



Department of Justice

STATEMENT OF

**MELANIE ANN PUSTAY
DIRECTOR
OFFICE OF INFORMATION POLICY**

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

AT A HEARING ENTITLED

**“THE FREEDOM OF INFORMATION ACT: EXAMINING THE
ADMINISTRATION’S PROGRESS ON REFORMS AND LOOKING
AHEAD”**

**PRESENTED
MARCH 13, 2018**

**Statement of
Melanie Ann Pustay
Director of Office of Information Policy**

**Before the
Senate Judiciary Committee
For a Hearing Entitled:
“The Freedom of Information Act: Examining the Administration’s Progress on Reforms
and Looking Ahead”**

March 13, 2018

Good morning, Chairman Grassley, Ranking Member Feinstein, and Members of the Committee. I am pleased to be here today to discuss the Freedom of Information Act (“FOIA”) and the Department of Justice’s ongoing efforts to encourage agency compliance with the statute. My office, the Office of Information Policy (OIP), has undertaken a range of initiatives designed to assist agencies in improving their FOIA administration. Today I am pleased to highlight some of those efforts, focusing on our work in assisting agencies in implementing the *FOIA Improvement Act of 2016*, which was signed into law on June 30, 2016.

Before detailing these efforts, I would like to note that several of the changes made by the *FOIA Improvement Act of 2016* codified longstanding DOJ policies that were already fully embedded in the Department’s practices and OIP’s government-wide trainings, advice and reporting requirements. For example, the presumption of openness and the foreseeable harm standard were established in the Department’s [2009 FOIA Guidelines](#). Additionally, the new statutory requirement that agencies post online the releasable portions of records that have been requested three or more times – commonly referred to as the “Rule of 3” – was also previously established through OIP guidance.

OIP Guidance and Training

After passage of the *FOIA Improvement Act of 2016*, OIP immediately took a number of steps to inform and educate agencies as to all of its provisions. OIP created a [detailed summary](#) of the law and a [redline version](#) of the FOIA showing the changes made and posted those resources to its website. We held a [government-wide training event](#) on the new provisions that was filled to capacity. The training provided an overview of the amendments, including codification of the foreseeable harm standard and the posting of frequently requested records. The training also provided an opportunity for agency FOIA personnel to engage with OIP directly about the statutory reforms. We made the [slides](#) from the training session publicly available on OIP’s website.

OIP continued to assist agencies with implementation of the new statutory amendments by providing training, issuing guidance, and leading government-wide efforts in accordance with the various new provisions of the law. OIP issued several guidance articles to agencies addressing the various changes made by the *FOIA Improvement Act of 2016*. For example:

- On July 18, 2016, OIP issued [guidance](#) to agencies on the new requirements for FOIA response letters, including the requirement to afford requesters ninety days to file administrative appeals and the new notification requirements for extending the FOIA's time limits. The guidance included an implementation [checklist](#) and sample language to serve as a quick resource for FOIA professionals.
- On September 8, 2016, OIP issued [updated guidance](#) on Agency FOIA Regulations, which incorporated the changes made by the *FOIA Improvement Act of 2016*. OIP also issued an updated [Template for Agency FOIA Regulations](#) for agencies to use as they update their regulations. The Department updated its own FOIA regulations to bring them into alignment with the provisions contained in the FOIA Improvement Act of 2016. OIP has likewise reviewed and made suggested revisions to language contained in the proposed FOIA regulations of other agencies.
- On October 6, 2016, OIP issued [guidance](#) on the new requirements for agency Annual FOIA Reports. OIP also updated the [Department of Justice Handbook for Agency Annual FOIA Reports](#) to reflect the changes made in the *FOIA Improvement Act of 2016*.
- On October 19, 2016, OIP issued [guidance](#) on the new provisions further prohibiting the assessment of certain fees when the FOIA's time limits are not met. This guidance included a step-by-step "[Decision Tree](#)" designed to serve as a resource for FOIA professionals as they implement the new restrictions in real time.
- OIP also incorporated the new statutory provisions into our training programs held throughout the year that reach thousands of FOIA professionals. As part of our *Best Practices* workshop series, OIP held a session that focused on the importance of informing, educating, and working collaboratively with requesters throughout the FOIA process.

As a further resource to agencies, OIP provides direct, one-on-one counseling for agency personnel through its [FOIA Counselor Service](#). Agency professionals call OIP's FOIA Counselor Service for advice on all aspects of the FOIA, including the new provisions contained in the *FOIA Improvement Act of 2016*. OIP handled nearly 1500 requests for guidance through its FOIA Counselor service during 2017.

The *FOIA Improvement Act of 2016* amended the FOIA to require the creation of a Chief FOIA Officers Council. On July 22, 2016, OIP convened the first meeting of the Chief FOIA Officers (CFO) Council, and held two additional meetings thereafter. The third Council meeting specifically focused on the statutory notification requirements concerning FOIA Public Liaisons and the Office of Government Information Services (OGIS) that are contained in the *FOIA Improvement Act of 2016*. This third meeting of the Council included an overview of the respective duties of FOIA Public Liaisons and OGIS, as well as those of the FOIA Requester

Service Center, and featured a panel discussion on maximizing the effectiveness of all of their services. All the information describing these meetings, including associated resources, are available on a dedicated [Chief FOIA Officers Council](#) page of OIP's website.

Each year OIP develops guidelines for agency Chief FOIA Officer Reports and after the reports are submitted we conduct an [assessment](#) of each agency's progress in administering the FOIA, scoring agencies on a range of milestones. For the 2017 Chief FOIA Officer Reports OIP modified and updated the reporting requirements to reflect the amendments made to the FOIA by the *FOIA Improvement Act of 2016*. Our assessment of agency progress likewise included milestones connected with agency implementation of the new statutory provisions.

National FOIA Portal

One of the major new provisions in the *FOIA Improvement Act of 2016* was the requirement that OMB and DOJ ensure the operation of a consolidated online request portal that allows members of the public to submit a request for records to any agency from a single website. Significantly, the amendments expressly stated that creation of this new portal should not alter the power of any other agency to create or maintain an independent request portal. We are pleased to report that we have just "gone live" with the first iteration of a National FOIA Portal built in accordance with both these statutory directives.

With OMB's support, DOJ secured \$1.3 million for building the new National FOIA Portal, which resides on FOIA.gov. Given that DOJ's FOIA.gov website already served as the government's comprehensive, public facing FOIA resource, DOJ decided that it was a logical choice to expand those services to include a National FOIA Portal.

From the beginning DOJ wanted to approach this effort using modern, open source technologies and agile methodologies that focused on user experience and user design. DOJ partnered with GSA's 18F digital services team and augmented the group with OIP's own FOIA subject matter experts, and technical staff from DOJ's Chief Information Office coupled with technical contract support. GSA's 18F team specializes in agile and user-based development, which made them an ideal partner. In addition to utilizing their technical expertise, GSA was able to add an additional \$500,000 from the Federal Citizens Services Fund to support the project.

Working in the open, the team conducted extensive research, interviewed requesters, agencies, and the open government community, and continually tested prototypes. The new portal:

- Provides the public with the ability to submit a request to any federal agency from a single site,
- Contains agency specific request forms, which both standardize the request-making process, while allowing for agency or component-specific variations,
- Allows agencies to directly update and customize certain content and contact information, and
- Delivers a wealth of information to the public to help them determine whether they need to make a FOIA request and to assist them when they do.

These new features were added to the functionality that already existed on FOIA.gov, providing the public with a robust, one-stop resource on government-wide FOIA administration. OMB will be issuing government-wide standards later this spring to guide agencies in ensuring that their existing or future FOIA case management systems are interoperable with the National FOIA Portal.

Looking Ahead

DOJ is looking forward to receiving feedback from both requesters and agencies to inform our decisions on the portal going forward. In partnership with OMB, DOJ has identified a dedicated funding source to operate and maintain the portal to ensure its success in the long-term, with major agencies sharing in the costs to operate, maintain, and fund any future enhancements designed to improve FOIA processes.

In addition to continued improvements to the National FOIA Portal, OIP will continue to focus on its core efforts to encourage agency compliance with the FOIA. We believe that the foundation of any FOIA program are personnel who have a complete understanding of the FOIA's legal requirements and policy considerations. Accordingly, we will continue to offer a range of government-wide training programs and will continue to issue policy guidance to agencies on the proper implementation of the law. For example, in addition to our guidance on implementing the *FOIA Improvement act of 2016*, last year OIP issued guidance on defining a record under the FOIA and on the content of agency FOIA websites. As in years past, OIP also issued guidance to agencies for further improvement based on our review and assessment of agencies' Chief FOIA Officer Reports. Additionally, to assist agencies in reviewing their own FOIA programs and identifying ways to make improvements, last year OIP created a [*FOIA Self-Assessment Toolkit*](#). The *Toolkit* is composed of thirteen modules corresponding to the various stages of the FOIA process, from initial mail intake, to searching and reviewing records, to updating FOIA websites. There is a dedicated module for "Requester Services" which addresses the roles and responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons.

As you know, this week we are celebrating Sunshine Week. The Department's FOIA Guidelines were issued during Sunshine Week 2009. Those Guidelines address the presumption of openness that is inherent in the FOIA, the need for agencies to create and maintain an effective system for responding to requests, and the need to improve timeliness and to work to reduce any backlogs. The FOIA Guidelines also direct agencies to promptly and proactively make information available and they emphasize the importance of agencies using "modern technology to inform citizens about what is known and done by their Government." Finally, stressing the critical role played by agency Chief FOIA Officers in improving FOIA performance, the FOIA Guidelines direct all Chief FOIA Officers to review their agencies' FOIA administration each year and to report to the Department of Justice on the steps taken to achieve improved transparency. We will continue to focus attention on all these areas of FOIA administration as we strive to make further improvements in the year ahead.

In closing, I want to thank you for the opportunity to be here today to discuss OIP's work in encouraging agencies' compliance with the FOIA. The Department of Justice looks forward to

working together with the Committee on matters pertaining to the government-wide administration of the FOIA. I would be pleased to address any question that you or any other Member of the Committee might have on this important subject.

DOJ/OIP Response to GAO's Request #1 for Job Code 101411

(1) Guidance/Procedures for Processing Requests

As discussed during the entrance conference, OIP has government-wide responsibilities to encourage compliance with the FOIA. In satisfying these responsibilities, OIP issues guidance on the proper application of the law and provides agencies with a range of resources to assist them in implementing the Act. All of this material is publicly available and relied on both within the Department and across the government.

- All of OIP's guidance can be found on the "[Guidance](#)" page of OIP's website.
- The [Department of Justice Guide to the Freedom of Information Act](#) is an essential resource for all FOIA professionals. The Guide is a comprehensive legal treatise on the FOIA, which includes detailed discussions on the FOIA's procedural requirements, nine exemptions, and litigation considerations.
- In addition to the Guide, OIP provides summaries of new FOIA decisions on a rolling basis so that agency personnel are actively informed of the state of the law. The summaries of the court decisions can be found [here](#).
- OIP also provides agencies with two important resources for applying Exemption 3 of the FOIA. First, each year OIP publishes a listing of all the Exemption 3 statutes cited by agencies in their Annual FOIA Report. These lists which go back to Fiscal Year 2010 can all be found [here](#). On this same page, OIP also provides an up-to-date running list of all the statutes that courts have found to qualify as Exemption 3 statutes. That list can also be accessed directly by clicking [here](#).
- OIP also manages a very robust training program for all agency personnel. Each year OIP subject matter experts provide training to thousands of FOIA professionals across the government. A description of OIP's yearly offerings can be found on the "[Training](#)" page of OIP's website. In addition, in an effort to reach all agency personnel across the world, OIP developed a suite of electronic training tools, which include two separate e-Learning programs. A description of these tools can be found under the "Digital FOIA Training Resources" header of OIP's "[Training](#)" page. Finally, OIP also provides specialized training at the request of agencies. A full description of our training efforts from last year and all of our efforts to encourage compliance with the FOIA can be found in the [Department's 2016 Litigation and Compliance Report](#).
- As yet another resource, in 2014 OIP began a new Best Practices Workshop Series to share best practices in FOIA administration across the government. For each event, OIP invites a panel of experts to discuss successful strategies they have implemented for the benefit of all agencies. A brief recap of each event as well as the best practices discussed can be found on the "[Best Practices](#)" page of OIP's website.

(2) Description of agency's tracking system for processing a FOIA request

The Department of Justice's administration of the FOIA is decentralized and each component of the Department is responsible for the handling of the requests it receives. Accordingly, the

tracking systems used by the Department's components vary according to the unique needs of each component. OIP processes requests for its records and the records of the Department's senior leadership offices, which include the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legislative Affairs, Public Affairs, and Legal Policy. Additionally, OIP adjudicates all of the Department's administrative FOIA appeals. OIP uses [FOIAonline](#) for tracking these requests and appeals.

(3) Roles and responsibilities for Chief FOIA Officer (including last review performed for compliance) and FOIA Public Liaison

The roles and responsibilities of both Chief FOIA Officers and FOIA Public Liaisons are detailed in the FOIA itself. The statutory responsibilities are summarized below. Every year Chief FOIA Officers review their agency's FOIA administration and report to the Attorney General on the steps they have taken to improve FOIA administration. All of these Chief FOIA Officer Reports, including DOJ's Summary and Assessment of the reports, can be found on the "[Reports](#)" page of OIP's website.

Chief FOIA Officers (*See* 5 U.S.C. § 552(j)(2),(3)):

- Have agency-wide responsibility for efficient and appropriate compliance with the FOIA
- Monitor implementation of the FOIA throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing the Act
- Recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve the agency's implementation of the FOIA
- Review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing the FOIA
- Facilitate public understanding of the purposes of the statutory exemptions by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g) of the FOIA, and the agency's Annual FOIA Report, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply
- Offer training to agency staff regarding their responsibilities under the FOIA
- Serve as the primary agency liaison with the Office of Government Information Services and the Office of Information Policy
- Designate one or more FOIA Public Liaisons
- Review, not less frequently than annually, all aspects of the administration of the FOIA by the agency to ensure compliance with the requirements of the FOIA, including agency regulations, disclosure of records under subsections (a)(2) and (a)(8) of the FOIA, assessment of fees and determination of eligibility for fee waivers, the timely processing of requests, the use of exemptions, and dispute

resolution services with the assistance of the Office of Government Information Services or the FOIA Public Liaison.

FOIA Public Liaison (See 5 U.S.C. § 552(l)):

- The FOIA Public Liaisons reports to the agency Chief FOIA Officer and serves as a supervisory official to whom a requester can raise concerns about the service he or she has received from the FOIA Requester Center.
- The FOIA Public Liaison is also responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(4) Description on training on FOIA

As noted in response to Question 1, as part of its government-wide FOIA responsibilities, OIP provides comprehensive FOIA training to thousands of professionals across the government every year. In addition, as described above, OIP provides a wide range of resources for agencies to use for their own training programs. A detailed description of all the training provided in 2016 can be found on pages 20-22 of the [Department's 2016 Litigation and Compliance Report](#).

(5) Policies and procedures for providing information electronically

The FOIA requires that agencies provide records to requesters “in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” 5 U.S.C § 552(a)(3)(B). Therefore, if a requester asks that records be provided in an electronic format the agency would be required to do so unless the records are not readily reproducible in the format requested. This provision is discussed on page 66 of the “[Procedural Requirements](#)” chapter of the [Department of Justice Guide to the FOIA](#).

Additionally, in 2013, OIP issued guidance to agencies emphasizing the use of technology to further improve communications with requesters and directing agencies to communicate with requesters electronically as a default. That guidance, titled “[The Importance of Good Communication with FOIA Requesters 2.0: Improving Both the Means and the Content of Requester Communications](#),” is also publicly available on OIP’s “[Guidance](#)” page. The Department has not only fully implemented this guidance, but we have also incorporated it in our FOIA regulations. See 28 C.F.R. § 16.6(a). Additionally, OIP has provided agencies sample language that supports this practice to use in their FOIA regulations as well. See Section VI of OIP’s [Template for Agency FOIA Regulations](#).

(6) Policies/procedures for referring to statutory exemptions for redacting records

OIP issued detailed guidance on the marking of exemptions when redacting material in its 2008 Guidance titled “[OIP Guidance: Segregating and Marking documents for Release in Accordance with the OPEN Government Act](#).”

As detailed in the guidance, for any records released in part, the FOIA requires that the released portions indicate the amount of information withheld and the exemption being asserted, unless doing so would harm an interest protected by the exemption being asserted. *See* 5 U.S.C. § 552(b) (paragraph immediately following exemptions). If "technically feasible," the FOIA requires this information to "be indicated at the place in the record where such deletion is made." *Id.* In addition to OIP's guidance, this topic is also addressed on pages 67-68 of the [Department of Justice's Guide to the FOIA](#).

(7) Documentation showing how the agency has responded to the FOIA 2016 update

OIP has taken a number of steps to not only assist agencies across the government in implementing the recent amendments to FOIA, but also to ensure that the Department itself has implemented the changes as well. Before detailing these many efforts, we note that several of the changes made by the FOIA Improvement Act of 2016 codified longstanding DOJ policies that were already fully embedded in the Department's practices and OIP's government-wide trainings, advice and reporting requirements. For example, the presumption of openness and the foreseeable harm standard were established in the Department's [2009 FOIA Guidelines](#). For a number of years, OIP asked agencies to give examples of their discretionary releases in their Chief FOIA Officer Reports, and each year, the Department's Chief FOIA Officer Report contained a wealth of such examples. All of the Chief FOIA Officer Reports, including the Department of Justice's, can be found on the "[Reports](#)" page of OIP's website. Additionally, the new statutory requirement that agencies post online the releasable portions of records that have been requested three or more times commonly referred to as the "Rule of 3" was also previously established through OIP [guidance](#).

After passage of the FOIA Improvement Act of 2016, OIP immediately took a number of steps to inform and educate agencies as to all of its provisions. OIP created a [detailed summary](#) of the law and a [redline version](#) of the FOIA showing the changes made and posted those resources to its website. OIP continued to assist agencies with implementation of the new statutory amendments by providing training, issuing guidance, and leading government-wide efforts in accordance with the various new provisions of the law. For example:

- OIP held a [government-wide training event](#) that was widely attended on the new amendments to FOIA. The training provided an overview of the amendments, including codification of the foreseeable harm standard and the posting of frequently requested records. The training also provided an opportunity for agency FOIA personnel to ask OIP's Director questions about the FOIA Improvement Act. The [slides](#) from the training session are publicly available on OIP's website.
- OIP issued several guidance articles to agencies addressing the various changes made by the FOIA Improvement Act of 2016:

- On July 18, 2016, OIP issued [guidance](#) to agencies on the new requirements for FOIA response letters, including the requirement to afford requesters ninety days to file administrative appeals and the new notification requirements for extending the FOIA's time limits. The guidance included an implementation [checklist](#) to serve as a quick resource for FOIA professionals.
- On September 8, 2016, OIP issued [updated guidance](#) on Agency FOIA Regulations, which incorporated the changes made by the FOIA Improvement Act of 2016. OIP also issued an updated [Template for Agency FOIA Regulations](#) for agencies to use as they update their regulations.
- On October 6, 2016, OIP issued [guidance](#) on the new requirements for agency Annual FOIA Reports. OIP also updated the [Department of Justice Handbook for Agency Annual FOIA Reports](#) to reflect the changes made in the FOIA Improvement Act of 2016.
- On October 19, 2016, OIP issued [guidance](#) on the new provisions further prohibiting the assessment of certain fees when the FOIA's time limits are not met. This guidance also included a "[Decision Tree](#)" designed to serve as a resource for FOIA professionals as they implement the new restrictions in real time.

OIP will continue to issue guidance as needed to assist agencies with their implementation of the FOIA's new requirements.

- On July 22, 2016, OIP convened the first meeting of the Chief FOIA Officers (CFO) Council, created by the FOIA Improvement Act of 2016. As one of the Chairs for the Council, OIP convened this inaugural meeting to both immediately establish this new body and to receive feedback on the potential implementation of a "Release to One is a Release to All" presumption for FOIA responses. OIP's Director opened the meeting by providing an overview of the responsibilities of agency CFOs and then briefed the Council on the Department's six-month Proactive Disclosure Pilot that tested the "Release to One is a Release to All" concept.
- OIP continues to provide direct, one-on-one counseling for agency personnel through its [FOIA Counselor Service](#). Agency professionals continue to call OIP's FOIA Counselor Service for advice on all aspects of the FOIA, including the new provisions from the FOIA Improvement Act of 2016.

All of the guidance, training, and other resources created by OIP are applicable and available to both other federal agencies and to the Department's own components. OIP also provided a dedicated training session on the amendments for the Department's components during the Department's Annual FOIA Conference in February 2017.

(8) Policies/procedures to reduce backlogs of requests

Reducing backlogs and improving timeliness has long been a focus of OIP's work in encouraging and overseeing compliance with the FOIA. In 2014, OIP issued [guidance](#) to agencies on this topic. Additionally, OIP has held two Best Practices Workshops on this topic (May 20, 2014 & December 8, 2015) and has included the [best practices from these sessions](#) on our site as well. Further, every year since 2010 when agencies first began submitting Chief FOIA Officer Reports to the Department of Justice, OIP has required agencies to report on their efforts to reduce backlogs. This includes not only the number of requests in the backlog, but also the age of the backlog. Since 2014, OIP has required agencies with backlogs of over 1,000 requests that have not reduced their backlog to provide plans for backlog reduction. Similarly, agencies that did not close their ten oldest requests, appeals, or consultations have been required to provide a plan for doing so in the upcoming year. The Guidelines for all Chief FOIA Officer Reports can be found on the "[Guidance](#)" page of OIP's website. Finally, OIP's annual assessment of agency FOIA administration scores agencies on a number of metrics tied directly to both the number and age of agencies' request backlogs. All of the assessments can be found on the "[Reports](#)" page of OIP's website under the subheading "[OIP Summaries and Assessments of Agency Chief FOIA Officer Reports](#)."

(9) Policies/procedures on allowing non-custodians to respond to requests

Based on the discussion during the entrance conference, OIP understands this item to pertain to any policies or procedures for an agency to process information that contains another agency's equity without the need for a referral or consultation. As OIP explained during our meeting, when appropriate and possible, agencies are encouraged to enter into agreements with one another on the handling of records with shared equities so as to avoid the need for referrals and consultations. OIP issued detailed guidance in 2011 on Referrals, Consultations, and Coordination. In this guidance OIP stated,

[W]hen agencies find that they routinely locate the same or similar types of documents or information that originated with another agency, or when agencies find that they routinely receive for consultation or referral the same type of record or information from another agency, they should look for ways to collaborate to see if they can adopt standard processing procedures with regard to the documents or information that might reduce the number of referrals or consultations that need to be made. This, in turn, will improve overall processing times both for the agency which otherwise would have made the referral or consultation and the agency that otherwise would have received the referral or consultation.

[OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them](#) (posted Dec. 5, 2011)

Further, in 2014, OIP directed agencies to detail in their Chief FOIA Officer Reports any steps they have taken to make the handling of consultations and referrals more efficient and effective such as entering into the type of agreements described above. *See* Section II, Question 5 of the [Guidelines for the 2014 Chief FOIA Officer Reports](#). As discussed in OIP's [2014 Summary of Agency Chief FOIA Officer Reports](#), a number of agencies reported creating efficiencies by entering into agreements with other agencies or agency components on how to process records that are a common source of consultations or referrals. For example, at DOJ, the Executive Office for Immigration Review continued to work under a longstanding agreement with DHS on the processing of immigration records, and the Federal Bureau of Investigation reached an agreement within the Intelligence Community on the processing of certain information.

(10) Notifications given by DOJ, over the last ten years, to OSC regarding civil actions described in the first sentence of 5 U.S.C. 552(a)(4)(F)(i)

The United States courts have made no written finding pursuant to 5 U.S.C. § 552(a)(4)(F)(i) during this time period. Accordingly, no notification to the Special Council has been necessary.

(11) Annual reports delivered to Congress on the number of civil actions described in the first sentence of 5 U.S.C. 552(a)(4)(F)(i).

The Department satisfies its reporting obligation under 5 U.S.C. § 552(a)(4)(F)(ii)(II) through its annual Litigation and Compliance Report to Congress. All of these reports going back to 1998 can be found on the "[Reports](#)" page of OIP's website. Please note, however, that the specific reporting requirement referenced in the document request (i.e., the requirement to report on any court findings regarding the handling of a request) was added to the FOIA with the OPEN Government Act of 2007, and therefore, the Department began including this information as part of its Litigation and Compliance Report starting in 2008.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 19 2017

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This responds to your letter dated March 15, 2017 to the Director of the Department of Justice's (the Department) Office of Information Policy (OIP) concerning the implementation of the FOIA Improvement Act of 2016 and OIP's role in FOIA matters. As you know, the Department is responsible for encouraging government-wide compliance with the FOIA and we take this responsibility very seriously. The Department recently submitted to Congress its 2016 FOIA Litigation and Compliance Report,¹ which details a wide range of efforts undertaken by OIP this past calendar year to encourage compliance with the FOIA. We refer the Committee to that Report for a comprehensive description of OIP's activities in that regard. Set out below are answers to your specific questions. We are sending identical responses to the other Senators who joined in your letter.

FOIA Improvement Act of 2016

OIP has taken a number of steps to ensure that agencies are fully implementing all the recent changes made to the FOIA through the FOIA Improvement Act of 2016. The two changes to the statute referenced in your letter, i.e., codification of the "foreseeable harm standard" and codification of the practice of proactively posting records online once they have been requested three times, both originated with the Department of Justice and OIP has been encouraging compliance with these long-standing policies for a number of years. OIP has long included these topics in its government-wide FOIA trainings and has required agencies to report on their implementation through their Chief FOIA Officer Reports, which are publicly available on OIP's website.

After passage of the FOIA Improvement Act of 2016, OIP immediately took a number of steps to inform and educate agencies as to all of its provisions. OIP created a detailed summary of the law and a redline version of the FOIA showing the changes made and posted those resources to its website. OIP continued to assist agencies with implementation of the new

¹ Links to supporting documents have been embedded throughout the document and can be viewed by selecting the highlighted text. All links can be accessed by visiting <http://www.justice.gov/oip>.

statutory amendments by providing training, issuing guidance, and leading government-wide efforts in accordance with the various new provisions of the law. For example:

- OIP held a government-wide training event that was widely attended on the new FOIA amendments. The training provided an overview of the amendments, including codification of the foreseeable harm standard and the posting of frequently requested records. The training also provided an opportunity for agency FOIA personnel to ask OIP's Director questions about the FOIA Improvement Act. The slides from the training session are publicly available on OIP's website.
- OIP issued several guidance articles to agencies addressing the various changes made by the FOIA Improvement Act of 2016:
 - On July 18, 2016, OIP issued guidance to agencies on the new requirements for FOIA response letters, including the requirement to afford requesters ninety days to file an administrative appeal and the new notification requirements for extending the FOIA's time limits. The guidance included an implementation checklist to serve as a quick resource for FOIA professionals.
 - On September 8, 2016, OIP issued updated guidance on Agency FOIA Regulations, which incorporated the changes made by the FOIA Improvement Act of 2016. OIP also issued an updated Template for Agency FOIA Regulations for agencies to use as they update their regulations.
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- On July 22, 2016, OIP convened the first meeting of the Chief FOIA Officers (CFO) Council, created by the FOIA Improvement Act of 2016. As one of the Chairs for the Council, OIP coordinated this inaugural meeting to both immediately establish this new body and to receive feedback on the potential implementation of a "Release to One is a Release to All" presumption for FOIA responses. OIP's Director opened the meeting by providing an overview of the responsibilities of agency CFOs and then briefed the Council on the Department's six-month Proactive Disclosure Pilot that tested the "Release to One is a Release to All" concept.

Finally, OIP continues to provide direct, one-on-one counseling for agency personnel through its FOIA Counselor Service. Agency professionals continue to call OIP's FOIA Counselor service for advice on all aspects of the FOIA, including the new provisions from the FOIA Improvement Act of 2016.

Consolidated Online Request Portal

With the launch of FOIA.gov in 2011, OIP created a singular online resource that the public can use to learn about the FOIA, including where and how to make a request, with ready links to existing agency online portals, and descriptions of each agency. FOIA.gov also has a range of other helpful features, such as a search function that allows a potential requester to first search for publicly available information that is already online. FOIA.gov also displays graphically a wealth of data on all aspects of agencies' compliance with the FOIA. Over the past few years, as part of commitments in the United States' Second and Third Open Government National Action Plans, OIP has been working with both internal and external stakeholders to develop user and market research, as well as baseline requirements, for development of enhanced features on FOIA.gov. Among those features would be a consolidated or national FOIA request portal that would allow a member of the public to make a request to any agency directly from FOIA.gov.

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Fostering Good Communication between Agencies and Requesters

OIP has engaged in a range of efforts over the years to encourage good communication and outreach with requesters across the government. Since 2010, OIP has issued multiple guidance articles encouraging practices that embrace the importance of good communication with requesters. This guidance, which is listed below, is available on OIP's website.

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As a further way of reinforcing the importance of outreach to requesters, OIP has also required agencies to report on their FOIA outreach activities in their Chief FOIA Officer Reports. As you know, the FOIA requires each agency Chief FOIA Officer to "review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing [the FOIA]." 5 U.S.C. § 552(j)(2)(D) (2014). In addition to asking about requester outreach, OIP has also asked agencies to report on the activities of their FOIA Requester Service Centers and FOIA Public Liaisons who interact with requesters every day. Moreover, this past year, OIP asked agencies to report on whether they offer a mechanism for requesters to provide feedback about their experience with the FOIA process. OIP posts all of the Chief FOIA Officer Report Guidelines on its Guidance page.

In their Chief FOIA Officer Reports, many agencies have detailed their efforts to engage in outreach with requesters. The following are just a few examples of these efforts that were highlighted in the Department's Summary of the 2016 Chief FOIA Officer Reports:

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As you can see, the Department very much appreciates the importance and benefits of working with requesters and employing good communication practices. OIP has fully embedded those principles in all of its different efforts to encourage compliance with the FOIA.

"Release to One is Release to All"

In July 2015, the Department launched a 6-month pilot program with seven volunteer agencies to assess the viability of a policy that would direct agencies to proactively post online their FOIA responses. The concept behind the pilot was to take the legal maxim under the FOIA that "release to one is release to all" and make it literally a reality. The goal of such a policy is to enable all citizens—not just those making individual requests—to have access to information released under the FOIA. Preparing documents for online posting involves time and resources to ensure that the material is available to all members of the public, including those with disabilities. Because that preparation necessarily involves agency time and resources, OIP conducted the pilot to capture metrics on the time and resources associated with implementing this policy, as well as to assess any impacts on interested stakeholders. At the conclusion of the pilot OIP prepared a comprehensive report, summarizing the metrics gathered and experiences learned by the pilot participants. Based on the metrics collected, input from stakeholders, and interviews and discussions with the pilot participants OIP made seven findings concerning the feasibility of implementing such a policy, which it included in its public report.

In conjunction with the signing of the FOIA Improvement Act of 2016, OIP took this initiative to the next step by working with the newly established Chief FOIA Officers Council to consider the lessons learned from the pilot and to get further input on issues critical to a proposed government-wide "Release to One is a Release to All" policy. This effort included assessing the impact on investigative journalism, as well as how best to address technological and resource challenges. OIP held two Chief FOIA Officer Council meetings in July and September of 2016, both of which were open to the public. A recap of the meetings, and all of the material from the meetings, can be found on the Chief FOIA Officer Council page of OIP's website.

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OIP is continuing to encourage agencies to proactively post information of interest to the public. Indeed, several agencies reported in their 2017 Chief FOIA Officer Reports that they are already implementing the “Release to One is a Release to All” presumption. Moreover, as discussed above, in accordance with the FOIA Improvement Act of 2016 agencies are required to post FOIA-processed records once they have been requested three times and so those FOIA-processed records are now being made available to all through that public posting.

Defining a “Record”

In response to your questions about OIP’s guidance on defining a “record” for purposes of responding to FOIA requests, that guidance is rooted in the guiding principles provided by the Court of Appeals for the District of Columbia Circuit in *American Immigration Lawyers Association (AILA) v. EOIR*, 830 F.3d 667, 678 (2016), as well as the definition of a record found in the FOIA’s sister statute, the Privacy Act of 1974. Like the FOIA, the Privacy Act has an access provision and is contained within 5 U.S.C. § 552 as part of the Administrative Procedure Act.

In *AILA* the plaintiff submitted a request to the agency for records regarding complaints made against immigration judges. The agency processed thousands of pages of complaint files, but made redactions of information that the agency deemed to be non-responsive to the FOIA request. *AILA* moved to compel production of the non-responsive material and, as the D.C. Circuit relayed, “[t]he district court, relying on its own past practice and that of other district courts in recent years, denied *AILA*’s motion.” Indeed, as noted in OIP’s guidance, for many years it was common practice for agencies to process only those portions of a document that are responsive to the topic of the request and to redact the other portions as “non-responsive” or “outside the scope.” This is clearly evidenced in the many court decisions where this practice was affirmed. See *Welby v. HHS*, 2016 WL 1718263, at *8 (S.D.N.Y. Apr. 27, 2016) (finding that the agency did not improperly redact portions of a document because the subject matter was unrelated to the FOIA request or fell outside the time period provided in the FOIA request);

Gahagan v. USCIS, 147 F.Supp.3d 613 (E.D. La 2015) (finding that the agency lawfully withheld, from otherwise responsive documents, nonresponsive notes about the processing of the request); *Meniffee v. U.S. Dep't of the Interior*, 931 F. Supp. 2d 149, 167 (D.D.C. 2013) (finding that redactions of information outside the scope of the request was not improper, even if not exempted from FOIA disclosure); *Pub. Investors Arb. Bar Ass'n v. S.E.C.*, 930 F. Supp. 2d 55, 72 (D.D.C. 2013) (concluding that, "it is elementary that an agency's decision to withhold non-responsive material is not a violation of the FOIA"); *Ctr. for Biological Diversity v. OMB*, No. 07-04997, 2009 WL 1246690, at *5 (N.D. Cal. May 5, 2009) (finding that agency "is not required to produce information that is not responsive to a FOIA request"); *Cal. ex rel. Brown v. NHTSA*, No. 06-2654, 2007 WL 1342514, at *2 (N.D. Cal. May 8, 2007) (declining to order agency to disclose non-responsive information redacted from documents, and stating that "[a]n agency has no obligation to produce information that is not responsive to a FOIA request").

On appeal, the D.C. Circuit noted that the agency practice of redacting non-responsive information within responsive records was "a question of first impression" for the D.C. Circuit. Relying on the Supreme Court's ruling in *Milner v. Department of the Navy* that the FOIA's exemptions are "'exclusive' and must be 'narrowly construed,'" 562 U.S. 562, 565 (2011) (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973) & *FBI v. Abramson*, 456 U.S. 615, 630 (1982)), the D.C. Circuit ruled that "non-responsive redactions . . . find no home in FOIA's scheme." *AILA*, 830 F.3d at 677. OIP's guidance fully embraces and implements the D.C. Circuit's finding in *AILA* that once an agency identifies a record that is responsive to a request, it cannot redact information within that record based on the fact that it is non-responsive.

Significantly, in arriving at its conclusion the D.C. Circuit did not attempt to answer the important antecedent question of what a "record" is under the FOIA. *Id.* at 678. Indeed, it noted that the "practical significance of FOIA's command to disclose a responsive record as a unit (after deletion of exempt information) depends on how one conceives of a 'record.'" *Id.* The court in *AILA* noted that there is no definition of the term "record" in the definition section of the FOIA. *AILA*, 830 F.3d at 678.

While the court in *AILA* declined to examine the issue and provide a definition of a "record," for purposes of FOIA, some helpful principles did emerge from the court's opinion which form the basis of OIP's guidance. The court recognized that there are a range of ways to define what is a "record," and that it is the very process of searching for what has been requested by each requester that forms the basis for the determination. *See id.* While the court drew attention to a number of different disclosure statutes, the "record" definition from the Privacy Act is particularly relevant, given that the Privacy Act is the sister statute to the FOIA, often working in tandem with it. Indeed, both the FOIA and the Privacy Act are part of the Administrative Procedure Act, and both statutes contain rights of access to agency records. *See* 5 U.S.C. §§ 552(a)(3), 552a(d)(1). Additionally, unlike other Federal statutory definitions of the term "record," the Privacy Act definition allows for a content-based approach to the decision. Using the Privacy Act' definition of a record as an "item, collection, or grouping of information" allows agencies to understand as a practical matter what may be considered a single record when processing a request. Moreover, OIP's guidance stresses that the nature of a FOIA "record" is

defined by both the content of a document *and* the subject of the request, both of which must be considered in determining what is a record for the purposes of each individual FOIA request.

OIP's guidance was thoughtfully crafted to embrace the presumption of openness. The guidance helps ensure that requesters have efficient access to the records that they seek and that agency time and resources are not diverted from that task by reviewing records that were not requested. Spending resources to process records that the requester has not requested disadvantages all requesters by prolonging response times for everyone. A recent decision by the District Court for the District of Columbia affirmed this approach, with the court noting that "If an agency was forced to turn over a full manual or entire report every time a single page contained a responsive term, the amount of time, labor, and cost that would be required to review this purportedly 'responsive' material for exemptions would be exponential, hindering the agency's ability to process multiple requests efficiently or allocate its resources effectively." *Shapiro v. CIA*, No. 00019 (D.D.C. Mar. 21, 2017).

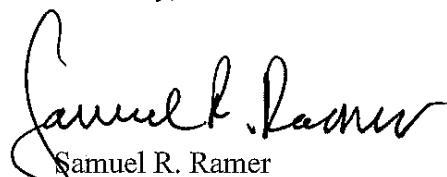
Additionally, once a record has been identified as responsive, the agency applies the presumption of openness in processing those records. OIP's guidance does not change this in any way. Indeed, the Department has long championed applying a presumption of openness to disclosure determinations even before these principles were codified in the statute. Looking to the definition of a record found in the Administrative Procedure Act, OIP's guidance provides workable principles to help agencies implement the precedent set in *ALA* in a manner that is not only consistent with the presumption of openness, but fully embraces it.

OIP's Litigation Role

From time to time OIP has assisted the United States Attorney's Office for the District of Columbia by taking on a handful of FOIA cases. These cases can involve both procedural matters and the proper application of exemptions. In accordance with 28 C.F.R. § 0.24(g) (2016), OIP may represent government agencies in FOIA litigation through the United States Attorney's Offices.

We appreciate your interest in the Department's and agencies' FOIA administration and 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 black ink, appearing to read "Samuel R. Ramer". The signature is fluid and cursive, with the first name "Samuel" being more prominent.

Samuel R. Ramer
Acting Assistant Attorney General



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 19 2017

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Feinstein:

This responds to your letter dated March 15, 2017 to the Director of the Department of Justice's (the Department) Office of Information Policy (OIP) concerning the implementation of the FOIA Improvement Act of 2016 and OIP's role in FOIA matters. As you know, the Department is responsible for encouraging government-wide compliance with the FOIA and we take this responsibility very seriously. The Department recently submitted to Congress its 2016 FOIA Litigation and Compliance Report,¹ which details a wide range of efforts undertaken by OIP this past calendar year to encourage compliance with the FOIA. We refer the Committee to that Report for a comprehensive description of OIP's activities in that regard. Set out below are answers to your specific questions. We are sending identical responses to the other Senators who joined in your letter.

FOIA Improvement Act of 2016

OIP has taken a number of steps to ensure that agencies are fully implementing all the recent changes made to the FOIA through the FOIA Improvement Act of 2016. The two changes to the statute referenced in your letter, i.e., codification of the "foreseeable harm standard" and codification of the practice of proactively posting records online once they have been requested three times, both originated with the Department of Justice and OIP has been encouraging compliance with these long-standing policies for a number of years. OIP has long included these topics in its government-wide FOIA trainings and has required agencies to report on their implementation through their Chief FOIA Officer Reports, which are publicly available on OIP's website.

After passage of the FOIA Improvement Act of 2016, OIP immediately took a number of steps to inform and educate agencies as to all of its provisions. OIP created a detailed summary of the law and a redline version of the FOIA showing the changes made and posted those resources to its website. OIP continued to assist agencies with implementation of the new

¹ Links to supporting documents have been embedded throughout the document and can be viewed by selecting the highlighted text. All links can be accessed by visiting <http://www.justice.gov/oip>.

statutory amendments by providing training, issuing guidance, and leading government-wide efforts in accordance with the various new provisions of the law. For example:

- OIP held a government-wide training event that was widely attended on the new FOIA amendments. The training provided an overview of the amendments, including codification of the foreseeable harm standard and the posting of frequently requested records. The training also provided an opportunity for agency FOIA personnel to ask OIP's Director questions about the FOIA Improvement Act. The slides from the training session are publicly available on OIP's website.
- OIP issued several guidance articles to agencies addressing the various changes made by the FOIA Improvement Act of 2016:
 - On July 18, 2016, OIP issued guidance to agencies on the new requirements for FOIA response letters, including the requirement to afford requesters ninety days to file an administrative appeal and the new notification requirements for extending the FOIA's time limits. The guidance included an implementation checklist to serve as a quick resource for FOIA professionals.
 - On September 8, 2016, OIP issued updated guidance on Agency FOIA Regulations, which incorporated the changes made by the FOIA Improvement Act of 2016. OIP also issued an updated Template for Agency FOIA Regulations for agencies to use as they update their regulations.
 - On October 6, 2016, OIP issued guidance on the new requirements for agency Annual FOIA Reports. OIP also updated the Department of Justice Handbook for Agency Annual FOIA Reports to reflect the changes made under the FOIA Improvement Act of 2016.
 - On October 19, 2016, OIP issued guidance on the new requirements further prohibiting the assessment of certain fees when the FOIA's time limits are not met. This guidance also included a "Decision Tree" designed to serve as a resource for FOIA professionals as they implement the new restrictions in real time.
- On July 22, 2016, OIP convened the first meeting of the Chief FOIA Officers (CFO) Council, created by the FOIA Improvement Act of 2016. As one of the Chairs for the Council, OIP coordinated this inaugural meeting to both immediately establish this new body and to receive feedback on the potential implementation of a "Release to One is a Release to All" presumption for FOIA responses. OIP's Director opened the meeting by providing an overview of the responsibilities of agency CFOs and then briefed the Council on the Department's six-month Proactive Disclosure Pilot that tested the "Release to One is a Release to All" concept.

Finally, OIP continues to provide direct, one-on-one counseling for agency personnel through its FOIA Counselor Service. Agency professionals continue to call OIP's FOIA Counselor service for advice on all aspects of the FOIA, including the new provisions from the FOIA Improvement Act of 2016.

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On appeal, the D.C. Circuit noted that the agency practice of redacting non-responsive information within responsive records was "a question of first impression" for the D.C. Circuit. Relying on the Supreme Court's ruling in *Milner v. Department of the Navy* that the FOIA's exemptions are "'exclusive' and must be 'narrowly construed,'" 562 U.S. 562, 565 (2011) (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973) & *FBI v. Abramson*, 456 U.S. 615, 630 (1982)), the D.C. Circuit ruled that "non-responsive redactions . . . find no home in FOIA's scheme." *AILA*, 830 F.3d at 677. OIP's guidance fully embraces and implements the D.C. Circuit's finding in *AILA* that once an agency identifies a record that is responsive to a request, it cannot redact information within that record based on the fact that it is non-responsive.

Significantly, in arriving at its conclusion the D.C. Circuit did not attempt to answer the important antecedent question of what a "record" is under the FOIA. *Id.* at 678. Indeed, it noted that the "practical significance of FOIA's command to disclose a responsive record as a unit (after deletion of exempt information) depends on how one conceives of a 'record.'" *Id.* The court in *AILA* noted that there is no definition of the term "record" in the definition section of the FOIA. *AILA*, 830 F.3d at 678.

While the court in *AILA* declined to examine the issue and provide a definition of a "record," for purposes of FOIA, some helpful principles did emerge from the court's opinion which form the basis of OIP's guidance. The court recognized that there are a range of ways to define what is a "record," and that it is the very process of searching for what has been requested by each requester that forms the basis for the determination. *See id.* While the court drew attention to a number of different disclosure statutes, the "record" definition from the Privacy Act is particularly relevant, given that the Privacy Act is the sister statute to the FOIA, often working in tandem with it. Indeed, both the FOIA and the Privacy Act are part of the Administrative Procedure Act, and both statutes contain rights of access to agency records. *See* 5 U.S.C. §§ 552(a)(3), 552a(d)(1). Additionally, unlike other Federal statutory definitions of the term "record," the Privacy Act definition allows for a content-based approach to the decision. Using the Privacy Act' definition of a record as an "item, collection, or grouping of information" allows agencies to understand as a practical matter what may be considered a single record when processing a request. Moreover, OIP's guidance stresses that the nature of a FOIA "record" is

defined by both the content of a document *and* the subject of the request, both of which must be considered in determining what is a record for the purposes of each individual FOIA request.

OIP's guidance was thoughtfully crafted to embrace the presumption of openness. The guidance helps ensure that requesters have efficient access to the records that they seek and that agency time and resources are not diverted from that task by reviewing records that were not requested. Spending resources to process records that the requester has not requested disadvantages all requesters by prolonging response times for everyone. A recent decision by the District Court for the District of Columbia affirmed this approach, with the court noting that "If an agency was forced to turn over a full manual or entire report every time a single page contained a responsive term, the amount of time, labor, and cost that would be required to review this purportedly 'responsive' material for exemptions would be exponential, hindering the agency's ability to process multiple requests efficiently or allocate its resources effectively." *Shapiro v. CIA*, No. 00019 (D.D.C. Mar. 21, 2017).

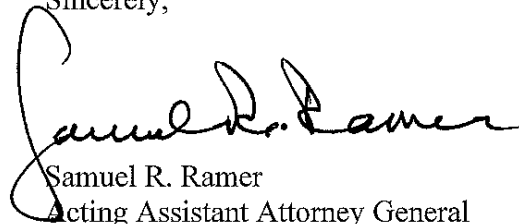
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We appreciate your interest in the Department's and agencies' FOIA administration and we hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,



Samuel R. Ramer
Acting Assistant Attorney General



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 19 2017

The Honorable John Cornyn
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Cornyn:

This responds to your letter dated March 15, 2017 to the Director of the Department of Justice's (the Department) Office of Information Policy (OIP) concerning the implementation of the FOIA Improvement Act of 2016 and OIP's role in FOIA matters. As you know, the Department is responsible for encouraging government-wide compliance with the FOIA and we take this responsibility very seriously. The Department recently submitted to Congress its 2016 FOIA Litigation and Compliance Report,¹ which details a wide range of efforts undertaken by OIP this past calendar year to encourage compliance with the FOIA. We refer the Committee to that Report for a comprehensive description of OIP's activities in that regard. Set out below are answers to your specific questions. We are sending identical responses to the other Senators who joined in your letter.

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After passage of the FOIA Improvement Act of 2016, OIP immediately took a number of steps to inform and educate agencies as to all of its provisions. OIP created a detailed summary of the law and a redline version of the FOIA showing the changes made and posted those resources to its website. OIP continued to assist agencies with implementation of the new

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statutory amendments by providing training, issuing guidance, and leading government-wide efforts in accordance with the various new provisions of the law. For example:

- OIP held a government-wide training event that was widely attended on the new FOIA amendments. The training provided an overview of the amendments, including codification of the foreseeable harm standard and the posting of frequently requested records. The training also provided an opportunity for agency FOIA personnel to ask OIP's Director questions about the FOIA Improvement Act. The slides from the training session are publicly available on OIP's website.
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Finally, OIP continues to provide direct, one-on-one counseling for agency personnel through its FOIA Counselor Service. Agency professionals continue to call OIP's FOIA Counselor service for advice on all aspects of the FOIA, including the new provisions from the FOIA Improvement Act of 2016.

Consolidated Online Request Portal

With the launch of FOIA.gov in 2011, OIP created a singular online resource that the public can use to learn about the FOIA, including where and how to make a request, with ready links to existing agency online portals, and descriptions of each agency. FOIA.gov also has a range of other helpful features, such as a search function that allows a potential requester to first search for publicly available information that is already online. FOIA.gov also displays graphically a wealth of data on all aspects of agencies' compliance with the FOIA. Over the past few years, as part of commitments in the United States' Second and Third Open Government National Action Plans, OIP has been working with both internal and external stakeholders to develop user and market research, as well as baseline requirements, for development of enhanced features on FOIA.gov. Among those features would be a consolidated or national FOIA request portal that would allow a member of the public to make a request to any agency directly from FOIA.gov.

Subsequent to the signing of the FOIA Improvement Act of 2016, OIP continued this work with the Office of Management and Budget (OMB) as a Cross-Agency Priority (CAP) goal. Working with OMB, we have secured \$1.3 million to develop the initial phase of the portal. OIP also has been working with the 18F Team at GSA to develop a Statement of Work for the project and the Department has now signed an inter-agency agreement with 18F. As you know, 18F is a technology service built in the spirit of tech startups and provides agencies with custom, user-centric solutions that address a client's unique challenges. We are nearing the kickoff of our new work on the portal in conjunction with 18F in the coming weeks. We expect the initial phase of the project to be completed in 2017; however, we will be employing an open and iterative development process throughout this project allowing stakeholders to be fully engaged from the very beginning. This will ensure that interested stakeholders, including requesters and agencies, can monitor, and weigh-in on, the progress of the portal as the project proceeds. The work being done on the portal will be available to view and interact with from the beginning and as it progresses towards a more final product, both requesters and agency users will be able to continue to work with it and test new features in each iteration of the development process.

Fostering Good Communication between Agencies and Requesters

OIP has engaged in a range of efforts over the years to encourage good communication and outreach with requesters across the government. Since 2010, OIP has issued multiple guidance articles encouraging practices that embrace the importance of good communication with requesters. This guidance, which is listed below, is available on OIP's website.

- The Importance of Good Communication with FOIA Requesters (March 1, 2010)

- The Importance of Good Communication with FOIA Requesters 2.0: Improving Both the Means and Content of Requester Communications (November 22, 2013)
- Limitations on Use of "Still-Interested" Inquiries (July 2, 2015)
 - Implementation Checklist for OIP Guidance on Limitations on Use of "Still-Interested" Inquiries

In addition to its guidance, each year OIP provides training to thousands of FOIA professionals across the government and has integrated the importance of good communication throughout those training programs. Further, in March 2015 OIP released a suite of new electronic training resources available for all agencies. As part of this suite of resources, in the e-Learning training for FOIA professionals an entire module focuses on good communication practices and working with requesters in a spirit of cooperation. This module includes simulated interactions between FOIA professionals and requesters illustrating the benefits of good communication.

Expanding on its training program, in May 2014 OIP launched a new Best Practices Workshop Series and invited experts from the government and the public to share successful strategies and best practices on specific topics in FOIA administration. All of the sessions and the best practices shared are recapped on OIP's website so that all government personnel can learn from them. Each year for the past three years, OIP has held a workshop that specifically focused on good communication and outreach with requesters:

- Best Practices from the Requester's Perspective (October 28, 2014)
- Customer Service and Dispute Resolution (February 18, 2015)
- Best Practices from the Requester's Perspective (April 25, 2016)

You can view all of the best practices discussed at these workshops on the Best Practices Workshop Series page of OIP's website. OIP's guidance, as well as the best practices shared in these workshops, emphasize communicating with requesters early on and then maintaining frequent and substantive communications throughout the FOIA process.

As a further way of reinforcing the importance of outreach to requesters, OIP has also required agencies to report on their FOIA outreach activities in their Chief FOIA Officer Reports. As you know, the FOIA requires each agency Chief FOIA Officer to "review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing [the FOIA]." 5 U.S.C. § 552(j)(2)(D) (2014). In addition to asking about requester outreach, OIP has also asked agencies to report on the activities of their FOIA Requester Service Centers and FOIA Public Liaisons who interact with requesters every day. Moreover, this past year, OIP asked agencies to report on whether they offer a mechanism for requesters to provide feedback about their experience with the FOIA process. OIP posts all of the Chief FOIA Officer Report Guidelines on its Guidance page.

In their Chief FOIA Officer Reports, many agencies have detailed their efforts to engage in outreach with requesters. The following are just a few examples of these efforts that were highlighted in the Department's Summary of the 2016 Chief FOIA Officer Reports:

- The Department of Homeland Security Privacy Office hosted an open forum meeting to discuss their FOIA process with requesters and to look for ways to improve.
- At the Department of Defense, in July 2016 the National Security Agency (NSA) hosted a roundtable with a representative of civil society. Additionally, in April 2016 NSA held a session with a frequent requester at the Intelligence Community FOIA Officers Information Day.
- The United States Postal Service (USPS) held a FOIA Forum in December 2015 that was open to postal employees and the public.

As you can see, the Department very much appreciates the importance and benefits of working with requesters and employing good communication practices. OIP has fully embedded those principles in all of its different efforts to encourage compliance with the FOIA.

"Release to One is Release to All"

In July 2015, the Department launched a 6-month pilot program with seven volunteer agencies to assess the viability of a policy that would direct agencies to proactively post online their FOIA responses. The concept behind the pilot was to take the legal maxim under the FOIA that "release to one is release to all" and make it literally a reality. The goal of such a policy is to enable all citizens—not just those making individual requests—to have access to information released under the FOIA. Preparing documents for online posting involves time and resources to ensure that the material is available to all members of the public, including those with disabilities. Because that preparation necessarily involves agency time and resources, OIP conducted the pilot to capture metrics on the time and resources associated with implementing this policy, as well as to assess any impacts on interested stakeholders. At the conclusion of the pilot OIP prepared a comprehensive report, summarizing the metrics gathered and experiences learned by the pilot participants. Based on the metrics collected, input from stakeholders, and interviews and discussions with the pilot participants OIP made seven findings concerning the feasibility of implementing such a policy, which it included in its public report.

In conjunction with the signing of the FOIA Improvement Act of 2016, OIP took this initiative to the next step by working with the newly established Chief FOIA Officers Council to consider the lessons learned from the pilot and to get further input on issues critical to a proposed government-wide "Release to One is a Release to All" policy. This effort included assessing the impact on investigative journalism, as well as how best to address technological and resource challenges. OIP held two Chief FOIA Officer Council meetings in July and September of 2016, both of which were open to the public. A recap of the meetings, and all of the material from the meetings, can be found on the Chief FOIA Officer Council page of OIP's website.

After giving careful consideration to the lessons learned from the pilot and the feedback received from both agencies and the public, OIP next published draft guidance concerning the proposed policy in the Federal Register for public comment. All comments were due by December 23, 2016. OIP received a range of thoughtful comments with competing suggestions from the public on several aspects of the policy, including the merits of whether a delay should be required before agencies post records. The Department is currently evaluating those comments and balancing them against the lessons learned from the pilot and agency feedback to determine the best path forward for advancing the principles behind the policy. The overwhelming concern raised by agencies with regard to the policy are the resources needed to prepare documents for posting by making them compliant with Section 508 of the Rehabilitation Act. Some agencies have reported concern that this diversion of their time and resources could impact their ability to respond to FOIA requests.

OIP is continuing to encourage agencies to proactively post information of interest to the public. Indeed, several agencies reported in their 2017 Chief FOIA Officer Reports that they are already implementing the “Release to One is a Release to All” presumption. Moreover, as discussed above, in accordance with the FOIA Improvement Act of 2016 agencies are required to post FOIA-processed records once they have been requested three times and so those FOIA-processed records are now being made available to all through that public posting.

Defining a “Record”

In response to your questions about OIP’s guidance on defining a “record” for purposes of responding to FOIA requests, that guidance is rooted in the guiding principles provided by the Court of Appeals for the District of Columbia Circuit in *American Immigration Lawyers Association (AILA) v. EOIR*, 830 F.3d 667, 678 (2016), as well as the definition of a record found in the FOIA’s sister statute, the Privacy Act of 1974. Like the FOIA, the Privacy Act has an access provision and is contained within 5 U.S.C. § 552 as part of the Administrative Procedure Act.

In *AILA* the plaintiff submitted a request to the agency for records regarding complaints made against immigration judges. The agency processed thousands of pages of complaint files, but made redactions of information that the agency deemed to be non-responsive to the FOIA request. AILA moved to compel production of the non-responsive material and, as the D.C. Circuit relayed, “[t]he district court, relying on its own past practice and that of other district courts in recent years, denied AILA’s motion.” Indeed, as noted in OIP’s guidance, for many years it was common practice for agencies to process only those portions of a document that are responsive to the topic of the request and to redact the other portions as “non-responsive” or “outside the scope.” This is clearly evidenced in the many court decisions where this practice was affirmed. See *Welby v. HHS*, 2016 WL 1718263, at *8 (S.D.N.Y. Apr. 27, 2016) (finding that the agency did not improperly redact portions of a document because the subject matter was unrelated to the FOIA request or fell outside the time period provided in the FOIA request);

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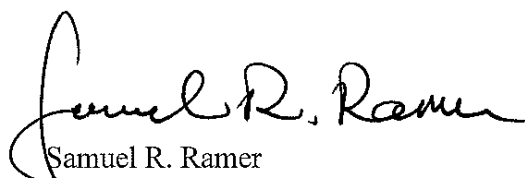
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Acting Assistant Attorney General



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Washington, D.C. 20530

APR 19 2017

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Finally, OIP continues to provide direct, one-on-one counseling for agency personnel through its FOIA Counselor Service. Agency professionals continue to call OIP's FOIA Counselor service for advice on all aspects of the FOIA, including the new provisions from the FOIA Improvement Act of 2016.

Consolidated Online Request Portal

With the launch of FOIA.gov in 2011, OIP created a singular online resource that the public can use to learn about the FOIA, including where and how to make a request, with ready links to existing agency online portals, and descriptions of each agency. FOIA.gov also has a range of other helpful features, such as a search function that allows a potential requester to first search for publicly available information that is already online. FOIA.gov also displays graphically a wealth of data on all aspects of agencies' compliance with the FOIA. Over the past few years, as part of commitments in the United States' Second and Third Open Government National Action Plans, OIP has been working with both internal and external stakeholders to develop user and market research, as well as baseline requirements, for development of enhanced features on FOIA.gov. Among those features would be a consolidated or national FOIA request portal that would allow a member of the public to make a request to any agency directly from FOIA.gov.

Subsequent to the signing of the FOIA Improvement Act of 2016, OIP continued this work with the Office of Management and Budget (OMB) as a Cross-Agency Priority (CAP) goal. Working with OMB, we have secured \$1.3 million to develop the initial phase of the portal. OIP also has been working with the 18F Team at GSA to develop a Statement of Work for the project and the Department has now signed an inter-agency agreement with 18F. As you know, 18F is a technology service built in the spirit of tech startups and provides agencies with custom, user-centric solutions that address a client's unique challenges. We are nearing the kickoff of our new work on the portal in conjunction with 18F in the coming weeks. We expect the initial phase of the project to be completed in 2017; however, we will be employing an open and iterative development process throughout this project allowing stakeholders to be fully engaged from the very beginning. This will ensure that interested stakeholders, including requesters and agencies, can monitor, and weigh-in on, the progress of the portal as the project proceeds. The work being done on the portal will be available to view and interact with from the beginning and as it progresses towards a more final product, both requesters and agency users will be able to continue to work with it and test new features in each iteration of the development process.

Fostering Good Communication between Agencies and Requesters

OIP has engaged in a range of efforts over the years to encourage good communication and outreach with requesters across the government. Since 2010, OIP has issued multiple guidance articles encouraging practices that embrace the importance of good communication with requesters. This guidance, which is listed below, is available on OIP's website.

- The Importance of Good Communication with FOIA Requesters (March 1, 2010)

- The Importance of Good Communication with FOIA Requesters 2.0: Improving Both the Means and Content of Requester Communications (November 22, 2013)
- Limitations on Use of "Still-Interested" Inquiries (July 2, 2015)
 - Implementation Checklist for OIP Guidance on Limitations on Use of "Still-Interested" Inquiries

In addition to its guidance, each year OIP provides training to thousands of FOIA professionals across the government and has integrated the importance of good communication throughout those training programs. Further, in March 2015 OIP released a suite of new electronic training resources available for all agencies. As part of this suite of resources, in the e-Learning training for FOIA professionals an entire module focuses on good communication practices and working with requesters in a spirit of cooperation. This module includes simulated interactions between FOIA professionals and requesters illustrating the benefits of good communication.

Expanding on its training program, in May 2014 OIP launched a new Best Practices Workshop Series and invited experts from the government and the public to share successful strategies and best practices on specific topics in FOIA administration. All of the sessions and the best practices shared are recapped on OIP's website so that all government personnel can learn from them. Each year for the past three years, OIP has held a workshop that specifically focused on good communication and outreach with requesters:

- Best Practices from the Requester's Perspective (October 28, 2014)
- Customer Service and Dispute Resolution (February 18, 2015)
- Best Practices from the Requester's Perspective (April 25, 2016)

You can view all of the best practices discussed at these workshops on the Best Practices Workshop Series page of OIP's website. OIP's guidance, as well as the best practices shared in these workshops, emphasize communicating with requesters early on and then maintaining frequent and substantive communications throughout the FOIA process.

As a further way of reinforcing the importance of outreach to requesters, OIP has also required agencies to report on their FOIA outreach activities in their Chief FOIA Officer Reports. As you know, the FOIA requires each agency Chief FOIA Officer to "review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing [the FOIA]." 5 U.S.C. § 552(j)(2)(D) (2014). In addition to asking about requester outreach, OIP has also asked agencies to report on the activities of their FOIA Requester Service Centers and FOIA Public Liaisons who interact with requesters every day. Moreover, this past year, OIP asked agencies to report on whether they offer a mechanism for requesters to provide feedback about their experience with the FOIA process. OIP posts all of the Chief FOIA Officer Report Guidelines on its Guidance page.

In their Chief FOIA Officer Reports, many agencies have detailed their efforts to engage in outreach with requesters. The following are just a few examples of these efforts that were highlighted in the Department's Summary of the 2016 Chief FOIA Officer Reports:

- The Department of Homeland Security Privacy Office hosted an open forum meeting to discuss their FOIA process with requesters and to look for ways to improve.
- At the Department of Defense, in July 2016 the National Security Agency (NSA) hosted a roundtable with a representative of civil society. Additionally, in April 2016 NSA held a session with a frequent requester at the Intelligence Community FOIA Officers Information Day.
- The United States Postal Service (USPS) held a FOIA Forum in December 2015 that was open to postal employees and the public.

As you can see, the Department very much appreciates the importance and benefits of working with requesters and employing good communication practices. OIP has fully embedded those principles in all of its different efforts to encourage compliance with the FOIA.

"Release to One is Release to All"

In July 2015, the Department launched a 6-month pilot program with seven volunteer agencies to assess the viability of a policy that would direct agencies to proactively post online their FOIA responses. The concept behind the pilot was to take the legal maxim under the FOIA that "release to one is release to all" and make it literally a reality. The goal of such a policy is to enable all citizens—not just those making individual requests—to have access to information released under the FOIA. Preparing documents for online posting involves time and resources to ensure that the material is available to all members of the public, including those with disabilities. Because that preparation necessarily involves agency time and resources, OIP conducted the pilot to capture metrics on the time and resources associated with implementing this policy, as well as to assess any impacts on interested stakeholders. At the conclusion of the pilot OIP prepared a comprehensive report, summarizing the metrics gathered and experiences learned by the pilot participants. Based on the metrics collected, input from stakeholders, and interviews and discussions with the pilot participants OIP made seven findings concerning the feasibility of implementing such a policy, which it included in its public report.

In conjunction with the signing of the FOIA Improvement Act of 2016, OIP took this initiative to the next step by working with the newly established Chief FOIA Officers Council to consider the lessons learned from the pilot and to get further input on issues critical to a proposed government-wide "Release to One is a Release to All" policy. This effort included assessing the impact on investigative journalism, as well as how best to address technological and resource challenges. OIP held two Chief FOIA Officer Council meetings in July and September of 2016, both of which were open to the public. A recap of the meetings, and all of the material from the meetings, can be found on the Chief FOIA Officer Council page of OIP's website.

After giving careful consideration to the lessons learned from the pilot and the feedback received from both agencies and the public, OIP next published draft guidance concerning the proposed policy in the Federal Register for public comment. All comments were due by December 23, 2016. OIP received a range of thoughtful comments with competing suggestions from the public on several aspects of the policy, including the merits of whether a delay should be required before agencies post records. The Department is currently evaluating those comments and balancing them against the lessons learned from the pilot and agency feedback to determine the best path forward for advancing the principles behind the policy. The overwhelming concern raised by agencies with regard to the policy are the resources needed to prepare documents for posting by making them compliant with Section 508 of the Rehabilitation Act. Some agencies have reported concern that this diversion of their time and resources could impact their ability to respond to FOIA requests.

OIP is continuing to encourage agencies to proactively post information of interest to the public. Indeed, several agencies reported in their 2017 Chief FOIA Officer Reports that they are already implementing the “Release to One is a Release to All” presumption. Moreover, as discussed above, in accordance with the FOIA Improvement Act of 2016 agencies are required to post FOIA-processed records once they have been requested three times and so those FOIA-processed records are now being made available to all through that public posting.

Defining a “Record”

In response to your questions about OIP’s guidance on defining a “record” for purposes of responding to FOIA requests, that guidance is rooted in the guiding principles provided by the Court of Appeals for the District of Columbia Circuit in *American Immigration Lawyers Association (AILA) v. EOIR*, 830 F.3d 667, 678 (2016), as well as the definition of a record found in the FOIA’s sister statute, the Privacy Act of 1974. Like the FOIA, the Privacy Act has an access provision and is contained within 5 U.S.C. § 552 as part of the Administrative Procedure Act.

In *AILA* the plaintiff submitted a request to the agency for records regarding complaints made against immigration judges. The agency processed thousands of pages of complaint files, but made redactions of information that the agency deemed to be non-responsive to the FOIA request. AILA moved to compel production of the non-responsive material and, as the D.C. Circuit relayed, “[t]he district court, relying on its own past practice and that of other district courts in recent years, denied AILA’s motion.” Indeed, as noted in OIP’s guidance, for many years it was common practice for agencies to process only those portions of a document that are responsive to the topic of the request and to redact the other portions as “non-responsive” or “outside the scope.” This is clearly evidenced in the many court decisions where this practice was affirmed. See *Welby v. HHS*, 2016 WL 1718263, at *8 (S.D.N.Y. Apr. 27, 2016) (finding that the agency did not improperly redact portions of a document because the subject matter was unrelated to the FOIA request or fell outside the time period provided in the FOIA request);

Gahagan v. USCIS, 147 F.Supp.3d 613 (E.D. La 2015) (finding that the agency lawfully withheld, from otherwise responsive documents, nonresponsive notes about the processing of the request); *Meniffee v. U.S. Dep't of the Interior*, 931 F. Supp. 2d 149, 167 (D.D.C. 2013) (finding that redactions of information outside the scope of the request was not improper, even if not exempted from FOIA disclosure); *Pub. Investors Arb. Bar Ass'n v. S.E.C.*, 930 F. Supp. 2d 55, 72 (D.D.C. 2013) (concluding that, "it is elementary that an agency's decision to withhold non-responsive material is not a violation of the FOIA"); *Ctr. for Biological Diversity v. OMB*, No. 07-04997, 2009 WL 1246690, at *5 (N.D. Cal. May 5, 2009) (finding that agency "is not required to produce information that is not responsive to a FOIA request"); *Cal. ex rel. Brown v. NHTSA*, No. 06-2654, 2007 WL 1342514, at *2 (N.D. Cal. May 8, 2007) (declining to order agency to disclose non-responsive information redacted from documents, and stating that "[a]n agency has no obligation to produce information that is not responsive to a FOIA request").

On appeal, the D.C. Circuit noted that the agency practice of redacting non-responsive information within responsive records was "a question of first impression" for the D.C. Circuit. Relying on the Supreme Court's ruling in *Milner v. Department of the Navy* that the FOIA's exemptions are "'exclusive' and must be 'narrowly construed,'" 562 U.S. 562, 565 (2011) (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973) & *FBI v. Abramson*, 456 U.S. 615, 630 (1982)), the D.C. Circuit ruled that "non-responsive redactions . . . find no home in FOIA's scheme." *AILA*, 830 F.3d at 677. OIP's guidance fully embraces and implements the D.C. Circuit's finding in *AILA* that once an agency identifies a record that is responsive to a request, it cannot redact information within that record based on the fact that it is non-responsive.

Significantly, in arriving at its conclusion the D.C. Circuit did not attempt to answer the important antecedent question of what a "record" is under the FOIA. *Id.* at 678. Indeed, it noted that the "practical significance of FOIA's command to disclose a responsive record as a unit (after deletion of exempt information) depends on how one conceives of a 'record.'" *Id.* The court in *AILA* noted that there is no definition of the term "record" in the definition section of the FOIA. *AILA*, 830 F.3d at 678.

While the court in *AILA* declined to examine the issue and provide a definition of a "record," for purposes of FOIA, some helpful principles did emerge from the court's opinion which form the basis of OIP's guidance. The court recognized that there are a range of ways to define what is a "record," and that it is the very process of searching for what has been requested by each requester that forms the basis for the determination. *See id.* While the court drew attention to a number of different disclosure statutes, the "record" definition from the Privacy Act is particularly relevant, given that the Privacy Act is the sister statute to the FOIA, often working in tandem with it. Indeed, both the FOIA and the Privacy Act are part of the Administrative Procedure Act, and both statutes contain rights of access to agency records. *See* 5 U.S.C. §§ 552(a)(3), 552a(d)(1). Additionally, unlike other Federal statutory definitions of the term "record," the Privacy Act definition allows for a content-based approach to the decision. Using the Privacy Act's definition of a record as an "item, collection, or grouping of information" allows agencies to understand as a practical matter what may be considered a single record when processing a request. Moreover, OIP's guidance stresses that the nature of a FOIA "record" is

defined by both the content of a document *and* the subject of the request, both of which must be considered in determining what is a record for the purposes of each individual FOIA request.

OIP's guidance was thoughtfully crafted to embrace the presumption of openness. The guidance helps ensure that requesters have efficient access to the records that they seek and that agency time and resources are not diverted from that task by reviewing records that were not requested. Spending resources to process records that the requester has not requested disadvantages all requesters by prolonging response times for everyone. A recent decision by the District Court for the District of Columbia affirmed this approach, with the court noting that "If an agency was forced to turn over a full manual or entire report every time a single page contained a responsive term, the amount of time, labor, and cost that would be required to review this purportedly 'responsive' material for exemptions would be exponential, hindering the agency's ability to process multiple requests efficiently or allocate its resources effectively." *Shapiro v. CIA*, No. 00019 (D.D.C. Mar. 21, 2017).

Additionally, once a record has been identified as responsive, the agency applies the presumption of openness in processing those records. OIP's guidance does not change this in any way. Indeed, the Department has long championed applying a presumption of openness to disclosure determinations even before these principles were codified in the statute. Looking to the definition of a record found in the Administrative Procedure Act, OIP's guidance provides workable principles to help agencies implement the precedent set in *AILA* in a manner that is not only consistent with the presumption of openness, but fully embraces it.

OIP's Litigation Role

From time to time OIP has assisted the United States Attorney's Office for the District of Columbia by taking on a handful of FOIA cases. These cases can involve both procedural matters and the proper application of exemptions. In accordance with 28 C.F.R. § 0.24(g) (2016), OIP may represent government agencies in FOIA litigation through the United States Attorney's Offices.

We appreciate your interest in the Department's and agencies' FOIA administration and 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 black ink, reading "Samuel R. Ramer". The signature is fluid and cursive, with the first name "Samuel" being the most prominent part.

Samuel R. Ramer
Acting Assistant Attorney General



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 21 2017

The Honorable Michael F. Bennet
United States Senate
Washington, DC 20510

Dear Senator Bennet:

This responds to your letter dated March 15, 2017 to the Director of the Department of Justice's (the Department) Office of Information Policy (OIP), inquiring about the Department's regulations, guidance, processes, and standards for implementing the Freedom of Information Act (FOIA). As you know, the FOIA gives the Department the important responsibility of encouraging government-wide compliance with the law and we take this responsibility very seriously. The Department recently submitted to Congress its [2016 FOIA Litigation and Compliance Report](#),¹ which details a wide range of efforts undertaken by OIP this past calendar year to encourage compliance with the FOIA. We refer you to that Report for a comprehensive description of OIP's activities in that regard.

FOIA Improvement Act of 2016

Given our unique role in FOIA, the Department always strives to lead by example. We have taken a number of steps to not only assist agencies across the government in implementing the recent amendments to FOIA, but also to ensure that the Department itself has implemented the changes as well. Before detailing these many efforts, we note that several of the changes made by the FOIA Improvement Act of 2016 codified longstanding DOJ policies that were already fully embedded in the Department's practices and OIP's government-wide trainings, advice and reporting requirements. For example, the presumption of openness and the foreseeable harm standard were established in the Department's [2009 FOIA Guidelines](#). For a number of years, OIP asked agencies to give examples of their discretionary releases in their Chief FOIA Officer Reports, and each year, the Department's Chief FOIA Officer Report contained a wealth of such examples. All of the Chief FOIA Officer Reports, including the Department's, can be found on the [Reports](#) page of OIP's website. Additionally, the new statutory requirement that agencies post online the releasable portions of records that have been requested three or more times—commonly referred to as the "Rule of 3"—was also previously established through OIP [guidance](#).

¹ All links, noted in highlighted text, can be accessed by visiting <http://www.justice.gov/oip>.

After passage of the FOIA Improvement Act of 2016, OIP immediately took a number of steps to inform and educate agencies as to all of its provisions. OIP created a [detailed summary](#) of the law and a [redline version](#) of the FOIA showing the changes made and posted those resources to its website. OIP continued to assist agencies with implementation of the new statutory amendments by providing training, issuing guidance, and leading government-wide efforts in accordance with the various new provisions of the law. For example:

- OIP held a [government-wide training event](#) that was widely attended on the new amendments to FOIA. The training provided an overview of the amendments, including codification of the foreseeable harm standard and the posting of frequently requested records. The training also provided an opportunity for agency FOIA personnel to ask OIP's Director questions about the FOIA Improvement Act. The [slides](#) from the training session are publicly available on OIP's website.
- OIP issued several guidance articles to agencies addressing the various changes made by the FOIA Improvement Act of 2016:
 - On July 18, 2016, OIP issued [guidance](#) to agencies on the new requirements for FOIA response letters, including the requirement to afford requesters ninety days to file administrative appeals and the new notification requirements for extending the FOIA's time limits. The guidance included an implementation [checklist](#) to serve as a quick resource for FOIA professionals.
 - On September 8, 2016, OIP issued [updated guidance](#) on Agency FOIA Regulations, which incorporated the changes made by the FOIA Improvement Act of 2016. OIP also issued an updated [Template for Agency FOIA Regulations](#) for agencies to use as they update their regulations.
 - On October 6, 2016, OIP issued [guidance](#) on the new requirements for agency Annual FOIA Reports. OIP also updated the [Department of Justice Handbook for Agency Annual FOIA Reports](#) to reflect the changes made in the FOIA Improvement Act of 2016.
 - On October 19, 2016, OIP issued [guidance](#) on the new requirements, further prohibiting the assessment of certain fees when the FOIA's time limits are not met. This guidance also included a "[Decision Tree](#)" designed to serve as a resource for FOIA professionals as they implement the new restrictions in real time.

OIP will continue to issue guidance as needed to assist agencies with their implementation of the FOIA's new requirements. With regard to your specific question concerning new guidance on agency searches for records, please note that the FOIA Improvement Act of 2016 did not change any aspect of how agencies conduct searches, and therefore, OIP did not provide any written instructions or training materials pertaining to searches as a result of the amendments.

- On July 22, 2016, OIP convened the first meeting of the Chief FOIA Officers (CFO) Council, created by the FOIA Improvement Act of 2016. As one of the Chairs for the Council, OIP coordinated this inaugural meeting to both immediately establish this new body and to receive feedback on the potential implementation of a “Release to One is a Release to All” presumption for FOIA responses. OIP’s Director opened the meeting by providing an overview of the responsibilities of agency CFOs and then briefed the Council on the Department’s six-month Proactive Disclosure Pilot that tested the “Release to One is a Release to All” concept.
- OIP continues to provide direct, one-on-one counseling for agency personnel through its [FOIA Counselor Service](#). Agency professionals continue to call OIP’s FOIA Counselor Service for advice on all aspects of the FOIA, including the new provisions from the FOIA Improvement Act of 2016.

All of the guidance, training, and other resources created by OIP are applicable and available to both other federal agencies and to the Department’s own components. OIP also provided a dedicated training session on the amendments for the Department’s components during the Department’s Annual FOIA Conference in February 2017.

Additionally, as you know, the FOIA Improvement Act of 2016 required agencies to review their regulations and to update them in accordance with the new amendments. As noted above, OIP issued updated guidance to agencies to assist them with this mandate. On January 4, 2017, the Department issued an [interim final rule](#) updating its own FOIA regulations. *See* 82 Fed. Reg. 725 (Jan. 4, 2017) (updating 28 C.F.R. Part 16). The rule took effect on February 3, 2017 and was open for public comment until March 6, 2017. In accordance with the FOIA Improvement Act of 2016, the Department’s FOIA Regulations:

- provide requesters ninety days to administratively appeal an adverse determination, and
- require components to notify requesters about the availability of the component’s FOIA Public Liaison and the Office of Government Information Services (OGIS) at various stages throughout the request process.

Additionally, the Department updated the fee provisions of its regulations to include the new fee restrictions and exceptions for assessing fees and added a new provision regarding engaging in dispute resolution services provided by OGIS. Finally, the Department also updated its FOIA regulations to reflect recent case law that has affected the definitions of two fee categories (educational institutions and representatives of the news media) and streamlined the analysis for fee waiver determinations.

With regard to your questions about the number of requests received, processed, and backlogged, much like the government overall, the Department has experienced the challenge of unprecedented numbers of incoming requests. In the last fiscal year alone, the Department received 73,103 requests, which is the second most number of requests received by any agency

across the government. We are proud to report that the Department worked to meet this high demand of incoming requests by processing 71,584 requests, which was more than in any year since 2002,² which was prior to the relocation of the then Immigration and Naturalization Service (INS) to the Department of Homeland Security.³ Further, while processing a record high number of requests, the Department maintained a high release rate of 93.5% and closed its oldest requests, appeals, and consultations. Despite these impressive accomplishments, as a result of the increase in the number of incoming requests and a continued increase in the complexity of the requests received, the Department's overall request backlog increased to 10,644 requests. Even with the increase, however, the backlog amounts to less than 15% of the total number of requests received in Fiscal Year 2016. Our ability to address this backlog is, of course, tied to the resources available to us to fulfill our responsibilities.

For Fiscal Year 2016, the Department reported an estimated \$78,263,484 in total FOIA costs and 489.64 full-time and equivalent full-time FOIA staff.⁵ All of this data and much more is publicly reported in agency Annual FOIA Reports, set forth on the [Reports page](#) of OIP's website. Section V of the Annual FOIA Reports provides the numbers of FOIA requests received and processed; Section IX provides details about FOIA personnel and costs; and Section XII indicates the number of requests in the backlog. Additionally, all of the data from these reports can easily be retrieved, sorted, and compared through the Department's comprehensive government-wide resource, [FOIA.gov](#). FOIA.gov allows users to create custom reports and graphs for all agencies on all the data points going back to Fiscal Year 2010.

Finally, as indicated above, please note that all of the formal guidance issued by OIP is publicly available on the [Guidance](#) page of OIP's website. OIP also posts online many of the resources it provides agencies such as the [Department of Justice Guide to the Freedom of Information Act](#), Charts of [Qualifying](#) and [Cited](#) Exemption 3 Statutes, and [best practices](#) from its Best Practices Workshop Series. OIP publicizes on its blog, [FOIA Post](#), all of its scheduled trainings and events, and alerts readers any time its website is updated with new guidance or resources. In order to ensure agencies are notified of any new material issued by OIP, a subscription service is provided that can notify any user any time OIP posts a new blog. You may subscribe to this feed and receive real-time updates from OIP by clicking [here](#).

² Prior to 2009, agencies included in their Annual FOIA Reports the number of first-party requests processed solely under the Privacy Act. In accordance with [OIP's guidance](#), since 2009 agencies have only included Privacy Act requests in their numbers if the FOIA was utilized in any way to process the request. Impressively, the nearly 72,000 FOIA requests processed by the Department in Fiscal Year 2016 is more than the Department has processed in any year going back to 2002, including those years when Privacy Act requests were included in the Annual FOIA Report data.

³ On March 1, 2003, the functions of the INS were placed under three agencies within the Department of Homeland Security.

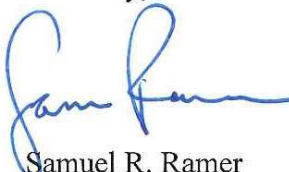
⁴ Over the past five fiscal years this figure has fluctuated from an estimated \$64 million to \$78 million.

⁵ Over the past five fiscal years this figure has fluctuated from approximately 470 staff to 529.

The Honorable Michael F. Bennet
Page Five

We appreciate your interest in the Department's and agencies' FOIA administration and 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 "Sam Ramer", is positioned above the printed name.

Samuel R. Ramer
Acting Assistant Attorney General

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

March 15, 2017

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:

We write to express our unified sense that compliance with both the letter and spirit of the Freedom of Information Act (FOIA) should be and always remain a top priority for any administration. Enacted over 50 years ago, FOIA is a critically important tool for Americans to ensure government transparency and accountability, as it establishes clear rules for informing the people about what their government is doing. Without FOIA, countless stories of government waste, fraud, and abuse, as well as important historical documents, would have remained in the dark.

Despite its successes, however, a culture of obstruction and reflexive secrecy across government has undermined FOIA. This has been the case under both Democratic and Republican administrations. Last year, a strong bipartisan and bicameral effort resulted in the enactment of the FOIA Improvement Act of 2016. This important piece of legislation accomplishes some of the most sweeping and meaningful improvements to FOIA in history. The amendments made by the FOIA Improvement Act of 2016 were guided by an overriding principle—to make government transparency the norm, not the exception.

The Senate Committee on the Judiciary has jurisdiction over—and is charged with conducting oversight of—FOIA. Complete implementation of FOIA's statutory requirements, including its most recent amendments, is necessary to ensure that the public can exercise its right to know. Accordingly, we request detailed information regarding the implementation of the FOIA Improvement Act of 2016, as well as information regarding your office's role in FOIA matters. Please provide a numbered, written response to the following questions by no later than April 5, 2017.

1. What specific actions has the Office of Information Policy (OIP) taken or does it intend to take to ensure government-wide compliance with the “foreseeable harm standard,” as codified by the FOIA Improvement Act of 2016?
2. What specific actions has OIP taken or does it intend to take to ensure government-wide compliance with the FOIA Improvement Act's requirement that agencies proactively make available certain categories of information “for public inspection in an electronic format”?

3. 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.”¹
- a. What is the current status of, and what specific actions has OIP (or the Department of Justice more broadly) taken in furtherance of, this requirement?
 - b. Please explain in detail the status of funding for the portal, as well as OIP’s and the Department’s specific involvement in the portal’s development.
 - c. Please provide a specific date upon which requesters should anticipate the availability of the portal.
4. What specific actions, if any, has OIP taken or does it intend to take to encourage a more customer-friendly, collaborative FOIA response process? Has OIP identified agency best practices that encourage communication and dialogue early in the FOIA request process between requesters and processors, and if so, what is OIP doing to ensure that these practices are encouraged and ultimately adopted government-wide?
5. Please provide a comprehensive and detailed update on the status and anticipated finalization date of the Department’s “Release to One, Release to All” policy. What specific obstacles, if any, has OIP identified in finalizing and encouraging government-wide implementation of this policy?
6. On January 11, 2017, OIP issued guidance to agencies entitled “Defining a ‘Record’ Under the FOIA.” The guidance document, issued in response to a 2016 U.S. Court of Appeals for the District of Columbia Circuit decision,² instructs agencies “to ensure that they are carefully defining what is a ‘record’ responsive to a request so that they are not unnecessarily processing material that is not what the requester sought.”³ It further urges agencies to “use the definition of record found in the Privacy Act.... Thus, a ‘record’ can potentially constitute an entire document, a single page of a multipage document, or an individual paragraph of a document.”⁴ On its face, this guidance appears troubling, inconsistent with both the letter and spirit of FOIA, and seemingly provides agencies with significant discretion in avoiding disclosure of information that should otherwise be publicly made available.
- a. Please explain the legal basis, if any, *within* 5 U.S.C. §552 that justifies this interpretation of what constitutes a “record” for purposes of responding to FOIA requests, including OIP’s determination that the Privacy Act’s definition of a “record” is the appropriate definition for agencies to utilize, as opposed to other definitions in the United States Code.

¹ 5 U.S.C. §552(m)(1).

² *American Immigration Lawyers Association v. EOIR*, 830 F.3d 667 (D.C. Cir. 2016).

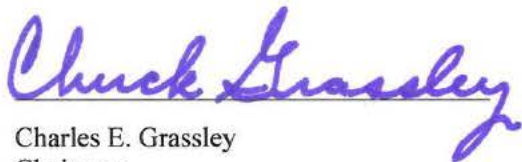
³ “Defining a ‘Record’ Under the FOIA,” Office of Information Policy, U.S. Dept. of Justice (Jan. 11, 2017) available at https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia (last visited Mar. 10, 2017).

⁴ *Id.*

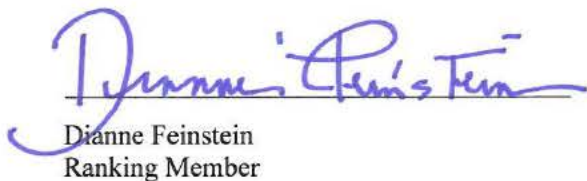
- b. Please explain the factual basis for OIP's statement that "a common practice has been for an agency to process only the responsive portion and redact the other portions as 'non-responsive' or 'outside the scope' of the request."
 - c. Please explain how this guidance is consistent with or advances a government-wide "presumption of openness."
7. According to the Department's website, OIP "handles the defense of certain FOIA litigation cases" and "Defend[s] certain FOIA matters in litigation." We would like to gain a clearer understanding of OIP's specific litigation functions and roles.
- a. Please explain the types of litigation matters that OIP "handles" or defends and the nature of its involvement.
 - b. Please explain the factors and considerations that determine whether OIP will provide assistance in, or have primary responsibility for, handling or defending a FOIA litigation case.

Thank you for your prompt attention to this important matter. If you have any questions, please contact Kyle McCollum of the Majority Staff at (202) 224-5225 or Lartease Tiffith of the Minority Staff at (202) 224-(b)(6).

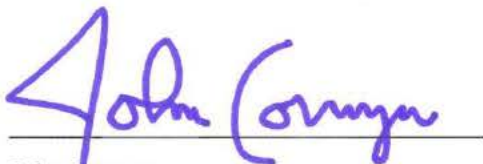
Sincerely,



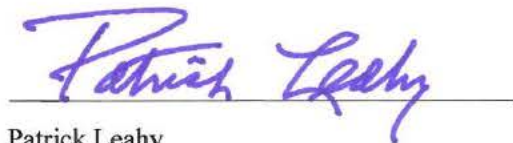
Charles E. Grassley
Chairman



Dianne Feinstein
Ranking Member



John Cornyn
Chairman
Subcommittee on Border Security and Immigration



Patrick Leahy
Former Ranking Member

Brinkmann, Vanessa R (OIP)

From: Brinkmann, Vanessa R (OIP)
Sent: Friday, March 31, 2017 1:12 PM
To: Hibbard, Douglas (OIP); Day, Laurie (OIP); Villanueva, Valeree A (OIP)
Cc: Mallon, Carmen L (OIP); Tennant, Sara (OIP)
Subject: Language change

Guys – going forward I don't think we should include the "none of the material is appropriate for release as a matter of discretion" standard language in our responses anymore. Given the recent statutory changes codifying the foreseeable harm standard, this language will become less and less applicable and thus I think it is better to just take it out across the board. If we think a particular case warrants its inclusion we can consider that, but generally speaking this statement is becoming obsolete.

Sara could you address this in our samples?

Thanks!
V

O'Neill, Sean (OIP)

From: O'Neill, Sean (OIP)
Sent: Friday, September 2, 2016 4:21 PM
To: Troiani, Christina D (OIP); Fiorillo, Andrew (OIP); Cunningham, Marilyn (OIP); Hurd, Matthew (OIP); Breyan, Jonathan (OIP); Ziese, Timothy (OIP); Castellano, Daniel (OIP); Farace, Jessica (OIP); Santiago, Rowena (OIP); Warzynski, Jillian (OIP); Barrett, Rianna (OIP); Austin, Patrick (OIP); Causey, Daniel (OIP)
Subject: Reminder on 7A appeals

As some of you remember, we used to make the component spell out a 7A harm for each 7A appeal that we received. In recent years, we have moved more in the direction of a presumption of harm for an investigation that is truly active and ongoing.

Just a reminder, though, especially with the new foreseeable harm standard- your blitz should include *some* discussion of the harm. If the component says nothing except that the file is pending, the blitz should say something more than that (i.e. the type of investigation and/or the stage of the investigation). In other words, enough for the reviewer to see that the investigation truly is active and ongoing and not just technically "pending."

O'Neill, Sean (OIP)

From: O'Neill, Sean (OIP)
Sent: Wednesday, August 24, 2016 2:52 PM
To: Hurd, Matthew (OIP); Troiani, Christina D (OIP)
Subject: RE: Updated Draft Foreseeable Harm Language

OK, let's handle as you suggest.

From: Hurd, Matthew (OIP)
Sent: Wednesday, August 24, 2016 2:45 PM
To: O'Neill, Sean (OIP); Troiani, Christina D (OIP)
Subject: RE: Updated Draft Foreseeable Harm Language

I struggled with exemption 4. But I agree with you.

Regarding, 6 and 7C, the PA does not prohibit the release of PA protected information if that information is required to be released under the FOIA. If that is the case, wouldn't we have to apply the foreseeable harm standard to those exemptions? I personally cannot think of any situation where the foreseeable harm analysis would tip the scales in favor of releasing PII, but I think that it should be a part of the analysis.

Matthew W. Hurd
Office of Information Policy
Phone (202) 616-5463

From: O'Neill, Sean (OIP)
Sent: Wednesday, August 24, 2016 2:42 PM
To: Hurd, Matthew (OIP); Troiani, Christina D (OIP)
Subject: RE: Updated Draft Foreseeable Harm Language

Thanks Matt (b)(5) For
Exemption 4, I believe that the Trade Secrets Act has been held by courts to prohibit the release of any
record that would be withholdable under Ex. 4 (b)(5)

(b)(5)

(b)(5)

From: Hurd, Matthew (OIP)
Sent: Wednesday, August 24, 2016 2:15 PM

To: O'Neill, Sean (OIP); Troiani, Christina D (OIP)
Subject: Updated Draft Foreseeable Harm Language

Hi Sean and Christina

I have now updated our standard language to include the foreseeable harm standard. To make review easier, I have bolded the changes and made them red. These changes will be found in certain areas in the PA section and the exemption sections.

I have attached the word file.

Thanks!

Matthew W. Hurd

Associate Chief, Administrative Appeals Staff
Office of Information Policy
U.S. Department of Justice
Phone (202) 616-5463
Fax (202) 514-1009

<< File: Appeals Language Database - Word (With Proposed Foreseeable Harm Language).docx >>

O'Neill, Sean (OIP)

From: O'Neill, Sean (OIP)
Sent: Thursday, August 4, 2016 3:20 PM
To: Troiani, Christina D (OIP); Fiorillo, Andrew (OIP); Cunningham, Marilyn (OIP); Hurd, Matthew (OIP); Breyan, Jonathan (OIP); Ziese, Timothy (OIP); Castellano, Daniel (OIP); Farace, Jessica (OIP); Santiago, Rowena (OIP); Warzynski, Jillian (OIP); Barrett, Rianna (OIP); Austin, Patrick (OIP); Causey, Daniel (OIP)
Subject: Foreseeable harm

We are learning as we go in terms of applying the foreseeable harm standard. One important point-you do not need to discuss foreseeable harm where the release of the record would be prohibited by law. That is an express carve out in the statute. So, for instance, Ex. 1 information cannot be released because an executive order prohibits the release. For Ex. 3, another law prohibits the release. Most of the time with Ex. 4, the Trade Secrets Act prohibits the release. (b)(5)

[REDACTED]



UNITED STATES DEPARTMENT *of* JUSTICE

Exemption 5

The Civil Discovery Privileges



FOIA Improvement Act of 2016

- *Sunset Provision* for the deliberative process privilege
 - The privilege “shall not apply to records created 25 years or more before the date on which the records were requested.”
- Should not withhold information under Exemption 5 unless there is a *foreseeable harm* in disclosure.



UNITED STATES DEPARTMENT *of* JUSTICE

Freedom of Information Act Exemptions Overview



New FOIA Legislation

On June 30, 2016, the first significant amendments to the FOIA since 2007 were signed into law.

This lecture incorporates the new changes to the law, which among other things, codified DOJ's foreseeable harm standard.



- Since 2009, the government has applied a **foreseeable harm standard** where agencies released otherwise withholdable records if **1)** there would be no foreseeable harm from releasing the records, and **2)** the disclosure would not otherwise be prohibited by law.
- This standard has now been codified in the FOIA itself.



Exemption 2

Remember that under the recently amended FOIA law, a foreseeable harm standard must be applied to records otherwise withholdable under this Exemption



Exemption 5

Exemption 5 continues to be a prime area of consideration when applying the foreseeable harm standard that has now been codified in the statute.

If an agency determines that records could be released without causing a foreseeable harm and without violating a law, those records must be released.



UNITED STATES DEPARTMENT *of* JUSTICE

Freedom of Information Act Procedural Requirements



Reviewing the Documents

Exemptions and Segregation

- Department of Justice FOIA Guidelines emphasize agency obligation to segregate and apply foreseeable harm standard.
- 2016 amendments to the FOIA codify the foreseeable harm standard.

OIP Guidance: *Segregating and Marking Documents for Release in Accordance with the OPEN Government Act (10/23/08)*



UNITED STATES DEPARTMENT *of* JUSTICE

Chief FOIA Officers Council

Inaugural Meeting
July 22, 2016



Responsibilities of Chief FOIA Officers

New: Chief FOIA Officers are also now required to “review, not less frequently than annually, all aspects” of their agency’s administration of the FOIA, including:

- Agency regulations,
- Disclosure of records under paragraphs (a)(2) [proactive disclosure provision] and (a)(8) [foreseeable harm standard],
- Assessment of fees and fee waivers,
- Timely processing of requests,
- Use of exemptions, and
- Dispute resolution services with the Office of Government Information Services or the FOIA Public Liaison.



Freedom of Information Act Exemptions Overview

**Bobak (Bobby) Talebian
OIP, Dept. of Justice
&**

**Anne Weismann
Campaign for Accountability**



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New FOIA Legislation

On June 30, 2016, the President signed into law the first significant amendments to the FOIA since 2007.

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Since 2009, agencies have applied a **foreseeable harm standard** where information is disclosed if: 1) there would be no foreseeable harm from releasing the records, and 2) the disclosure would not otherwise be prohibited by law.

This standard has now been codified in the FOIA itself.



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Exemption 2

Remember that under the recently amended FOIA law, a foreseeable harm standard must be applied to records otherwise withholdable under this Exemption.



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Exemption 5

Exemption 5 continues to be a prime area of consideration when applying the foreseeable harm standard.

If an agency determines that records could be released without causing a foreseeable harm and without violating a law, those records must be released.



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