



FOIA: 50 YEARS OLD, BUT STILL NOT IN THE 21ST CENTURY

WHITE PAPER



INTRODUCTION

Are Freedom of Information laws truly effective means to achieve governmental transparency? Or, are they just a way government agencies pay lip service to the idea without ever actually providing important information the public requests?

Debates rage on either side. After 35 years of developing technologies that help governments streamline their efforts in responding to public records requests, we know the answers are not as simple as yes or no. Factors preventing agencies from complete success can be alleviated. Government agencies can be empowered to consistently, thoroughly, and timely respond to all records requests. Only then could we assess the true effectiveness of Freedom of Information laws.

In this white paper, we discuss the evolution of the U.S. Freedom of Information Act (FOIA). In particular, we focus on how legislative changes have increased administrative burdens on federal agencies who were not and still are not equipped with the appropriate technologies to process the hundreds of thousands of FOIA requests they receive each year. And, we share how modern eDiscovery platforms are uniquely suited to usher them into a new era of fast, efficient processing of public records requests.

THE FREEDOM OF INFORMATION ACT

The FOIA was enacted in 1967 and applies only to agencies and departments of the executive branch of the U.S. federal government. It does **not** apply to:

- Congress, Federal Courts, or the Supreme Court
- Staff of the Offices of the President and Vice President
- State and local governments.
- Private entities and corporations.

The FOIA grants any person a legal right to know about the government's inner workings. Common requests include access to government contracts, inspection reports, studies, assessments, emails among officials, drafts of proposed rules, consumer complaints, and so on. If an agency refuses to produce information, it must justify doing so by citing to appropriate exemptions or exclusions.

FOIA EXCLUSIONS AND EXEMPTIONS

Federal agencies may withhold information protected by one or more of the following:

3 EXCLUSIONS TO FEDERAL FOIA REQUESTS

- When disclosure of records would interfere with a criminal investigation or proceeding, of which the subject is unaware.
- Classified FBI foreign intelligence, counterintelligence, or international terrorism records.
- Informant records of a criminal law enforcement agency when the individual's status as an informant is not known.

9 EXEMPTIONS TO FEDERAL FOIA REQUESTS

1. National defense or foreign policy records.
 2. Internal personnel rules and practices.
 3. Documents specifically exempted by other federal statutes.
 4. Trade secrets, commercial, or financial information considered privileged or confidential.
 5. Inter- or intra-agency memoranda or letters that would not be available to a party other than an agency in litigation with the agency.
 - Deliberative Process Privilege (as long as the records were created less than 25 years before the date requested)
 - Attorney-Work Product Privilege
 - Attorney-Client Privilege
-

FOIA EXCLUSIONS AND EXEMPTIONS

6. Personnel, medical, and similar files that, if released, would invade an individual's privacy. (PII and PHI)
7. Information compiled for law enforcement purposes that:
 - Could interfere with enforcement proceedings
 - Would deprive a person of a right to a fair trial
 - Could constitute an unwarranted invasion of personal privacy
 - Could disclose the identity of a confidential source
 - Would disclose techniques, guidelines, or procedures for law enforcement investigations or prosecutions
 - Could endanger the life or physical safety of an individual
6. Information on the regulation or supervision of financial institutions.
7. Geological and geophysical information concerning wells.
(Yes, wells.)

U.S. STATE AND LOCAL FOI LAWS

Freedom of Information laws (FOI) have been enacted in all 50 U.S. states. State and local FOI laws are typically referred to as "Sunshine" laws, open records laws, or public records acts. State and local governments model their FOI laws after the federal FOIA, though they also make revisions such as adding more exemptions.

For example, the California Public Records Act includes a catch-all provision that exempts from disclosure records if "on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." Wording like this is typically at the heart of appeals and lawsuits.

OUTCOMES OF USING THE FOIA

FOIA CLEARLY DOESN'T WORK

Journalists and government watchdog organizations often contend that officials do all they can to prevent the disclosure of any truly meaningful information. They argue that agencies ignore requests, intentionally stall on delivering responses, and wrongly use the FOIA's overly broad exemptions to deliberately deny requests.

Their arguments are supported by stories such as:

- *October 4, 2016: [The State Department has Taken Over 4 Years on a FOIA Request About How Long it Takes to Process FOIA Requests](#)*
- *September 28, 2016: [CIA Took Three Years to Reject FOIA Request for Criteria for Rejecting FOIA Request](#)*
- *In 2004, the Department of Labor said it needed 30,290 hours—15 work years—to respond to a request for data on workplace injuries and death from The New York Times.*

Thousands of appeals are filed every year complaining of unfair denials or incomplete responses. The federal government received [14,548 FOIA appeals during 2017](#), which was the third consecutive year over 14,000 appeals were processed.

Aggrieved requesters may also take legal action. At this time, The FOIA Project reports at least [12,232 FOIA-related lawsuits](#) have been filed since October 1992, and the number rises steadily.

FOIA CLEARLY DOES WORK

Despite all the protestations otherwise, the FOIA has undoubtedly given the American public greater transparency into government operations. Requests under the FOIA uncover waste, fraud, and wrongdoing in federal agencies as well as the existence of dangerous consumer products and environmental health hazards that could otherwise go undetected.

OUTCOMES OF USING THE FOIA

[Judicial Watch](#) shares multiple instances in which FOIA requests unearthed important evidence including:

- *Americans used FOIA to obtain lists of almost 300 Saudi subjects, including members of the Bin Laden family, allowed to leave the country shortly after 9/11 with little or no questioning by authorities.*
- *The Justice Department's Community Relations Service actively participated in inflaming racial tensions in Sanford, Florida in the spring of 2012 following the death of Trayvon Martin.*
- *The Consumer Financial Protection Bureau spent millions of dollars collecting personal financial transaction data, without a warrant, on five million American consumers.*

It is doubtful much of this information would have been shared with the public voluntarily or in any other way than in response to a FOIA request.

Why the Discrepancy:

So, do most government officials prefer their activities remain shrouded in secrecy for nefarious reasons? Decades of experience assisting government agencies in responding to FOIA requests have shown us that the vast majority of agency employees and FOIA personnel work extremely hard to fully respond to public records requests.

Unfortunately, their efforts are flawed from the start.

Without the appropriate technology to collect, search, and review growing amounts of data, the process is plagued with excessive delays, incomplete responses and inappropriate denials.

OUTCOMES OF USING THE FOIA

Case in Point:

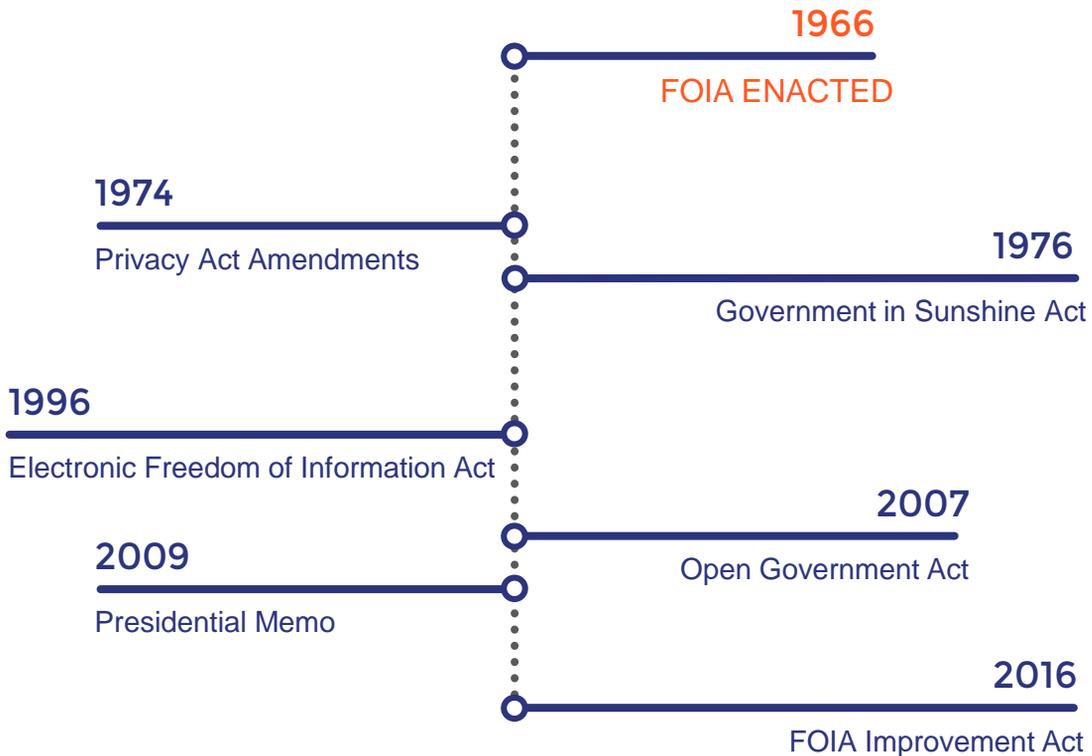
The National Security Archive and the Project on Government Oversight report that statistics show [a large percentage of FOIA requests are denied](#) because an agency claims that “no responsive records were found.” Many of these denials are the result of improper or poorly conducted searches. Administrative appeals often result in a second, more thorough search that finds the documents requested.

THE EVOLUTION OF THE FOIA

Over the years, changes to the FOIA have introduced challenges to this basic process that increase the administrative burdens on FOIA personnel.

Prior to 1996, requesters submitted written letters to agencies to ask for copies of documents. Agency employees manually searched for, collected, and copied paper documents. They manually redacted exempt information, often with black markers or tape. Then, they mailed copies to the requester.

THE EVOLUTION OF THE FOIA



1996 The Electronic Freedom of Information Act Amendments

In 1996, Congress enacted amendments to the FOIA designed to improve public access to government information and records, particularly electronic records, and reduce the delays in agencies' responses to requests for records under FOIA.

The 1996 Amendments acknowledged the up-and-coming internet and a trend toward digital recordkeeping. It pushed for disclosure of records in electronic format and encouraged electronic redactions. It also expanded the deadline to provide an initial response from 10 to 20 days.

THE EVOLUTION OF THE FOIA

Key amendments that added to agencies' administrative tasks include:

- Agencies must proactively post frequently requested records and records of general interest to the public in an online “FOIA Reading Room.”
- When withholding documents, agencies must provide an index that:
 - identifies each document withheld;
 - states the statutory exemption claimed; and
 - explains how disclosure would damage the interests protected by the claimed exemption.
- Agencies must provide information on processing time in their annual reports and make these reports available to the public. Later legislation requires agencies to proactively post online the raw data that makes up their annual reports.

THE FOIA PROCESS

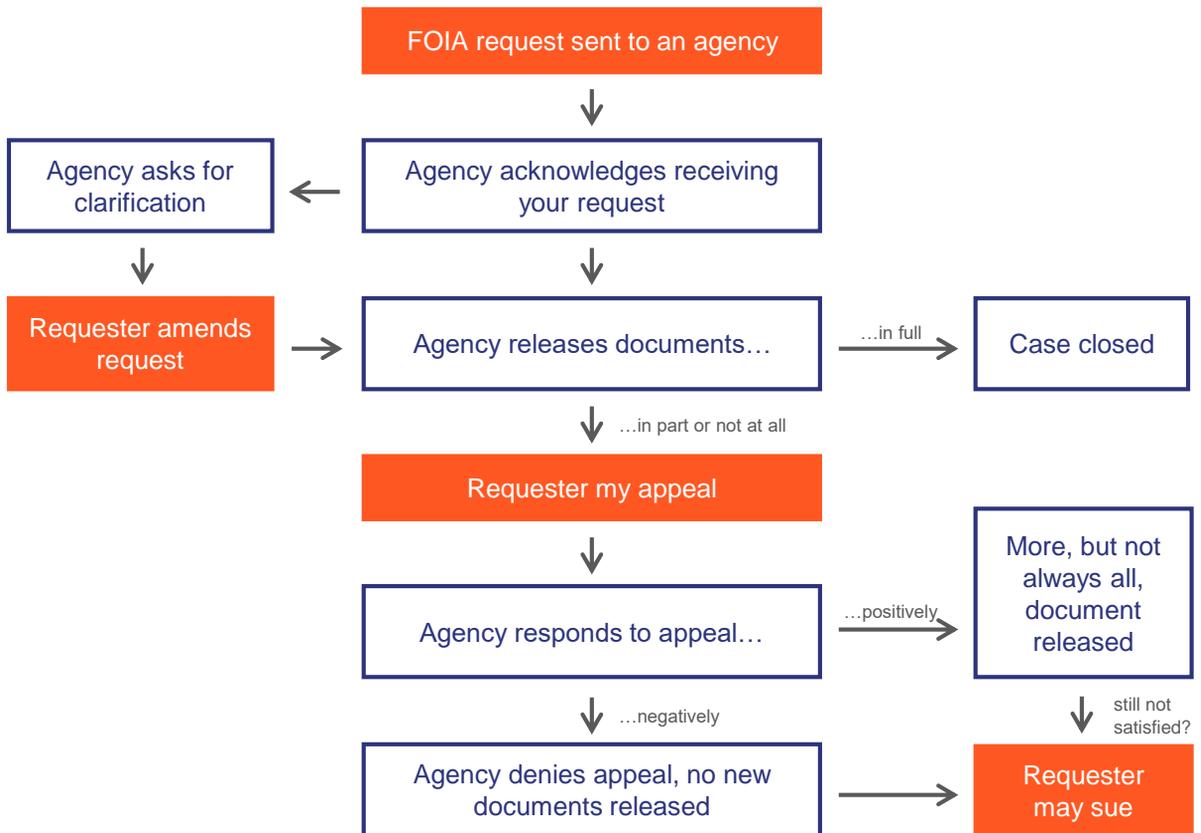
After a request is submitted, a federal agency has 20 days to respond, which is the timeframe most state and local governments adopted as well. The initial response may be in the form of providing the records requested, acknowledging receipt of the request, asking for clarification of the information requested, or providing an estimated completion date.

Agencies are encouraged to identify simple requests early to ensure faster processing. But, requests may be more complex than they initially appear. They may require searching for records across multiple agencies or departments. How can you accurately estimate a completion date without knowing how much information will be responsive or where it all may be located? What about when collaborating with outside agencies causes unexpected delays?

eDiscovery platforms are designed to help agencies handle these initial tasks and other FOIA challenges with abilities to:

- Consolidate electronically stored information (ESI) from multiple locations to one place;
- Standardize all types of data files;
- Automatically identify and classify data sets;
- Make an informed early assessment that more accurately identifies potentially relevant information.

THE FOIA PROCESS



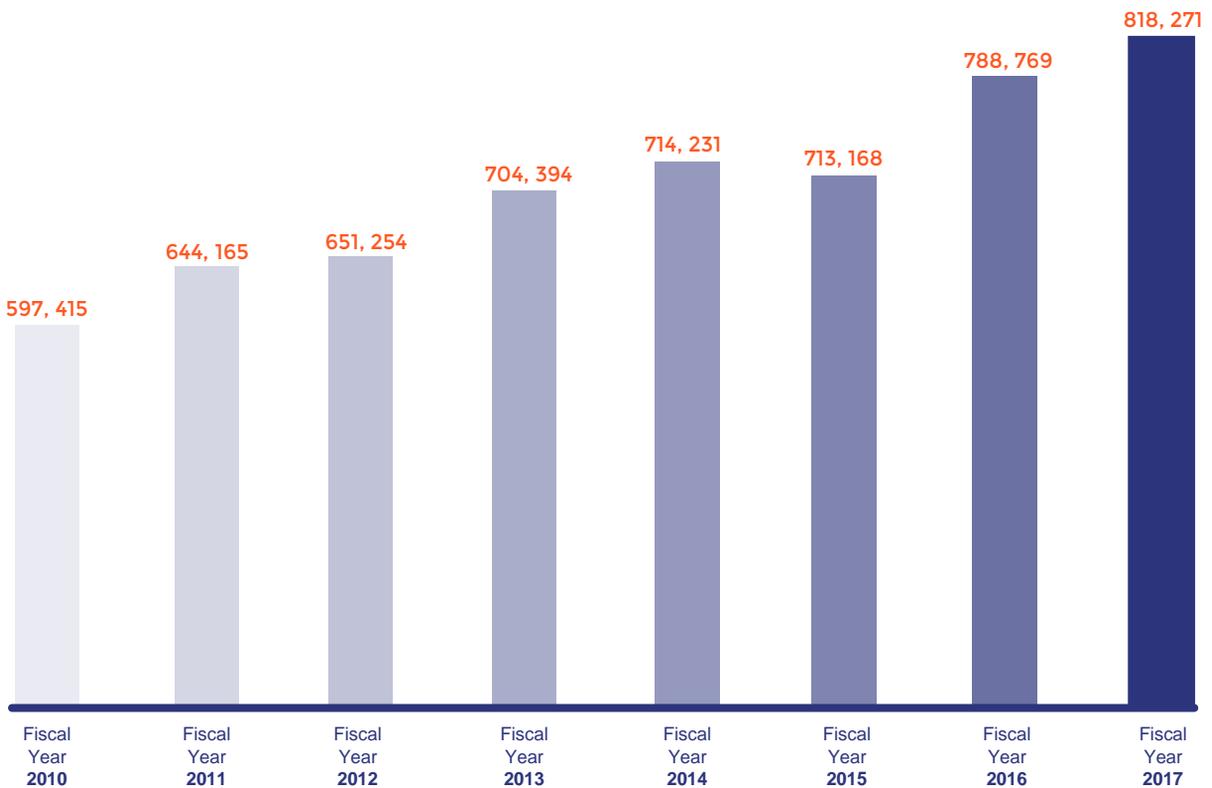
After an estimated completion date is determined, FOIA personnel begin the most time-consuming, difficult tasks in responding to FOIA requests:

1. Searching for, locating and collecting relevant information from amidst vast amounts of electronically stored information (ESI).
2. Reviewing every page to identify protected information.
3. Redacting protected information and building an index of redacted information.
4. Tracking all activities for required reporting.
5. Collaborating with others to compile full responses.

eDiscovery tools such as advanced search capabilities, automation, data analytics, and machine learning help FOIA personnel perform these activities with proven efficiency and accuracy.

FOIA IN THE DIGITAL ERA

The passage of time has also added to the challenges agencies face. The 24/7 television news cycle, a plethora of online news outlets, Facebook, Twitter, and social media have greatly increased the public's exposure to and interest in government affairs. Members of the press and the public submitted more than 818,000 FOIA requests to federal agencies in 2017, which continued a generally upward trend.



The Summary of Annual FOIA Reports shows a combined 111,344 backlogged requests for all federal agencies. Increasing demands in the digital era combined with ineffective search, review, and redaction processes threaten to add to that number every year.

FOIA IN THE DIGITAL ERA

DIGITAL ERA CHALLENGE: **INEFFECTIVE SEARCHES**

For the FOIA to be executed as intended, it assumes FOIA personnel can search **all** of their agency's records. It presumes they have centralized access to all agency ESI and a proven method of searching various file types to reliably identify all relevant information.

The National Security Archive and the Project on Government Oversight put these assumptions to the test in 2017. They sent an online survey to both FOIA processors and requesters to better understand how agencies search for records. The results indicate that a much-less-than-ideal system is in place.



[FOIA Search Survey Results \(2017\)](#)

- Most agencies appear to not have centralized FOIA search capabilities, which means they cannot search large portions of the agency's records.
- Federal employees often perform slow, unthorough, or otherwise imprecise searches for requested records.
- Many problems with FOIA searches are due the implementation of ingrained, unquestioned inefficiencies.
- Some agencies have access to state of the art eDiscovery tools to search for the requested documents (though as was pointed out in the January 2017 FOIA Advisory Committee Meeting, some agencies only use these efficient tools after being sued); other agencies **do not even search records electronically at all.**

FOIA IN THE DIGITAL ERA

DIGITAL ERA CHALLENGE: **INEFFICIENT REVIEW AND REDACTION**

Agencies are required to partially disclose information if full disclosure is not possible. The sheer breadth of exemptions and exclusions makes reviewing documents for protected information a time-intensive endeavor. Redacting hundreds of pages using software such as Adobe is a painstakingly slow process. But certainly, we can do better than this agency did recently with duct tape:

From: Klasen, Matthew
Sent: Wednesday, May 22, 2013 2:37 PM
To: Srinivasan, Gautam
Subject: RE: FYI -- Greenwire re: KY permit case and permit shield -- appeal to 6th Circuit

Got it, thanks.

From: Srinivasan, Gautam
Sent: Wednesday, May 22, 2013 2:30 PM
To: Klasen, Matthew; Lee, Michael; Mancusi-Ungaro, Philip
Cc: Shamet, Stefania; Zobrist, Marcus; Wilson, Scott; Peck, Gregory; Nuhfer, Mark; Thomas, Chris; MacKnight, Evelyn; boornazian, linda



Mike, please correct if you have a different recollection.
+++++
202-564-5647

*Redact - Attorney work
Product - attorney-
Client Privilege -
deliberative*

From: Klasen, Matthew
Sent: Wednesday, May 22, 2013 1:42 PM
To: Srinivasan, Gautam; Lee, Michael; Mancusi-Ungaro, Phillip
Cc: Shamet, Stefania; Zobrist, Marcus; Wilson, Scott; Peck, Gregory; Nuhfer, Mark; Thomas, Chris; MacKnight, Evelyn; boornazian, linda
Subject: FYI -- Greenwire re: KY permit case and permit shield -- appeal to 6th Circuit

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This is interesting -- mostly because the story suggests that enviros and industry are arguing over what they think EPA's position is on the permit shield.

Gautam, Mike, and Phil: Have we been involved in this case at all? I wonder if we could get copies of the briefs mentioned below.



Thanks,

Source: <https://unredacted.com/2018/03/07/foia-a-colossus-under-assault/>

FOIA IN THE DIGITAL ERA

Resolving these digital era challenges is important. Some states recognize a right for compensatory damages and attorneys' fees under FOIA. Punitive damages may be awarded under some public records laws if there is an arbitrary delay or unlawful refusal to disclose records by a government official or agency.

Dissatisfied requesters who have exhausted their administrative appeal options can file suit in federal court. The number of FOIA lawsuits reached a [25-year high in 2017](#) and [continues to surge](#) in 2018. One result of the increase in litigation is that judges are ordering the release of more information, which encourages more lawsuits.

<https://freedomofinformationacts.uslegal.com/remedies-available-for-agency-non-compliance-with-foia/>

eDISCOVERY TECHNOLOGY

eDiscovery technology is recognized as a powerful search tool. In its January 16, 2018 Recommendations to the FOIA Advisory Committee, the Subcommittee on FOIA Searches said it was “impressed by the power of eDiscovery searches and hopeful that their use increases.” The Subcommittee also said:



[The Subcommittee on FOIA Searches Recommendations \(2018\)](#)

- In light of the potential legal costs of untimely or inadequate FOIA searches, agencies should explore obtaining software and technology tools, including eDiscovery tools, to conduct more accurate and timely FOIA searches.
- Increase the ability for FOIA offices to procure technology to aid federal agencies in more efficiently conducting records searches to the greatest extent possible.

With eDiscovery platforms, agencies can use advanced search capabilities such as “fuzzy” searches to locate misspelled names and other techniques that help them find:

- Spoken words and phrases in videos and audio files;
- Specific numerical values or numbers within a range (eg. all dollar amounts between \$45K and \$50K);
- “Out of vocabulary” special names or code names with text mining.

The Subcommittee would be even more impressed if they delved further and discovered that eDiscovery platforms also provide the most effective solutions for collaboration, document review, redaction, and production challenges because they are designed specifically to:

eDISCOVERY TECHNOLOGY

- Consolidate data from multiple locations and standardize over 700 different file types;
- Provide an early assessment to identify potentially responsive information faster;
- Automate activities such as identification, classification, and redaction of excluded, private, and exempted data;
- Reveal how people, places, events, and activities are interrelated so information that is not as obviously relevant, but relevant nonetheless, is detected;
- Allow others to easily access and review the data; and
- Provide advanced, customizable reporting features to meet all FOIA reporting requirements.

With access to eDiscovery technologies, agencies can make real changes and implement cost-effective solutions to the issues that cause delayed or incomplete responses and inappropriate denials. They can reduce the numbers of costly appeals and lawsuits while providing full and accurate responses in a timely fashion that result in the transparency the public expects from the FOIA.

THE REAL COST OF PUBLIC RECORDS REQUESTS

[The federal government reported](#) that agencies reported collecting FOIA fees that amounted to less than 1% of the total costs related to the government's FOIA activities.

Government FOIA programs are notoriously starved of funds. eDiscovery technology is often seen as an expensive luxury item. But, what if you've been looking at costs in all the wrong places? Read "The Hidden Costs of Public Records Requests" to find out where you can find the savings you need.



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