercial interest of the requester” are the following:

- *Does the requester have a commercial interest that would be furthered by the requested disclosure?* A commercial interest is a commercial, trade or profit interest as these terms are commonly understood. An entity’s status is not determinative. Not only profit-making corporations – but also individuals or other organizations – may have a commercial interest to be served by disclosure, depending on the circumstances involved.
- *If the requester has a commercial interest, will disclosure be primarily in that interest?* The requester’s commercial interest is the primary interest if the magnitude of that interest is greater than the public interest to be served by disclosure. Where a requester is a representative of the news media seeking information as part of the news gathering process, it may be presumed that the public interest outweighs the organization’s commercial interest.

In light of the Trust’s need to be financially self-sufficient, the Trust’s ordinary fee waiver will reduce the chargeable fees by 25%, not by 100%. In exceptional circumstances, with the approval of the Trust’s Executive Director, a larger or even an entire fee waiver may be granted.

If a request for a fee waiver is denied, the requester may ask that the Trust review its decision in an administrative appeal. Section G(1) below addresses the procedures for administrative appeals.

#### **F. Documents Available from the Trust through FOIA Requests**

Once the Trust has processed a request and any fee issues have been resolved as discussed above, the Trust will send the requester a written initial determination. Whenever practicable, the Trust will include any documents that can be disclosed along with the determination letter, but the disclosable documents, if any, may also be sent within a reasonable time afterward.

As noted above, the FOIA provides access to all federal entity records, or portions of those records, that are not subject to the FOIA's nine exemptions. Federal agencies may withhold records that fall within these exemptions, and if records are being withheld from disclosure, the initial determination letter will specify under which exemption(s) a record is being withheld. The Trust will make a reasonable effort to estimate the number of pages that are being withheld. If portions of a document are being withheld and other portions are being disclosed, the withheld portions will be noted on the document wherever practicable.

The nine FOIA exemptions allow federal entities such as the Trust to withhold documents covering: (1) classified national defense and foreign relations information; (2) internal agency rules and practices; (3) information that is prohibited from disclosure by another federal law; (4) trade secrets and other confidential business information; (5) inter-agency or intra-agency communications that are protected by legal privileges; (6) information involving matters of personal privacy; (7) certain types of information compiled for law enforcement purposes; (8) information relating to the supervision of financial institutions; and (9) geological information on wells.

These exemptions have been interpreted by courts in many specific circumstances. In light of judicial interpretations of these exemptions, the Trust considers that sensitive portions of its leases and contracts are generally exempt from disclosure because they fall within Exemption 4's protection for "trade secrets and commercial or financial information obtained from a person and privileged and confidential" and Exemption 5's protection for documents whose disclosure would result in foreseeable harm to government interests. In addition, the Trust considers its deliberative, pre-decisional documents generally protected from disclosure by Exemption 5.

Consistent with federal law and sound policy, if the Trust is in possession of information that it believes (or that it has been informed) may constitute trade secrets or other confidential business information of an outside entity (such as a business), and if a FOIA request is made for documents containing that information, the Trust will ordinarily endeavor to notify that entity of the request and confirm whether the requested information is subject to Exemption 4 or any other applicable exemption before deciding whether to release the documents in question. If the Trust determines that any of the documents should be disclosed in response to the FOIA request, the affected outside entity will be informed of the decision in

advance of the Trust disclosing the documents to the requester, so that the outside entity, if it so desires, will have time to seek a court order blocking the disclosure pending further review.

The Trust's policy is to disclose its records to the public to the greatest extent possible consistent with the purposes of the Trust Act and the FOIA. Even if information may be withheld under the FOIA, the Trust still may disclose it as a matter of administrative discretion if disclosure is not prohibited by any law and would not cause any foreseeable harm.

## **G. Appeals**

If a requester does not agree with the Trust's response to the FOIA request, the requester may appeal the Trust's decision administratively (to a higher authority within the Trust) and, under certain circumstances, judicially (to a court).

### **1. Administrative Appeals**

A requester may file an administrative appeal if the requester is not satisfied with the Trust's initial response to the FOIA request. A requester also may file an administrative appeal if any portion of the request for expedited processing or a fee waiver was denied. The initial determination letter or the letter denying a request for expedited processing or a fee waiver will advise the requester of his/her right to file an appeal. The Trust's FOIA regulations regarding appeals can be found at 36 C.F.R. sections 1007.7 and 1007.8.

Appeals must be received by the Trust no later than 90 calendar days after the date of an initial denial, or 90 calendar days after a requester receives records, if the FOIA request was partially denied. All appeals must be made in writing and addressed to the Executive Director, the Presidio Trust, P.O. Box 29052, San Francisco, CA 94129-0052. To expedite processing, the envelope and the appeal letter should be marked "FREEDOM OF INFORMATION ACT APPEAL." If an appeal is received later than these deadlines, it will not be considered.

Appeals should include copies of the original FOIA request, the Trust's determination letter, and a brief statement of the reasons why the requester believes the initial determination was incorrect.

Appeals are reviewed by the Trust's Executive Director, in consultation with the Trust's FOIA Officer and General Counsel. The Trust will respond to an appeal within 20 working days after receiving it, but may, in unusual circumstances, notify the requester in writing of the need to extend the time necessary to respond to the appeal. These circumstances include the need for: (1) searching for and collecting records that are not located at the Trust's main office; (2) searching for, collecting and reviewing a voluminous number of separate and distinct records; or (3) consulting with another agency which has a substantial interest in the requested records. The time for responding to an appeal only may be extended where the initial time limit for the response to the FOIA request was not extended or was extended for fewer than ten working days. The extension of time for processing an appeal, including any extensions of time needed to process the initial request, may not be greater than ten working days. If an appeal

has not been processed after 20 working days or after the extended time for response, the requester may treat this delay as denial of the appeal and proceed to file an appeal to the United States District Court for the Northern District of California, as outlined below in section G(2).

The Trust will provide the requester with a written determination of the appeal containing the basis for the determination. If the determination requires the release of records, the Trust will promptly make the records available to the requester. If the determination upholds in whole or in part the Trust's initial determination of the FOIA request, the requester will be advised of the right to obtain judicial review in the United States District Court for the Northern District of California.

## **2. Judicial Review**

After an administrative appeal has been decided, if the requester still believes that the Trust has not handled the FOIA request in accordance with the law, the requester has a right to have the Trust's decision reviewed by the United States District Court for the Northern District of California. By law, this is the sole venue for lawsuits against the Trust.