



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 16 2019

The Honorable Charles E. Grassley
United States Senate
Washington, DC 20510

Dear Senator Grassley:

This responds to your letter dated March 14, 2019, seeking information regarding the work of the Department of Justice's (Department) Office of Information Policy (OIP) and other Executive Branch agencies' implementation of the Freedom of Information Act (FOIA). We are sending identical responses to the other Senators who joined your letter.

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In conjunction with agencies' 2020 Chief FOIA Officer Reports, OIP intends to continue its efforts to ensure that agencies update their regulations in accordance with the FOIA Improvement Act of 2016.

Proactive Disclosures

The Department takes very seriously its responsibility to encourage compliance with all aspects of the FOIA, including the recent codification of the requirement to post records that have been requested and released in response to three or more requests. *See* 5 U.S.C. § 552(a)(2)(D). This standard, also referred to as the "rule of three," was actually derived from longstanding DOJ policy guidance to agencies. OIP's guidance summarizing changes in the law following passage of the FOIA Improvement Act of 2016 included the codification of the "rule of three." OIP also provided government-wide training on this topic and added questions to its Chief FOIA Officer Report Guidelines requiring agencies to report on the methods they use for identifying frequently requested records.

As noted, the Department has long encouraged proactive disclosures. DOJ's FOIA Guidelines direct agencies to "readily and systematically post information online in advance of any public request." While the Guidelines state that such proactive disclosures "reduce [] the

need for individualized requests” and “may help reduce existing backlogs,” there is no concrete way to capture the number of requests that did not have to be made due to the agency's proactive posting of the material. Backlog reduction remains a challenge for some agencies, particularly those that have seen a continued increase in incoming FOIA requests.

Agencies have also reported for a number of years that the time and costs associated with remediating records so that they are compliant with Section 508 of the Rehabilitation Act (and so accessible to individuals with disabilities) poses a challenge to posting records. For some agencies, the resources required to prepare the records for posting are drawn from the FOIA office, thereby necessarily having a direct impact on the agency's FOIA administration. However, regardless of the impact, the Department believes there is an inherent value in making information of interest to the public available proactively. Accordingly, the Department continues to encourage agencies to identify and make proactive disclosures of records even beyond those that qualify under the “rule of three.”

Codification of DOJ's “Foreseeable Harm” Standard

After DOJ's FOIA Guidelines were issued in 2009, OIP issued guidance to agencies on the implementation of the foreseeable harm standard. The application of the standard was also fully incorporated into OIP's training courses. OIP required agencies to report in their Chief FOIA Officer Reports on their process for applying the foreseeable harm standard, as well as to provide examples of otherwise exempt information that was released under the standard. Accordingly, when the FOIA Improvement Act of 2016 codified the “foreseeable harm” standard, agencies were already applying the standard and reporting on those efforts. As noted above, after the 2016 amendments were enacted, OIP issued a summary of the amendments and provided government-wide training, which included the codification of DOJ's foreseeable harm standard. Application of the foreseeable harm standard also continues to be embedded in OIP's FOIA training programs.

“Release to One is Release to All” Proposed Policy

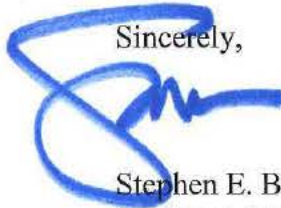
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We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

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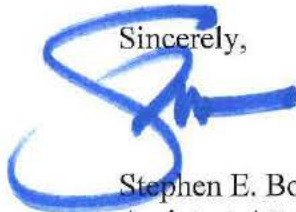
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OIP has taken a number of steps to assist agencies in updating their FOIA regulations consistent with FOIA law and policy and in accordance with the FOIA Improvement Act 2016. First, following the passage of the FOIA Improvement Act of 2016, OIP made several resources available to agencies to assist them in complying with the FOIA's requirement to update their regulations. These resources include publication of a Summary of the FOIA Improvement Act of 2016, which described all of the new requirements, including the directive for agencies to update their FOIA regulations; training on the new amendments; and updates to OIP's Guidance and Template for Agency FOIA Regulations to reflect the new requirements.

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In conjunction with agencies' 2020 Chief FOIA Officer Reports, OIP intends to continue its efforts to ensure that agencies update their regulations in accordance with the FOIA Improvement Act of 2016.

Proactive Disclosures

The Department takes very seriously its responsibility to encourage compliance with all aspects of the FOIA, including the recent codification of the requirement to post records that have been requested and released in response to three or more requests. *See* 5 U.S.C. § 552(a)(2)(D). This standard, also referred to as the "rule of three," was actually derived from longstanding DOJ policy guidance to agencies. OIP's guidance summarizing changes in the law following passage of the FOIA Improvement Act of 2016 included the codification of the "rule of three." OIP also provided government-wide training on this topic and added questions to its Chief FOIA Officer Report Guidelines requiring agencies to report on the methods they use for identifying frequently requested records.

As noted, the Department has long encouraged proactive disclosures. DOJ's FOIA Guidelines direct agencies to "readily and systematically post information online in advance of any public request." While the Guidelines state that such proactive disclosures "reduce [] the

need for individualized requests” and “may help reduce existing backlogs,” there is no concrete way to capture the number of requests that did not have to be made due to the agency's proactive posting of the material. Backlog reduction remains a challenge for some agencies, particularly those that have seen a continued increase in incoming FOIA requests.

Agencies have also reported for a number of years that the time and costs associated with remediating records so that they are compliant with Section 508 of the Rehabilitation Act (and so accessible to individuals with disabilities) poses a challenge to posting records. For some agencies, the resources required to prepare the records for posting are drawn from the FOIA office, thereby necessarily having a direct impact on the agency's FOIA administration. However, regardless of the impact, the Department believes there is an inherent value in making information of interest to the public available proactively. Accordingly, the Department continues to encourage agencies to identify and make proactive disclosures of records even beyond those that qualify under the “rule of three.”

Codification of DOJ's “Foreseeable Harm” Standard

After DOJ's FOIA Guidelines were issued in 2009, OIP issued guidance to agencies on the implementation of the foreseeable harm standard. The application of the standard was also fully incorporated into OIP's training courses. OIP required agencies to report in their Chief FOIA Officer Reports on their process for applying the foreseeable harm standard, as well as to provide examples of otherwise exempt information that was released under the standard. Accordingly, when the FOIA Improvement Act of 2016 codified the “foreseeable harm” standard, agencies were already applying the standard and reporting on those efforts. As noted above, after the 2016 amendments were enacted, OIP issued a summary of the amendments and provided government-wide training, which included the codification of DOJ's foreseeable harm standard. Application of the foreseeable harm standard also continues to be embedded in OIP's FOIA training programs.

“Release to One is Release to All” Proposed Policy

The Department has long championed the efforts to increase and improve the quality of proactive disclosures, including requiring agencies to report in their Chief FOIA Officer Reports on their proactive disclosure efforts. The idea behind the “release to one is release to all” initiative was to assess the feasibility of a proactive disclosure policy that would direct agencies to post FOIA-processed records after just one request. As noted, because there are legal requirements agencies must follow to ensure that posted records are accessible to all individuals, including those with disabilities, consideration of a “release to one is release to all” policy necessarily involves an assessment of the resources needed to carry it out and its impact on overall FOIA administration. We have consulted with stakeholders both inside and outside the federal government and many competing interests and resource needs were identified. Accordingly, the policy remains under review. In the meantime, the Department continues to

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Page Six

encourage proactive disclosures and is continuing to assess the impact of codification of the "rule of three" where FOIA-processed records are required to be posted after three requests.

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "S. Boyd", is written over the word "Sincerely,".

Stephen E. Boyd
Assistant Attorney General

Enclosure



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 16 2019

The Honorable John Cornyn
United States Senate
Washington, DC 20510

Dear Senator Cornyn:

This responds to your letter dated March 14, 2019, seeking information regarding the work of the Department of Justice's (Department) Office of Information Policy (OIP) and other Executive Branch agencies' implementation of the Freedom of Information Act (FOIA). We are sending identical responses to the other Senators who joined your letter.

As you know, the Department is responsible for encouraging agency compliance with the FOIA and we have undertaken a number of initiatives to both support agency compliance with the law and promote accountability. In addition to providing detailed guidance to agencies on all aspects of FOIA administration, OIP continues to train thousands of FOIA professionals across the government every year and makes a number of resources available to assist agencies in their implementation of the law. A detailed description of all our efforts can be found in the 2018 FOIA Litigation and Compliance Report¹ recently sent to Congress and the President.

National FOIA Portal & Interoperability

The first iteration of the National FOIA Portal was launched on March 8, 2018, and we have welcomed positive feedback on its release from both the public and agencies. Subsequently, on February 12, 2019, the Office of Management and Budget (OMB) and the Department issued a joint directive to agencies containing guidance on becoming fully interoperable with the National FOIA Portal. In accordance with the directive, all Chief Financial Officer Act agencies must submit a plan to OMB detailing how they intend to achieve full interoperability with the Portal.

The launching of the National FOIA Portal enabled members of the public to submit a FOIA request to any agency from that single website. For most agencies, the requester fills out a customized request form on FOIA.gov, which is then transmitted to the agency via a secure, structured email. The agency in turn then manually enters the request into its FOIA case

¹ All of the resources referenced in this letter are publicly available on OIP's website. *See* <https://www.justice.gov/oip>.

management system. For those agencies with existing FOIA portals, FOIA.gov provides a link to the agency portal rather than a customized request form. For these agencies the requester simply clicks on the link and makes their request to the agency through that agency's existing portal. The advantage of this accommodation is that the request is automatically ingested into the agency's FOIA case management system and need not be manually entered, as it would if it were sent by email. This "redirect" to existing agency portals is intended to be a temporary accommodation so that those agencies do not lose the efficiencies that their portals currently provide. Going forward, those agencies will be expected to develop an application programming interface (API), so that requesters can use the customized forms on FOIA.gov, which will then be transmitted via the API directly into the agency's case management system.

The onboarding of these agencies via an API will be an ongoing process in accordance with the OMB/DOJ directive, which requires agencies with automated case management systems to become fully interoperable via an API by August 2023. A list of the 140 agencies (out of 429 agencies with FOIA offices) which have existing FOIA portals and that are using the temporary redirect accommodation is enclosed.

Increase in FOIA Litigation

As you know, every year OIP provides in its FOIA Litigation and Compliance Report a listing of FOIA cases filed in federal court, which is obtained directly from the Public Access to Courts Electronic Records (PACER). The PACER list does not include the specific provisions of the FOIA that are at issue when the cases are filed. Therefore, we cannot draw any conclusions as to the reason some FOIA requests proceed to litigation. It is notable, however, that over the years agencies have also been experiencing increases in the number of requests received. In Fiscal Year 2017, the government received a record-breaking 818,271 requests. As agencies receive more requests that in turn can impact the number of FOIA lawsuits filed. Nevertheless, the proportion of requests that go to litigation remains a very small percentage of the requests agencies receive and process every year. The 816 lawsuits filed in 2018 represent just a fraction of one percent of the number of requests agencies received and processed that year.

As noted, OIP continues to encourage agency compliance with the FOIA through a number of initiatives such as issuing guidance, providing training, and making resources such as the FOIA Counselor Service available to agencies. All of these efforts are aimed at helping agencies ensure that requests are responded to as efficiently as possible in full compliance with the law.

Within the past year, OIP has issued two guidance articles that address alternatives to litigation. One of the guidance articles, issued on February 14, 2019, addressed the importance of a robust administrative appeals process. The FOIA provides requesters with a statutory right to administratively appeal an "adverse determination" made on a FOIA request. 5 U.S.C.

§ 552(a)(6)(A)(i) (2012 & Supp. V 2017). During this administrative appeals process, agencies can reevaluate their searches, take a second, fresh look at records, address requesters' specific concerns, and provide a further explanation of the agency's action on the request. As detailed in OIP's guidance, the administrative appeals process affords benefits to agencies and requesters alike.

In addition, on June 12, 2018, OIP issued guidance on the importance of quality requester services and the roles and responsibilities of both FOIA Requester Service Centers and FOIA Public Liaisons. As you know, the OPEN Government Act codified the role of agency FOIA Public Liaisons who are responsible for "increasing transparency" and "resolving disputes." The responsibilities of FOIA Public Liaisons were highlighted further in the FOIA Improvement Act of 2016. As the guidance notes, these resources serve a vital role in providing timely and helpful explanations of the FOIA process in general, as well as with respect to particular FOIA requests. The availability of these resources are another alternative to litigation.

Closing of Consultations, Reducing Backlogs & Improving Timeliness

DOJ's FOIA Guidelines stress that "[t]imely disclosure of information is an essential component of transparency." In 2014, OIP issued guidance to agencies specifically focusing on this topic. Building on that guidance, OIP continues to include backlog reduction and improvements to timeliness as part of its training to agency FOIA professionals. In particular, this topic is covered in OIP's Overview of the FOIA's Procedural Requirements, as well as through a course entitled "FOIA Processing from Start to Finish." The PowerPoint presentations for these trainings are publicly available on the Training page of OIP's website.

More specifically, OIP has long recognized the importance of agencies working to close their oldest consultations received from other agencies. In 2012, OIP issued guidance that stressed the importance of agencies closing their ten oldest consultations as a means of reducing the age and overall number of requests in the government's FOIA backlog. OIP reemphasized this point in additional guidance issued in 2013, 2015, 2016, 2017, and 2018.

Finally, to promote further accountability of the efforts of agencies to process consultations, OIP has instituted a number of reporting requirements in both agency Annual FOIA Reports and Chief FOIA Officer Reports. In addition to the metrics required by the statute, OIP added the requirement for agencies to include in their Annual FOIA Reports each year the numbers of consultations received, processed, and pending, as well as the agency's ten oldest consultations. Further, as part of their Chief FOIA Officer Report, OIP also requires agencies to report on whether they have closed their ten oldest consultations. Every year OIP scores agencies on whether they were able to close these consultations. Agencies that are not able to close their ten oldest consultations must provide a plan for doing so by the next year. Agencies are also required to report on whether any of their ten oldest requests were still pending due to an outstanding consultation, and if so, the date of the request, the date the consultation

was sent, and the date the agency last followed-up on the consultation. All of OIP's Summaries and Assessments of Agency Chief FOIA Officer Reports can be found on the Reports page of OIP's website.

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“Release to One is Release to All” Proposed Policy

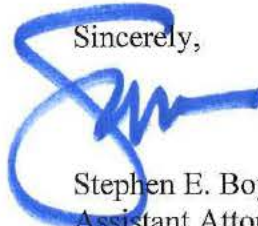
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The Honorable John Cornyn
Page Six

encourage proactive disclosures and is continuing to assess the impact of codification of the "rule of three" where FOIA-processed records are required to be posted after three requests.

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in blue ink, appearing to be "SEB", is written over the printed name and title.

Stephen E. Boyd
Assistant Attorney General

Enclosure

United States Senate

WASHINGTON, DC 20510

March 14, 2019

VIA ELECTRONIC TRANSMISSION

Melanie Pustay
Director, Office of Information Policy
U.S. Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, D.C. 20530

Dear Director Pustay:

As original supporters of the FOIA Improvement Act of 2016, and steadfast defenders of the public's right to know, we write to reiterate the importance of the Freedom of Information Act (FOIA) and its faithful administration. Equally important, we write to express concern about recent trends in FOIA compliance and reports indicating a continued culture of reflexive secrecy across the government.

According to the Justice Department's most recent aggregate statistics, the government in FY2017 processed the highest number of FOIA requests ever, with an 8.3% increase over FY2016.¹ However, it was reported that requesters received censored files or nothing at all in 78% of requests, a record over the past decade.² The number of FOIA lawsuits also continues to break records. In FY2018, a record-high 860 FOIA lawsuits were filed against agencies, representing a 67% increase in filings compared to the final year of the Obama administration.³ The Justice Department, for example, was sued more frequently under FOIA than ever before.⁴ Further, we have recently seen proposed updates to agency FOIA regulations that appear to restrict, rather than encourage, public access to records, and could delay the processing of FOIA requests.⁵

Furthermore, FOIA processing delays and backlogs continue to grow unchecked. The average processing times at many agencies are hundreds of days longer than the 20-day response time established by law.⁶ Some pending FOIA requests are even decades old.⁷ Making matters worse, there are a number of agencies with tens of thousands of backlogged FOIA requests.⁸

¹ See *Summary of Annual FOIA Reports for Fiscal Year 2017*, U.S. Department of Justice (June 7, 2018) available at <https://www.justice.gov/oip/page/file/1069396/download>.

² *Federal government sets new record for censoring, withholding files under FOIA*, CBS News (Mar. 12, 2018) available at <https://www.cbsnews.com/news/foia-federal-government-sets-new-record-for-censoring-withholding-files-trump-administration/>.

³ Christine Mehta, *Annual Report: FOIA Lawsuits Reach Record Highs in FY 2018*, The FOIA Project (Nov. 12, 2018) available at <http://foiaproject.org/2018/11/12/annual-report-foia-lawsuits-reach-record-highs-in-fy-2018/>.

⁴ *Id.*

⁵ See bicameral letter to Acting Secretary of Interior David Bernhardt (Mar. 5, 2019) available at <https://www.grassley.senate.gov/news/news-releases/cummings-leahy-grassley-and-cornyn-raise-concerns-regarding-proposed-interior>.

⁶ *25-Year-Old FOIA Request Confirms FOIA Delays Continue Unabated*, National Security Archive (Mar. 8, 2019) available at <https://nsarchive.gwu.edu/foia-audit/foia/2019-03-08/25-year-old-foia-request-confirms-foia-delays-continue-unabated>.

⁷ *Id.*

⁸ *Id.*

The Senate Committee on the Judiciary, of which we are members, has jurisdiction over FOIA. Compliance with FOIA's statutory requirements, including the 2016 amendments, is necessary to ensure that the public can fully exercise its right to know. To assist the Committee in better understanding the administration's commitment to transparency, please provide numbered, written responses to the following questions by no later than April 17, 2019.

1. The FOIA Improvement Act of 2016 requires "the operation of a consolidated online request portal that allows a member of the public to submit a request for records ... to any agency from a single website."⁹ We were pleased to see that on March 8, 2018, the Department "released the first iteration of the National FOIA Portal on FOIA.gov."¹⁰ A year later, however, the public still cannot submit FOIA requests to many agencies and departments, including some that are annually the largest recipients of FOIA requests. For example, as of the date of this letter, an attempt to submit a request to U.S. Customs & Border Protection, U.S. Citizenship & Immigration Services, or the State Department results in an alert to the requester that "[c]urrently, this agency's FOIA system is not linked to FOIA.gov."
 - a. What is the status of OIP's efforts to ensure that members of the public may use the FOIA portal to submit a request for records "to *any* agency from a single website"?
 - b. Please provide a complete list of departments or agencies whose FOIA systems are currently "not linked to FOIA.gov."
2. What specifically is causing the significant increase in FOIA lawsuits filed against agencies in FY 2018? In other words, what violations of FOIA's requirements are being cited most by litigants? And what specific steps is OIP taking to reduce the number of FOIA requests that end up in litigation?
3. What specific steps, beyond its 2014 guidance on the subject, is OIP taking to reduce the delays caused by inter-agency consultations and referrals of FOIA requests?
4. What specific steps is OIP taking to ensure that agency FOIA regulations are consistent with the letter and spirit of FOIA, including the 2016 amendments?
5. The FOIA Improvement Act of 2016 requires agencies to make records available in an electronic format if they have been requested three or more times. According to a 2018 audit by the Government Accountability Office, one agency responded that it does not comply with this statutory requirement because "it does not have the time to post all such records that have been requested."¹¹
 - a. Should agencies be able to disregard FOIA's statutory requirements if they "do not have the time"? And on what authority do agencies rely to ignore statutory law?

⁹ 5 U.S.C. §552(m)(1).

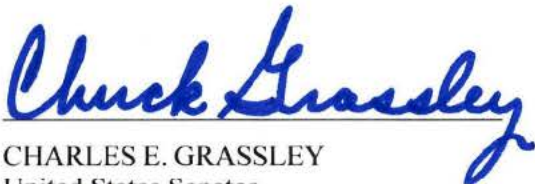
¹⁰ DOJ Announces the First Iteration of the New National FOIA Portal on FOIA.gov, Office of Information Policy, U.S. Department of Justice (Mar. 8, 2018) available at <https://www.justice.gov/oip/blog/doj-announces-first-iteration-new-national-foia-portal-foiagov>.

¹¹ U.S. Gov't Accountability Office, GAO-18-365, *Freedom of Information Act – Agencies Are Implementing Requirements, but Additional Actions Are Needed* 24 (June 2018) available at <https://www.gao.gov/assets/700/692782.pdf>.

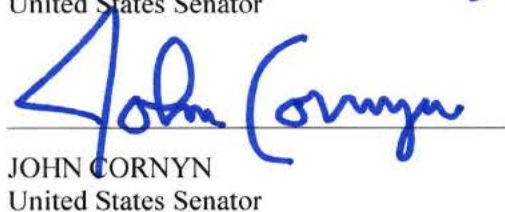
- b. What specific steps is OIP taking to ensure that *all* agencies are complying with the letter and spirit of the proactive disclosure requirements of the FOIA Improvement Act of 2016?
 - c. How would stricter compliance with the proactive disclosure requirements of the FOIA Improvement Act impact FOIA request processing delays and backlogs?
6. The FOIA Improvement Act of 2016 codified a “foreseeable harm” standard, to ensure that agencies may only withhold information from the public if the agency “reasonably foresees that disclosure would harm an interest protected by an exemption[.]” This change in the law tells agencies to make openness and transparency, instead of knee-jerk secrecy, their default setting. OIP plays the central role in ensuring government-wide compliance with the “foreseeable harm” standard.
- a. Has OIP published any government-wide directives concerning the implementation or proper interpretation of the “foreseeable harm” standard? If not, why?
 - b. What specific steps is OIP taking to ensure government-wide compliance with the “foreseeable harm” standard?
7. What is the current status and anticipated finalization date of the Department’s “Release to One, Release to All” policy? Why has this policy not been finalized yet?

Thank you for your prompt attention to this important matter. If you have any questions, please contact Kyle McCollum of Senator Grassley’s staff at (b)(6), Rajiv Venkataramanan of Senator Leahy’s staff at (b)(6), Franci Rooney of Senator Cornyn’s staff at (b)(6), or Christina Calce of Senator Feinstein’s staff at (b)(6).

Sincerely,



CHARLES E. GRASSLEY
United States Senator



JOHN CORNYN
United States Senator



PATRICK LEAHY
United States Senator



DIANNE FEINSTEIN
United States Senator