



**OGIS ADVISORY OPINION NO. 2020-01
ISSUED: MARCH 31, 2020**

**AGENCIES MUST PROVIDE ESTIMATED
DATES OF COMPLETION UPON REQUEST**

A Note to Readers

This advisory opinion—which reflects months of research and the review of hundreds of Office of Government Information Services (OGIS) cases—was written prior to the Coronavirus (COVID-19) pandemic. It does not reflect the challenges many Freedom of Information Act (FOIA) offices face as their staff members distance themselves physically from one another and, in some cases, from the computer and records systems upon which they depend to process requests.

Please note that a particular agency’s capability to respond to FOIA requests will vary depending on the records held by the agency and technology used by the FOIA staff. This situation is extremely fluid as agencies are creating new processes and learning the extent of their limitations. For this reason, we anticipate that there are likely to be COVID-19-related processing delays at many agencies, and in some cases, estimated dates of completion will be more difficult than ever to determine.

As OGIS communicates with agencies regarding their capabilities in the current environment, we will do our best to keep the FOIA community informed. We expect that the landscape will continue to change daily. In the meantime, we are publishing this assessment now because we believe that the core message—that it is essential for agencies to communicate with requesters about the status of requests—is more relevant than ever. We urge agencies to provide information on their FOIA page regarding their current status and to update that information as the situation changes. Finally, we ask requesters to recognize the challenges faced by agencies and to be patient during this extraordinary time.



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As part of its statutory mandate, OGIS “may issue advisory opinions at the discretion of the Office or upon request of any party to a dispute.” 5 U.S.C. § 552(h)(3). In its role as the FOIA Ombudsman, OGIS has the unique capacity to observe and examine the interactions between requesters and agencies across the Federal government, noting patterns and trends that impede the FOIA process. OGIS uses advisory opinions to highlight these systemic issues and to provide recommendations to improve efficiency and transparency in the FOIA process.

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires agencies to provide a requester with an estimated date of completion (EDC) by which the agency expects to complete work on a request when the requester asks for one. The OPEN Government Act of 2007 amended the FOIA to include a provision requiring agencies to “establish a telephone line or Internet service that provides information about the status of a request to the person making the request ... including ... an estimated date on which the agency will complete action on the request.”¹ Despite this requirement, and guidance issued by the U.S. Department of Justice’s Office of Information Policy (OIP),² OGIS has observed that agencies are not always providing EDCs as required.

As illustrated in the accompanying “[OGIS Issue Assessment: Agency Compliance with the Estimated Date of Completion Requirement of the Freedom of Information Act](#)” (EDC Assessment), our office has observed significant frustration among requesters and Federal agencies regarding EDCs. FOIA requesters tell us that they are unable to obtain EDCs. FOIA processors tell us about the challenges of providing requesters with EDCs, particularly when faced with backlogs. FOIA processors and requesters need to keep in mind that estimated dates of completion are just that – *estimates*. As long as an agency can show that it is working with a requester and providing an EDC to the best of its ability, the agency can show it is complying with the FOIA’s EDC

¹ See 5 U.S.C. § 552(a)(7).

² See “OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests (Updated Guidance)” updated October 28, 2014, <https://www.justice.gov/oip/oip-guidance-1>.

requirement. And both parties need to recognize that the EDC may change over the course of time. As OIP's guidance recommends, and EDC case law confirms, good communication between requesters and agencies is a significant key to reducing this frustration. This opinion advises agencies to improve their communication regarding EDCs and informs requesters of their legal right to request an EDC when making a FOIA request. Recommendations and best practices to improve communication, and for estimating EDCs if an agency is having trouble doing so, are found in OGIS's EDC Assessment.

There are some unique aspects to the case law that have developed regarding EDCs. Unlike most FOIA cases, releasing responsive documents does not moot an EDC claim. Courts have found that if an agency's FOIA pattern or practice impedes a requester's access to the information in the future, even release of responsive documents does not moot a claim that an agency has violated the FOIA statute (including failure to provide EDCs).³

In *Muttitt v. U.S. Central Command*,⁴ the government argued that disclosure of the records sought by the plaintiff mooted his claim that he was not provided EDCs. The district court disagreed, and relying on the D.C. Circuit ruling in *Payne Enters., Inc. v. United States*,⁵ concluded that "disclosure of the requested records alone would [not] provide an adequate remedy where an agency has a policy of routinely ignoring the requirement to provide time estimates as required by [5 U.S.C.] § 552(a)(7)(B)."⁶

Agencies should be aware that they could unwittingly establish a pattern or practice of not providing EDCs. To state a pattern or practice claim for relief under the FOIA, "a plaintiff must plausibly demonstrate that: (1) the agency in question has adopted, endorsed, or implemented a policy or practice that constitutes an ongoing 'failure to abide by the terms of the FOIA;' and (2) the plaintiff will suffer continuing injury due to this practice."⁷ If a FOIA requester challenges an

³ See *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988); *Muckrock, LLC v. CIA*, 300 F.Supp.3d 108, 130-31 (D.D.C. 2018); *Brown v. CBP*, 132 F.Supp.3d 1170, 1172 (N.D. Cal. 2015); *Muttitt v. U.S. Cent. Command*, 813 F.Supp.2d 221, 230 (D.D.C. 2011). But note that courts are split as to the viability of a "pattern-or-practice" claim as a separate cause of action under FOIA, with the Courts of Appeals for the District of Columbia and the Ninth Circuit expressly recognizing a separate "pattern-or-practice" claim, and district courts in the First, Second, Seventh and Tenth Circuits implicitly recognizing the validity of a separate "pattern-or-practice" claim.

⁴ 813 F.Supp.2d 221 (D.D.C. 2011).

⁵ 837 F.2d 486, 491 (D.C. Cir. 1988).

⁶ See *Muttitt*, 813 F.Supp.2d at 227.

⁷ See *Nat'l Sec. Counselors v. CIA*, 898 F.Supp.2d 233, 252-53 (D.D.C. 2012), (quoting *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 91 (D.C. Cir. 1986)). See also *Hajro v. USCIS*, 811 F.3d 1086, 1103 (9th Cir. 2015) ("plaintiff has shown injury in fact if he demonstrates the three following prongs: (1) the agency's FOIA violation was not merely an isolated incident, (2) the plaintiff was personally harmed by the alleged policy, and (3) the plaintiff himself has a sufficient likelihood of future harm by the policy or practice.").

agency's alleged ongoing policy or practice, and can demonstrate that it has pending claims that are likely to implicate that policy or practice, future injury is satisfied.⁸

In *Muttitt*, the plaintiff had written a book on the development of Iraqi oil policy titled *Fuel on Fire: Oil and Politics in Occupied Iraq*. In researching his book, the plaintiff submitted FOIA requests to the Department of Defense, U.S. Central Command, the Department of State (State) and the Department of the Treasury (Treasury) trying to access information regarding Iraq's oil industry. Muttitt alleged that on two separate occasions he had requested EDCs from State for five separate FOIA requests he had submitted. He also identified the relevant dates and tracking numbers of the requests at issue, and alleged that he had never received EDCs in response to any of his inquiries. The Court found that the plaintiff had demonstrated a pattern and practice claim against State under the FOIA, since he had been able to identify what "amount[ed] to **ten** requests for estimated completion dates that did not receive an adequate response."⁹ In contrast, the *Muttitt* court ruled that Treasury's **one-time** failure to provide the plaintiff with an EDC for a single request for information about Iraq's oil and gas industry was not a "policy, pattern, or practice" of violating FOIA so as to warrant injunctive relief.¹⁰

Courts have not set a numerical threshold for a requester to bring a viable pattern or practice claim regarding EDCs, but a plaintiff must allege more than one instance of unlawful behavior.¹¹ One district court found that **four** such failures to respond was not sufficient.¹² In contrast, the court in *Muttitt* concluded that **ten** requests for EDCs that went without an agency response

⁸ See *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 93 (D.D.C. 2013) (holding that future injury is satisfied "where FOIA requesters challenge an alleged ongoing policy or practice and can demonstrate that they have pending FOIA requests that are likely to implicate that policy or practice . . ."); *Citizens for Responsibility & Ethics in Washington v. SEC*, 858 F. Supp.2d 51, 60 (D.D.C. 2012) (holding that "outstanding FOIA requests that involve documents that likely will be unavailable due to the challenged policy" are sufficient to allege future injury); *Citizens for Responsibility & Ethics in Washington v. Exec. Office of the President*, 587 F.Supp.2d 48, 60-61 (D.D.C. 2008) (holding that because plaintiffs "each allege that they have FOIA requests for emails currently pending with the [defendant agencies] and intend to file future requests," their allegations of future injury were "real and immediate" (quoting *Pub. Citizen v. Carlin*, 2 F.Supp.2d 1, 6 (D.D.C. 1997))).

But note that a plaintiff does not have standing to bring an EDC pattern or practice claim if they rely solely on FOIA requests filed by other requesters that are not parties to the lawsuit. Rather, they must prove that they themselves will suffer the injury. See *Nat'l Sec. Counselors*, 898 F. Supp.2d at 262-63.

⁹ See *Muttitt*, 813 F.Supp.2d at 230-31 (emphasis added).

¹⁰ See *id.* at 229-31.

¹¹ *Cause of Action Inst. v. Eggleston*, 244 F. Supp. 3d 63, 72 (D.D.C. 2016) ("plaintiff cannot state a 'policy or practice' claim based on a single incident."); *Navigators Ins. Co. v. DOJ*, 155 F. Supp. 3d 157, 168 (D. Conn. 2016) (refusing to draw general conclusions about agency-wide practices from its handling of one case); *Nkihtaqmikon v. BIA*, 672 F. Supp. 2d 154, 170-71 (D. Me. 2009) (holding that "to draw general conclusions about . . . agency-wide patterns and practices from its handling of one case is a step too far").

¹² *Am. Ctr. for Law and Justice v. Dep't of State*, 249 F.Supp.3d 275, 285 (D.D.C. 2017). See also *Ctr. for Biological Diversity v. EPA*, 279 F. Supp.3d 121, 154-55 (D.D.C. 2017) (EPA's failure to provide EDCs for responding to two requests and one appeal did not constitute a pattern and practice of noncompliance with FOIA).

constituted a viable claim; and in *Nat'l Sec. Counselors*, **fifteen** examples served as a representative sample of pattern or practice.¹³ As the court in *American Center for Law and Justice* concluded, an “accumulation of FOIA violations [that] reasonably reveals some set of inopportune agency behaviors” is needed.¹⁴

The case laws suggests that as long as an agency can demonstrate that it is working with a requester and providing an EDC to the best of its ability, the agency should be able to satisfy its compliance with the FOIA’s EDC requirement – even if ultimately it is not able to respond by the estimated date it provides. In *Center for Biological Diversity v. EPA*,¹⁵ the court found that the Environmental Protection Agency’s (EPA’s) alleged failure to provide EDCs for two requests and one appeal did not constitute a pattern and practice of noncompliance with FOIA because the agency did not ignore the requester. Rather, EPA was in direct contact with the requester regarding the two requests, emphasizing that more than 20 business days would be required to complete requests due to the voluminous amount of responsive records potentially involved and the agency’s limited resources. Moreover, by assuring the plaintiff that the requests would be completed within 45 to 60 days, the court found that “EPA did, in fact, provide [plaintiff] with anticipated, estimated dates of completion even if EPA did not actually comply with those dates.”¹⁶ Agencies that have refused to work with requesters in any way regarding EDCs have been ordered to pay attorneys’ fees, as the courts have concluded that the agency’s refusal to communicate EDCs to a requester was unreasonable.¹⁷

In conclusion, agencies must provide EDCs when they are requested. If a FOIA requester is able to establish that an agency has a pattern or practice of failing to provide EDCs, a court may find that the agency has violated the FOIA. By providing a telephone line or Internet service so that

¹³ *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 262.

¹⁴ *Am. Ctr. for Law and Justice*, 249 F.Supp.3d at 285.

¹⁵ 279 F.Supp.3d 121, 154-55 (D.D.C. 2017).

¹⁶ Although FOIA does not require agencies to provide information about the status of an administrative appeal, including an estimated date of completion, both OGIS and the U.S. Department of Justice Office of Information Policy (OIP) have emphasized that informal communication with requesters can facilitate effective processing of an appeal. *See, e.g.*, “OIP Guidance: Adjudicating Administrative Appeals under the FOIA,” updated February 14, 2019, <https://www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%20under%20the%20FOIA>.

¹⁷ *See, e.g., The Sierra Club v. EPA*, 75 F.Supp.3d 1125, 1146-47 (N.D. Cal. 2014) (finding that despite repeated efforts by plaintiffs to communicate with the EPA, an estimated completion date for their request remained undetermined; plaintiffs’ repeated attempts to access the status of their request and ascertain an estimated date of completion on the EPA website were futile because their request number was unlisted; and that EPA acted unreasonably in failing to communicate and work with plaintiffs to create an agreed upon completion date). *Hajro v. USCIS*, No. 08-1350-PSG, 2012 WL 4903475 (N.D. Cal. Oct. 15, 2012) (granting in part plaintiff’s motion for attorneys’ fees after finding that plaintiff established a “pattern and practice of violations” and that defendants did not assert that they “were in compliance with FOIA’s time limits” and plaintiffs obtained “injunctive relief requiring [d]efendants to end [a] pattern and practice of violating FOIA.”).

requesters can obtain an estimated date on which the agency will complete action on the request, agencies will be in compliance with the FOIA. OGIS further advises agencies to improve their communication regarding EDCs to requesters. OGIS's EDC Assessment offers recommendations and best practices to help agencies provide accurate EDCs, and steps agencies can take to improve their processes so that they are able to provide EDCs in the future. The EDC Assessment also contains helpful tools and best practices that agencies may use to improve their FOIA EDC practice. The assessment can be found here:

<https://www.archives.gov/files/ogis/assets/edc-assessment-31-march-2020.pdf>.