

ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
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WASHINGTON, DC 20515-6143

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February 4, 2013

Ms. Melanie Ann Pustay
Director, Office of Information Policy
U.S. Department of Justice
1425 New York Avenue, NW
Suite 11050
Washington, DC 20530

Dear Ms. Pustay:

The Committee on Oversight and Government Reform is continuing its oversight of the federal government's compliance with the Freedom of Information Act. FOIA is extremely important in ensuring transparency and accountability and is an important option the public has for accessing information about the federal government's activities. As President Obama noted on his second day in office, "the Freedom of Information Act, which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government."¹

The Department of Justice's Office of Information Policy (OIP) plays an important role in government-wide FOIA policy implementation, compliance, and enforcement. Given OIP's role in implementing compliance with FOIA, the Committee seeks information about a number of issues including what many term as outdated FOIA regulations, exorbitant and possibly illegal fee assessments, FOIA backlogs, the excessive use and abuse of exemptions, and dispute resolution services. The Committee also requests you provide a briefing to Committee staff on these issues and that you produce relevant information and documents as described in this letter.

Outdated Agency FOIA Regulations

In March 2009, the Attorney General issued a memorandum on FOIA that directed all agencies to adopt "a presumption of openness" and to disclose any information unless disclosure

¹ The White House, Memorandum for the Heads of Executive Departments and Agencies, "Freedom of Information Act," January 21, 2009 (online at <http://www.whitehouse.gov/the-press-office/freedom-information-act>).

is prohibited by law or is protected by statutory exemption and would cause foreseeable harm.² Since that directive was issued, the Chief FOIA Officers for each agency have been required to report to the Attorney General on the steps taken to improve transparency. Last year, you testified before the Committee that “for the third year in a row, agencies are improving FOIA compliance and increasing transparency.”³ In December 2012, however, it was reported that 62 of 99 government agencies had not updated their FOIA regulations since the Attorney General’s 2009 memorandum.⁴ In addition, more than half of the agencies surveyed (56 of 99) had not updated their regulations since before the OPEN Government Act of 2007, and 31 agencies have regulations more than a decade old. DOJ’s own regulations have not been updated since 2003. As a result, it is unknown whether agencies are complying with the Attorney General’s presumption of openness or the significant changes in fees and requester classes under the OPEN Government Act. Please provide answers to the following questions:

- 1) Why has OIP not updated its FOIA regulations since 2003?
- 2) Has OIP issued any instructions to other agencies to update their regulations? If not, why not? If so, which agencies did OIP instruct, and did the agencies comply?
 - Please provide copies of any recommendations OIP has made from 2007 to present.
 - Please provide copies of all memoranda issued by DOJ concerning FOIA regulations from 2007 to present.
- 3) Has OIP assessed how requesters may have been negatively impacted by agency regulations that do not reflect current law?
 - Please produce a copy of all assessments from 2007 to present.
- 4) What does OIP plan to do to ensure agency regulations are updated to conform to the current statute?

Fee Assessments in Violation of the OPEN Government Act

The OPEN Government Act significantly amended agency FOIA fee structures. FOIA does not allow agencies to assess search fees if the agency does not comply with specific statutory time limits to respond to requesters. Additionally, the OPEN Government Act broadens the types of requesters who may qualify for a fee waiver under FOIA. Unfortunately, not all agencies appear to be complying with FOIA’s fee requirements. In February 2012, a group of national security researchers filed a class-action lawsuit against the Central Intelligence Agency for imposing fees without giving requesters cost estimates. The lawsuit also accused the

² Office of the Attorney General, Memorandum for the Heads of Executive Departments and Agencies, “Freedom of Information Act (FOIA),” March 19, 2009 (online at www.justice.gov/ag/foia-memo-march2009.pdf).

³ House Committee on Oversight and Government Reform, Testimony of Melanie Ann Pustay, Hearing on FOIA in the 21st Century: Using Technology to Improve Transparency in Government, March 21, 2012 (H.Rept. 112-140).

⁴ National Security Archive, “Outdated Agency Regs Undermine Freedom of Information,” December 4, 2012 (online at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB405/>).

CIA of imposing new fees for the declassification of records.⁵ The Department of Homeland Security was also accused by the American Civil Liberties Union and the Electronic Frontier Foundation of dissuading FOIA requests by imposing “exorbitant fees” to process FOIA requests.⁶

- 5) What is OIP doing to ensure agencies are complying with the OPEN Government Act provisions concerning FOIA when assessing fees and determining eligibility for fee waivers?
- 6) What is the most current guidance OIP has issued to agencies concerning assessment of fees and determining eligibility for fee waivers?
 - Please provide a copy of OIP’s latest guidance on fee waivers.
 - Please provide copies of all memoranda and official guidance issued by DOJ to agencies concerning FOIA fees from 2007 to present.
- 7) What steps has OIP taken to address the two incidents described above, as well as other reports of agencies violating FOIA’s requirements for determining fees and eligibility for fee waivers?
- 8) Does OIP have any recommendations for improving agency compliance with FOIA’s fee structure requirements?

FOIA Backlogs

Agencies have received increasing numbers of FOIA requests. The number of FOIA requests rose from 597,415 in Fiscal Year 2010 to 644,165 in Fiscal Year 2011, a 7.8 percent increase.⁷ However, during that same time frame backlogs increased 20.8 percent. From FY 2010 to FY 2011, the total backlog of FOIA requests increased from 69,526 to 83,490.⁸ DHS receives about 27 percent of total FOIA requests, but is responsible more than 50 percent of the backlog. Furthermore, 35,780 of the 42,417 backlogged requests at DHS are from a single component, U.S. Citizenship and Immigration Services (USCIS).⁹ Agencies have made efforts to reduce FOIA backlogs, but the backlogs continue to be a consistent problem.

- 9) What steps has OIP taken to help agencies reduce their FOIA backlogs?

⁵ “Suit: Spy Agency Flouting FOIA,” *Politico*, February 22, 2012 (online at <http://www.politico.com/blogs/under-the-radar/2012/02/suit-spy-agency-flouting-foia-115236.html>).

⁶ ACLU et. al. to Department of Homeland Security (Feb. 21, 2012) (online at <http://images.politico.com/global/2012/03/acluefffeewvrfoialtr.pdf>).

⁷ House Committee on Oversight and Government Reform, Testimony of Melaine Ann Pustay, Hearing on FOIA in the 21st Century: Using Technology to Improve Transparency in Government, March 21, 2012 (H.Rept. 112-140).

⁸ Department of Justice, “Summary of Annual FOIA Reports for Fiscal Year 2011,” (online at www.justice.gov/oip/foiapost/fy-2011-annual-report-summary.pdf).

⁹ Department of Homeland Security, “2011 Freedom of Information Act Report to the Attorney General of the United States,” February 2012 (online at www.dhs.gov/xlibrary/assets/privacy/privacy-foia-annual-report-fy-2011-dhs.pdf).

- 10) Has OIP reviewed DHS's backlog? If so, please produce all documents related to that review.
- 11) What are the causes of the significant increase in the request backlog at USCIS?
- 12) Has OIP provided any guidance to DHS or USCIS to resolve the backlog? If so, what guidance did OIP provide and is it being followed?
 - Please provide any guidance issued, and all related correspondence.
- 13) If no guidance has been provided, does OIP plan to consult or offer guidance to DHS on its backlog?

Excessive Use of Exemptions and Enforcing the "Presumption of Openness"

Under FOIA, there are nine statutory exemptions to protect sensitive records from disclosure. These exemptions serve an important purpose, but they can easily be abused. The use of Exemption 3 has been cited by many transparency groups as a particular concern.¹⁰ Exemption 3 includes any information that can or must be withheld under a different statute. The total number of Exemption 3 statutes is unknown, but OIP reported 140 separate statutes used by agencies to withhold information under Exemption 3 in 2011.¹¹

Additionally, while the Attorney General's 2009 FOIA Memorandum says that "an agency should not withhold information simply because it may do so legally,"¹² it is unclear whether agencies have fully adopted this direction. While agencies' use of exemptions decreased slightly from FY 2010 to FY 2011, there were still more than 30,000 full denials and more than 171,000 partial denials. DOJ itself increased the number of times it invoked Exemption 5, for deliberative process, from 1,231 times in 2010 to 1,500 times in 2011.¹³ According to the National Security Archive, DOJ, as the government's representative in all FOIA lawsuits, "cannot point to a single case of agency withholding that it has refused to defend."¹⁴

- 14) In your view, have agencies sufficiently complied with the President's and Attorney General memorandums on FOIA? Please explain.
- 15) Has OIP ever assisted DOJ in questioning an agency's decision to withhold information? If so, under what circumstance?

¹⁰ FOIA Eyes Only: How Buried Statutes are Keeping Information Secret," *ProPublica*, March 14, 2011.

¹¹ Department of Justice, Office of Information Policy, "Statutes Used by Federal Departments and Agencies in Conjunction with Exemption 3 of the FOIA as Reported in Fiscal Year 2011 Annual FOIA Reports," (<http://www.justice.gov/oip/docs/2011-exemption3-statutes.pdf>) (accessed January 22, 2013).

¹² See Note 2, *Supra*.

¹³ "Government Can't Keep Up With Information Requests," *Associated Press*, March 12, 2012.

¹⁴ National Security Archive, "Justice Department Wins Rosemary Award for Worst Open Government Performance in 2011," February 14, 2012.

- Please provide all memorandums and official guidance prepared by OIP concerning any instance where OIP has questioned an agency's decision to withhold a record from 2009 to present.
- 16) Has OIP taken any actions to limit the use of FOIA exemptions, and specifically Exemption 3?
- Please provide any guidance or correspondence with agencies concerning limiting FOIA exemptions from 2009 to present.
- 17) Does OIP ever review agency proposals for new exemptions under Exemption 3?
- Please provide a copy of any review OIP has conducted of Exemption 3 proposals.
- 18) What steps has OIP taken to ensure agencies use exemptions only when necessary, and in compliance with the Attorney General's guidelines?

Compliance with the E-FOIA Requirement to Post Frequently Requested Records Online

The Electronic FOIA Act of 1996 (E-FOIA) requires agencies to post frequently requested records in an electronic reading room available to the public. However, the law does not specify the number of times records must be requested to be considered "frequently requested," or whether similar but not identical requests are counted towards the number of frequently requested records. OIP's guidance on frequently requested records recommends that agencies release records after they have received three or more requests for a record.¹⁵

- 19) What steps has OIP taken to ensure that all agencies fully comply with the E-FOIA's requirement to post frequently requested records online?
- 20) Does OIP evaluate agency compliance with the requirement to post frequently requested records online? If so, please provide a copy of OIP's criteria used to measure compliance.
- 21) Please provide a copy of the most recent OIP issued guidance on the requirement to post frequently requested records?

Dispute Resolution Services

The OPEN Government Act amended FOIA to require each agency to "make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency."¹⁶ Further, it established the Office of Government Information Services (OGIS) within the National Archives and Records Administration to offer mediation services to

¹⁵ Department of Justice, Office of Information Policy (previously Office of Information and Privacy), FOIA Post, "FOIA Counselor Q&A: 'Frequently Requested' Records," (online at www.justice.gov/oip/foiapost/2003foiapost28.htm)(accessed January 22, 2013).

¹⁶ P.L. 110-175.

resolve disputes between agencies and requesters. While it was Congress's desire to avoid FOIA lawsuits whenever possible, reports show that the number of FOIA lawsuits continues to rise.¹⁷

22) What has OIP done to encourage agencies to engage in dispute resolution services and/or seek out the assistance of OGIS?

- Please provide all communications between OIP and agencies regarding the benefits of OGIS's dispute resolution services.
- Please provide all communications from OIP to an agency recommending the agency engage in dispute resolution or to seek assistance from OGIS.

23) Do you believe more could be done to avoid FOIA lawsuits? If so, what recommendations do you have for reducing the number of FOIA lawsuits?

We request you provide the requested responses and information as soon as possible, but no later than February 22, 2013. We also request that you provide a briefing for Committee staff on these topics by that date. When producing documents to the Committee, please deliver separate production sets to both the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. Additionally, the Committee has principal jurisdiction over FOIA in the House of Representatives.

If you have any questions regarding any aspect of this request, please contact Tegan Millspaw of the Majority Committee staff at Tegan.Millspaw@mail.house.gov or (202) 225-5074 and Krista Boyd of the Minority Committee staff at Krista.Boyd@mail.house.gov or (202) 225-5051. Thank you for your attention to this matter.

Sincerely,



Darrell E. Issa
Chairman



Elijah E. Cummings
Ranking Member

¹⁷ The FOIA Project, "FOIA Lawsuits Increase During Obama Administration, December 20, 2012 (<http://foiaproject.org/2012/12/20/increase-in-foia-lawsuits-during-obama-administration/>).