



OFFICE OF GOVERNMENT INFORMATION SERVICES

COMPLIANCE REVIEW OF THE USE OF “STILL INTERESTED” LETTERS

PART 3: RECOMMENDATIONS TO IMPROVE TRANSPARENCY OF THE USE OF STILL INTERESTED LETTERS

Summary

The Office of Government Information Services (OGIS), which reviews agency Freedom of Information Act (FOIA) policies, procedures and compliance, 5 U.S.C. §§ 552(h)(2)(A) and (h)(2)(B), reviewed the use of “still interested” letters by agencies to close FOIA requests. Our objective was to determine the effect of these letters on requesters and the FOIA process. In the course of processing FOIA requests, some Federal agencies ask requesters if they are still interested in the requested records; these letters typically come after a fairly lengthy delay in responding to the request and set a deadline for the requester’s affirmative response; receiving none, the agency closes the request.

[Part 1](#)¹ of our assessment explained our findings based on our review of available data on the use of these letters by Cabinet-level agencies between Fiscal Year (FY) 1998 and FY 2014. [Part 2](#)² of our assessment discussed our observations on the use of these letters by particular FOIA programs that processed nearly 84 percent of requests processed government-wide in FY 2014 (See Appendix A).

Key Findings

In the course of our assessment we found that

- while available data suggests that few requests are closed using still interested letters, the data does not capture key elements regarding the use of these letters that frustrate requesters, including the delay in an agency’s response to the request prior to sending a

¹ “OGIS Compliance Review of the Use of Still Interested Letters, Part 1: Historical Trends,” accessed May 5, 2016, <https://ogis.archives.gov/Assets/Still-interested-part-1-final.pdf?method=1>.

² “OGIS Compliance Review of the Use of Still Interested Letters, Part 2: OGIS Review of FOIA Programs’ Fiscal Year 2014 Use of Still Interested Letters,” accessed May 5, 2016, <https://ogis.archives.gov/Assets/Still-interested-part-2-final.pdf?method=1>.

still interested letter, the amount of time the requester is given to respond, or how many times a requester is sent still interested letters before the request is processed; and

- there is no guidance regarding how agencies should report requests closed using still interested letters, and agencies report these administrative closures in a variety of ways.

The following recommendations address these findings.

Discussion and Recommendations

Finding 1: Available Data Does Not Capture Requester Frustration

While available data suggests that agencies close few requests using still interested letters,³ we recognize that the requesters most likely to be annoyed by correspondence of this type—those who wish for their requests to remain open and who respond by the agency’s deadline—will never show up in data about the number of requests closed using still interested letters.

Requesters express frustration that still interested letters are not addressed in the FOIA statute or in agency regulations. As we reported in Part 1 of our assessment, we found that though an agency’s use of a still interested letter has been referenced in FOIA litigation, it appears that there is no case law addressing the use of a still interested letter to close a FOIA request. Although some agency regulations address administrative closures, we are not aware of any agency FOIA regulation that addresses the issue—though there is nothing to prohibit an agency from doing so in its regulation.

Requesters are further frustrated by the delay in the agencies’ response to the request prior to sending a still interested letter, the amount of time the requester is given to respond, and how many times a requester receives still interested letters before the request is processed. These issues are addressed in updated July 2, 2016, guidance from the Office of Information Policy (OIP) at the Department of Justice (DOJ), “Limitations on Use of Still Interested Inquiries.”⁴ The guidance included an implementation checklist that suggested agencies:

- ensure there are reasonable grounds to make a still-interested inquiry;
- not make multiple still interested inquiries unless the agency has good cause;
- attempt to contact the requester using the requester’s preferred mode of communication;

³ Requests closed using still interested letters account for less than 1 percent of all FOIA requests processed by Cabinet-level agencies in all but one of the last 17 fiscal years; “OGIS Compliance Review of the Use of Still Interested Letters, Part 1: Historical Trends.”

⁴ “Limitations on Use of ‘Still-Interested’ Inquiries,” Department of Justice, Office of Information Policy, last updated July 20, 2015, <http://www.justice.gov/oip/oip-guidance-8>.

- send a brief email or letter to the requester noting the request is closed in order to memorialize any decision made by the requester by telephone;
- provide the requester with no fewer than 30 working days to respond to the inquiry before closing the request;
- alert the requester to the fact the request will be administratively closed at the end of 30 working days if the requester elects to not respond;
- make good faith efforts to reach the requester using multiple methods of communication prior to administratively closing the request; and
- re-open the request if the requester responds to the inquiry within a “reasonable” amount of time after the agency’s deadline.⁵

In Part 2 of our assessment, we reported that all of the FOIA managers we contacted to discuss their agency’s use of still interested letters reported that their current use of these letters is in accordance with OIP’s guidance. We also noted, however, that while the programs reported sharing OIP’s guidance with the FOIA staffs, use of the letters was not explained in the FOIA programs’ Standard Operating Procedures (SOPs) or employee guidelines or memoranda.

We recommend that agencies wishing to use still interested letters include in their SOPs written instructions for using such letters based on OIP guidance. In addition to providing employees with these guidelines, we recommend that the FOIA managers ensure that the use of the letters is in accordance with the policy. One way to do that would be to require that FOIA managers sign still interested letters.

We also recommend that agencies regularly communicate with requesters about the status of requests that are in the agency’s backlog, particularly if the request is older than three or four months. Proactive communication would help agencies meet the portion of OIP’s guidance that suggests that a “still interested inquiry should never be the first communication a requester receives from the agency.”⁶ In fact, regularly communicating with requesters would help eliminate the need for still interested letters.

Additionally, we recommend that the use of still interested letters by agencies continue to be a component of our office’s agency FOIA compliance assessment program,⁷ including our agency self-assessment program.⁸ If our Compliance Team notes that an agency is using still interested letters in a manner that is inconsistent with OIP guidance, it will be noted in our assessment

⁵ “Reasonable” is not defined in the guidance. “Limitations on Use of ‘Still-Interested’ Inquiries.”

⁶ “Limitations on Use of ‘Still-Interested’ Inquiries.”

⁷ “OGIS Agency Compliance Reports,” accessed February 29, 2016, <https://ogis.archives.gov/foia--ompliance-program/agency-compliance-reports.htm>.

⁸ “OGIS Releases FOIA Compliance Self-Assessment Program,” accessed February 29, 2016, <http://foia.blogs.archives.gov/2016/01/27/ogis-releases-foia-compliance-self-assessment-program/>.

report. When warranted, we should also bring to the attention of agency Chief FOIA Officers instances of non-compliance with OIP guidance on still interested letters.⁹

Finding 2: Inconsistent Reporting

As we explained in our previous reports, FOIA requires that agencies annually report to DOJ the number of requests in which the agency cited exemptions to withhold records in full. OIP requires agencies to categorize into one of nine subcategories all other requests that are full denials based on reasons other than exemptions. These sub-categories are:

- no records
- all records referred to another component or agency
- request withdrawn
- fee related reason
- records not reasonably described
- improper FOIA request for other reason
- not agency record
- duplicate request
- other

If the agency reports requests closed under the category “other,” OIP requires that the agency describe the reason separately. In describing other reasons, some agencies directly note a lack of a response to a still interested letter while some agencies report other reasons that *might* be attributed to a lack of a response to still interested letters (e.g., “no response from requester” or “unable to contact requester”).

In Part 2 of our assessment, we noted that the FOIA managers we interviewed about their use of still interested letters reported recording requests closed using still interested letters in various ways in their FOIA Annual Reports to the Attorney General of the United States. One of the FOIA programs specified the use of still interested letters under the “other” category, while another FOIA program described the requests as being closed due to “no response from requester.” Some of the FOIA programs reported including requests closed using still interested letters in the “withdrawn” category. The lack of consistency in how these letters are reported makes it difficult for FOIA managers, Congress, and the public to understand how these letters are used.

We recommend that OIP ask agencies to directly report in the Annual FOIA Reports on cases closed through the use of still interested letters under the category of “Number of Full Denials

⁹ Letter from OGIS Director James Holzer to Department of Homeland Security Chief Privacy Officer Karen Neuman, September 15, 2016, accessed February 29, 2016, <https://ogis.archives.gov/Assets/Letter+to+Karen+Neuman+re+FEMA+Still+Interested-web.pdf?method=1>.

Based on Reasons Other than Exemptions” rather than relying on agencies to describe the use of the letters under the “other” category or having agencies report the cases as “withdrawn.”

Summary of OGIS Recommendations

There are several steps that we recommend that agencies, OIP, and OGIS take to increase transparency and reduce requester frustration with the use of still interested letters to close FOIA requests. In particular, we recommend that agencies take additional steps to ensure that the use of these letters is in line with OIP’s July 2, 2015, guidance, including providing instructions on how to use these letters in SOPs and ensuring that FOIA managers are aware of how FOIA processors are using still interested letters;¹⁰ one way to improve oversight of the use of still interested letters is for the FOIA manager to sign these letters. We also recommend that agencies regularly communicate with requesters regarding requests that have been pending more than three or four months, which could alleviate the need to use still interested letters, and that OGIS continue to monitor compliance with OIP’s guidance as part of our agency FOIA compliance assessments. Further, we recommend that OIP begin requiring that agencies directly report in Annual FOIA Reports how many requests are closed using still interested letters.

¹⁰ “Limitations on Use of ‘Still-Interested’ Inquiries.”

Appendix A

OGIS Review of Agency Use of Still Interested Letters

	Included FY 1998 - FY 2014 Review	Included FY 2014 Program Data Review	Program Data Reviewed <i>*Programs Interviewed Regarding use of still interested letters in italics</i>
Department of Agriculture	X	X	Farm Service Agency, Forest Service, Animal & Plant Health Inspection Service, <i>Natural Resources Conservation Service</i> , Food Safety & Inspection Service
Department of Commerce	X		
Department of Defense	X	X	<i>Army</i> , Navy, Defense Logistics Agency, National Security Agency
Department of Education	X		
Department of Energy	X		
Department of Health & Human Services	X	X	Center for Medicare & Medicaid Services, <i>Food & Drug Administration</i> , Office of the Secretary, Administration for Children & Families, National Institutes of Health, <i>Centers for Disease Control & Prevention</i>
Department of Homeland Security	X	X	Citizenship & Immigration Services, Customs & Border Protection, Immigration & Customs Enforcement, National Protection & Programs Directorate, US States Coast Guard, US Secret Service
Department of Housing & Urban Development	X		
Department of the Interior	X		
Department of Justice	X	X	Executive Office for Immigration Review, Bureau of Prisons, Federal Bureau of Investigation, Executive Office for United States Attorneys, US Marshals Service
Department of Labor	X	X	Occupational Safety & Health Administration, Wage & Hour Division, Employment & Training Administration, Mine Safety & Health Administration, Office of Workers' Compensation Programs
Department of State	X	X	Headquarters, Office of the Inspector General
Department of Transportation	X	X	Federal Aviation Administration, <i>Federal Motor Carrier Safety Administration</i> , Federal Highway Administration, Federal Railroad Administration, Office of the Secretary
Department of the Treasury	X	X	Internal Revenue Service, Office of the Comptroller of the Currency, Departmental Offices, <i>Bureau of the Fiscal Service</i> , Treasury Inspector General for Tax Administration
Department of Veterans Affairs	X	X	Veterans Health Administration, Veterans Benefit Administration, Office of the Inspector General, Office of Information Technology, Office of Acquisition, Logistics, and Construction
Equal Employment Opportunity Commission		X	Agency-level data only available
Environmental Protection Agency		X	Region 2, <i>Headquarters</i> , Region 5, Region 4, Region 9
National Archives & Records Administration		X	Agency-level data only available
Securities & Exchange Commission		X	Agency-level data only available