

**Chat Comments/Questions
for
FOIA Advisory Committee
Meeting – September 8, 2022
(OGIS & DOJ OIP Lack Funding)**

**PUBLIC COMMENT
September 8, 2022**

by Robert Hammond
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PREFACE – Why this matters!

This presentation addresses questions for the meeting Mediator to read aloud and for NARA's Office of Information Services (OGIS) and DOJ's Office of Information Policy (DOJ OIP) to answer during the core meeting (not Oral Comments).

- OGIS and DOJ OIP lack of funding; how much is needed.
- OGIS DOJ OIP compliance responsibilities and action taken (if any).
- OGIS conduct related to its statutory dual compliance and mediation missions.
- The FOIA Advisory Tech Committee Recommendation #2 requiring proactive posting of FOIA Logs.
- With FOIA online going away a high priority is to have each of the participating agencies brief how they will preserve the unique FOIA processing records therein, including workflows and actions by all processing personnel. NARA GRS 4.2 Item 20 requires these records to be preserved for 6+ years.
- Now I am asking Congress for GAO/OIG audits of OGIS & OIP funding and mission degradation. Well received. Two conference calls with Senate Judiciary staffers this week (their request). One more today.
- An adverse audit finding is a blessing if the reason is insufficient funding. Attach the audit to the next budget and place the onus on OMB and Congress. Ms. Wall (NARA)? Ms. Gupta (DOJ)?

HYPERLINKED OUTLINE

- [CHAT COMMENTS/QUESTION for OGIS and DOJ OIP](#)
- [Senate Hearing on FOIA. DOJ's Lack of Enforcement + Malfeasance + Open The Government Statement](#)
- [Senators Unite to Slam FOIA Compliance + POGO](#)

TRUTH, transparency, and accountability matter!

CHAT COMMENTS/QUESTION for OGIS and DOJ OIP	#
EXCELLENT READS. <u>Saving the Freedom of Information Act</u> by Margaret Kwoka .	1.
<u>The Art of Access. Strategies for Acquiring Public Records</u> by FOIA Advisory Committee member David Cuillier , University of Arizona, and co-author Charles N. Davis , University of Missouri-Colombia.	2.
Getting DOJ OIP to respond to compliance inquiries OIP.ComplianceInquiry@usdoj.gov) and issue non- compliance determinations is <u>harder than finding toilet paper in a pandemic</u> . It never happens.	3.
OGIS Director (Semo) states that “We sometimes joke, we are not the FOIA police.” WRONG!	4.
FOIA AC should require DOJ OIP and OGIS to provide funding levels and justifications to fully accomplish their statutory missions – then we may see what can be done to assist them in gaining funding.	5.
My questions conform to the Chat 200-character limit, so each is brief. I will keep calling back in until the full 15 minutes of oral comments time (total for all) is used.	6.
Greetings fellow FOIA advocates. Join the fight to improve FOIA. I will reply and be available for you. FOIAcompliance@gmail.com or on Twitter @FOIAcompliance	7.
I want to thank Committee member <u>Tom Susman</u> for his feedback on some of my proposals in advance of today’s meeting. <u>Alexander Howard</u> also.	8.

I front-loaded/overloaded the Committee with public comments in hopes of influencing your sub-committee decisions. If asked, I will participate in any working group and accept tasks.	9.
I am a private citizen Freedom of Information Act advocate, Naval Academy graduate/career veteran/DoD civilian and now reluctant whistleblower who loves our country.	10.
I believe that “An informed citizenry is at the heart of a dynamic democracy.” (Thomas Jefferson). Integrity and accountability matter.	11.
Questions <u>to be read aloud and answered</u> (not as part of oral public comments) are preceded by a question mark (e.g., ? OGIS, ? DOJ OIP.	12.
OGIS must append these public comments to meeting minutes.	13.
I am committed to helping the FOIA Advisory Committee in any way possible.	14.
I ask that the Committee review and act on my public comment, 2022-2024 FOIA Advisory Committee Bylaws - Recommended Changes containing common sense recommendations below to improve the Committee:	15.
The Agenda, briefing slides, and any draft committee recommendations will be posted ten days prior to the meeting to allow members of the public to prepare.	16.
Not less than 15 minutes <u>total divided among all commenters</u> will be allotted to oral public comments regardless of the # of callers. (If 5 callers, then 3 min. each. If one caller, then 15 min.)	17.
Members of the public may seek additions to the Agenda, which will receive a written reply.	18.

Members of the public may use briefing slides provided in advance for their oral public comments.	19.
Draft minutes and transcripts, addressing fully all oral and written public comments, all You-Tube top chant comments, and WEBEX comments shall be posted.	20.
within 30 calendar days for public review with a ten-day comment period to assure accuracy. The Chairperson will certify the accuracy of the minutes within 45 calendar days (not 90).	21.
Public Comments Posting Policy shall be approved by the Committee.	22.
The Designated Federal Officer (DFO) Kirsten Mitchell shall have no other NARA assigned duties.	23.
NARA Federal Advisory Committee reports cite DFO as 90%+ she is also the full time OGIS Compliance Team Lead and supports the OGIS Open Annual meeting & Chief FOIA Officers meeting. Can't do it all.	24.
Top FOIA issue is gross underfunding by NARA and DOJ of OGIS and DOJ OIP respectively rendering them utterly incapable of doing their FOIA compliance missions and OGIS additional mediation mission.	25.
I asked DOJ OIP and OGIS to identify in multiple meetings the dollar funding level needed for FY 2023 to effectively perform all their statutory missions. OGIS is likely underfunded ten to twenty-fold.	26.
OGIS is supposed to perform mediation to minimize litigation, yet OGIS does not do so at all. Litigation cases and costs are soaring. OGIS Mediation Team is 3. junior people. Need 10x – 20x more.	27.
OGIS Ombuds reports are inaccurate. OGIS does not perform mediation as required by statute. Impossible to mediate 4,600 cases in a year with 3 people. See OGIS Funding and Case Accountability Logs	28.

OGIS shirks compliance to NARA Records Management unit due to inadequate OGIS Staffing.	29.
NARA (parent of OGIS) does not have any data in FOIA.gov for its FY 2022 Q1 and Q2 reports. See my public comment (NARA FY 22 FOIA Data Stripped from http://FOIA.gov ?? + NARA False FOIA Reporting?).	30.
Getting DOJ OIP to respond to compliance inquiries OIP.ComplianceInquiry@usdoj.gov) and issue non- compliance determinations is <u>harder than finding toilet paper in a pandemic</u> . It never happens.	31.
? DOJ OIP. Bobby, one word answer. What is the dollar funding level that DOJ OIP needs to effectively accomplish its statutory missions for FY 2023?	32.
Not part of my planned comments, but in response to Bobby claiming that OIP is adequately funded. Bobby and Alina got their tails kicked at the recent Senate Judiciary FOIA hearings. You are both grossly underfunded.	33.
See public comments at https://www.documentcloud.org/app?q=%2Buser%3Arobert-hammond-106693%20	34.
• Senate Hearing on FOIA. DOJ's Lack of Enforcement + Malfeasance + Open The Government Statement	35.
• Senators Unite to Slam FOIA Compliance + POGO	36.

? DOJ OIP. I am prepared to provide you 1,000 – 2,000 compliance inquiries of incontrovertible false FOIA reporting and other potential malfeasance. Are you staffed and prepared?	37.
? OGIS. Alina, one word answer. What is the dollar funding level that OGIS needs to accomplish its statutory FOIA compliance and mediation missions for FY 2023 (with full mediation when sought)?	38.
Two years ago, I emailed Alina offering to lobby Congress for additional OGIS funding, but NARA gets every dime it asks for in budget submissions while seeking grossly insufficient funds for OGIS.	39.
Alina asked the last term to find her funding sources, like taking funds from agencies' cost recovery. Money doesn't fall from the sky. NARA and DOJ must ask for OGIS and OIP funding in their budgets.	40.
Now I am asking Congress for GAO/OIG audits of OGIS & OIP funding and mission degradation. Well received. Two conference calls with Senate Judiciary staffers this week (their request). One more today.	41.
An adverse audit finding is a blessing if the reason is insufficient funding. Attach the audit to the next budget and place the onus on OMB and Congress. Ms. Wall (NARA)? Ms. Gupta (DOJ)?	42.
I believe every agency budget should contain a line item for FOIA supported by what they would do to improve FOIA – increase staff and grade levels, reduce backlogs, etc.	43.
Place the onus on OMB and Congress to provide funding. In my conversations with Senate staff, Congress understands the funding shortfall and is receptive to supporting agency line-item budgets.	44.

? OGIS. Why did OGIS discontinue publishing contemporaneous ADR request case logs and ADR Final Response Letters in 2016 and will you restore this? https://www.archives.gov/ogis/mediation-program	45.
? OGIS. Alina, why did you recently discontinue your name in the signature block of OGIS response letters, instead citing “The OGIS Staff and will you now provide the name or a real person?”	46.
? OGIS. Alina, why did you discontinue satisfaction surveys and how do you now validate your suspect claims that requesters are satisfied?	47.
?OGIS. Statutory basis is what for statement, “OGIS staff may need to ... consult with the Office of Information Policy at the Department of Justice, ..., before accepting the request for mediation?”	48.
?OGIS. OGIS has never engaged in mediation of my specific requests to do so. Upon what authority is OGIS refusing mediation?	49.
Sample Hammond public comments are below.	50.
- <u>Public Comments Submitted to the Chief FOIA Officers Council</u> https://www.archives.gov/ogis/about-ogis/chief-foia-officers-council	51.
- <u>OGIS Annual Open Meeting Public comments</u> https://www.archives.gov/ogis/outreach-events/annual-open-meeting	52.
- <u>General</u> https://www.documentcloud.org/app?q=%2Buser%3ARobert-hammond-106693%20	53.

1. All Panelist Chat to June 9, 2022 FOIA Advisory Committee Meeting. OGIS & DOJ Funding + Missing FOIA.gov Data.”	54.
2. NARA FY 22 FOIA Data Stripped from FOIA.gov?? + NARA False FOIA Reporting?”	55.
3. Failure - FOIA Compliance Oversight & Funding. Part 2. No Joking Matter	56.
4. Comments to Unlawful Chief FOIA Officers Meeting of November 17, 2021	57.
5. Mandatory Right to Dispute Resolution - OGIS Malfeasance??	58.
6. DOD Massive False FOIA Reporting. Part1. Letter to SECDEF Complaint to DOJ OIG +v3	59.
7. Sample FOIA Template With Recent Developments to Combat Agency Misconduct	60.
8. HOT! Semo OGIS. Budget Numbers do not Comport w. NARA Published Budgets!	61.
9. DOD MASSIVE FALSE REPORTING PART II + “Still Interested” Abuse	62.
10.NARA, PLEASE FUND OGIS!! (PART 1)	63.

11.NARA FOIA & Financial Malfeasance \$789,730 + Alteration of Records and Loss of Public Trust?	64.
12.Archivist of USA & OGIS Posting Policy Does Not Comport with Law	65.
13. QUESTIONS for June 29, 2022 OGIS Annual FOIA Meeting v2	66.
14. The Uncommon Man. Response to Hon. David S. Ferriero June 10, 2021 Comments to FOIA Advisory Committee.”	67.
15. DOD’ Cites Change to CFR 32 CFR Part 286.4 as Unlawful Basis for Omitting OGIS Mediation Rights	68.
16. Senate Hearing on FOIA. DOJ's Lack of Enforcement + Malfeasance + Open The Government Statement	69.
17. Senators Unite to Slam FOIA Compliance + POGO	70.
18. OGIS Negligence Generally & Improper June 29, 2022 FOIA Meeting	71.
19. FOIAonline - Recommended System Changes	72.
20. Violations of the ADA in FOIA Redactions, Simple Solution	73.

21. Hammond Planned Chat Comments to 4.7.2022 FOIA Advisory Committee Meeting	74.
22. DOD Massive False Reporting. 5 yr. Late Acknowledgements, Unusual Circumstances Abuse	75.
23. DOD MASSIVE FALSE REPORTING PART II + Still Interested Abuse. Updated July 27, 2022	76.
24. DOJ OIP Compliance Inquiries	77.
25. 2022- 2024 FOIA Advisory Committee Bylaws - Recommended Changes	78.
26. 2022- 2024 FOIA Advisory Committee Inaugural Meeting DOJ OIP & OGIS Grossly Underfunded	79.
?OGIS. Why changed in 2022 Ombuds report statutory wording from “offer mediation services” to “help resolve disputes”? Per 5 USC § 552(h)(3) OGIS “shall offer mediation services to resolve disputes.”	80.
?OGIS. OGIS and Agency FOIA Public Liaisons routinely refuse to engage in ADR. Why does OGIS incorrectly report the # of OGIS cases and # times FPL assistance sought ADR in lieu of engaged in ADR?	81.
?OGIS. OGIS and Agency FOIA Public Liaisons routinely refuse to engage in ADR. Why does OGIS incorrectly report the # of OGIS cases and # times FPL assistance sought ADR in lieu of engaged in ADR?	82.
5 USC § 552(h)(4)(A)(ii)(II), OGIS report “ <u>number of times each agency engaged in dispute resolution with the assistance of the Office of Government Information Services or the FOIA Public Liaison.</u> ”	83.

?OGIS. In my requests for MEDIATION, OGIS often says, file an appeal & the agency will address your issues. Not what Congress intended! How can OGIS count such actions in its ADR case closure figures?	84.
?OGIS. Recommendation No. 2020-19 “in the absence of oversight from Congress, FOIA otherwise lacks a sustaining enforcement mechanism.” Why did OGIS non-concur with “additional hearings and inquiries?”	85.
?OGIS. NARA FY 2021 FOIA Requests that are not in FOIA annual raw data. ?False reporting: NGC-675, NGC-698, NGC-744, NGC-764, NGC-779, NGC-822, NGC-824	86.
? DOJ OIP. I recently provided you a compliance inquiry that NARA did not include any open FOIA requests in its FY 2021 FOIA raw data, in apparent violation of law. DOJ OIP action taken is what?	87.
? DOJ OIP. In violation of law, DOD has not released FY 2016 raw data & 2017 Defense Health Agency data does not contain any case numbers. DOJ OIP action taken is what?	88.
? DOJ OIP. FOIA.gov does not contain any NARA FY 22 Q1 or Q2 data. DOJ OIP action taken is what?	89.
? DOJ OIP. Will you consider my recommendation requiring Agencies to amend past reports and raw data with narrative as to how error/false reporting occurred?	90.
? DOJ OIP. FOIA AC Recommendation 2022-10. “We recommend that agencies proactively publish FOIA logs in the agency’s electronic reading room (often referred to as FOIA Libraries) on an ongoing basis”	91.
Communications made through Ombuds blog’s email and messaging system will in no way constitute a legal or official notice or comment to the NARA or any official or employee of NARA for any purpose.	92.

<u>FOIA Ombudsman - is this legal?</u>	93.
NARA BL 2015-02 applies to text messaging, chat/instant messaging, direct messaging functionality in social media tools or applications, voice messaging, and similar forms of electronic messaging systems,	94.
The FOIA Advisory Committee dashboard citing The Attorney General's March 15, 2022 FOIA guidelines are irrelevant. What is DOJ doing on this specific recommendation? Bobby? Ms. Gupta?	95.
The FOIA Advisory Committee must feel free to use email with a copy to foia-advisory-committee@nara.gov for preservation. Emails are not posted but may be subject to FOIA.	96.
The issue of B5 deliberative process of some communications remains open. I do not FOIA Committee communications.	97.
I like Michael Heise's idea of sub-elements to B5 to address specifically the reason for withholding. I will be preparing a public comment.	98.
Navy appellate authority withholds its appeals communications with the agency under B5 attorney client privilege where none exists at that juncture.	99.
Join the fight to improve FOIA. I will reply and make time for you. FOIAcompliance@gmail.com or on Twitter @FOIAcompliance.	100.



**Senate March 29, 2022
FOIA Hearings**

**“DOJ’s Lack of Enforcement”
+
Malfeasance
+
Open the Government
Statement for the Record**

**PUBLIC COMMENT
Revised**

**by Robert Hammond
foiacompliance@gmail.com
Whistleblower**

**Copy to: Senate Judiciary, House Oversight,
Vanita Gupta (DOJ), Debra Wall (NARA)**

whistleblower@judiciary-rep.senate.gov

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Outline

1. Opening Comments

- [Hammond Recommendations to FOIA Advisory Committee & Chief FOIA Officers Council](#)
- [Acknowledgments](#)
 - o FOIA Advisory Committee
 - o "Saving FOIA" - Margaret Kwoka
 - o Muckrock.com - Best FOIA Portal

2. [News Media Alliance - DOJ's Lack of Enforcement](#)

3. [Statement of Lisa Rosenberg @ Open The Government](#)

Hammond Recommendations

Recommendations to FOIA Advisory Committee & Chief FOIA Officers Council

Related to All

1. Require contemporaneous posting of FOIA raw data logs.
 - a. Some entities seemingly lie, alter and destroy FOIA raw data records after annual FOIA reports, knowingly submit massively false reports, and their quarterly data does not match annual FOIA reports.
2. Require agencies to amend past quarterly and Annual FOIA Reports.
 - a. See [Hammond, Robert](#) **DOD Massive False FOIA Reporting. Part 1. Letter to SECDEF, Complaint to DOJ OIG**
 - b. They are grossly inaccurate every year; some FOIA requests and appeals will never be reported; FOIA.gov data is materially inaccurate (DOJ and OGIS own this mess).
3. Evaluate admitted, incontrovertible alteration and massive destruction of FOIA records, despite being advised countless times to preserve them. Evaluate the inadequacy of funding and mission accomplishment of

NARA's Unauthorized Dispositions (UD) unit wrt alteration and destruction of FOIA records.

- a. DOD admits to altering FOIA processing log raw data and routinely admits to destroying records despite being advised countless times to preserve them for judicial review.
 - b. DOD's position in litigation (supported by DOJ) is that "nothing in FOIA requires records to be preserved."
 - i. The Chief FOIA Officers Council & FOIA Advisory Committee must address preservation of FOIA records & relevant federal statutes.
 - c. DOJ OIP sends me correspondence wherein DOD admits to destroying FOIA records subject to NARA GRS retention and to specific notices to preserve them. Yet DOJ OIP is oblivious to what their own compliance inquiry responses say (copy & past from agency), and DOJ OIP has done nothing whatsoever about this.
4. Require all agencies participating in FOIAonline.gov to produce plans to preserve all FOIAonline records, which are unique and subject to FOIA.
 5. Issue guidance discouraging/preventing automated destruction of FOIA case processing records and seeking a change to NARA GRS to make FOIA case processing records permanent.
 - a. DOD admits to (errantly/unlawfully) destroying potentially hundreds of thousands of records over a short time (Navy records schedule).

- b. NARA GRS 4.2 requires that FOIA and Privacy Act case files be retained for 6 years after final agency action or 3 years after final adjudication by the courts, whichever is later.
 - i. But requesters, unsatisfied with a FOIA response, often seek case records of prior FOIA request extending retention further.
 - ii. FOIA Officer has no idea of when FOIA case records are eligible for destruction.
 - iii. NARA now requires all that records be submitted digitally.
 - iv. FOIA case records should be permanent. Virtually no cost.

Related to Office of Government Information Services (OGIS)

- 6. Allow OGIS and DJO OIP to make referrals to Special Council in egregious compliance violations or willful withholding.
- 7. Allow OGIS to review records in camera and to release them.
- 8. Affirm that OGIS may use binding and non-binding arbitration as part of dispute resolution; else seek legislation to codify this.
- 9. Place OGIS under Congress with direct funding and reporting; eliminate Executive branch bias and OGIS conflict (particularly wrt NARA records).
- 10. Require OGIS to stipulate the annual funding it requires and study current OGIS funding shortfall and mission failure.

a. [Robert Hammond](#) - October 22, 2021 - NARA, Please Fund OGIS!!
(PART 1)

11. Require OGIS to properly report the number of times agencies or the FOIA public liaisons engaged in dispute resolution (as required by law), and to report the number of times OGIS or the Agency refused to participate.
12. Review OGIS apparent unlawful Public Comments Posting Policy and amend it as recommended.
 - a. [Robert Hammond](#) - October 22, 2021 - OGIS Posting Policy for Public Comments
13. Issue guidance on unlawful violations of the Americans with Disabilities Act in FOIA redactions (e.g., illegible 6-point red font against a black background (DOJ does this)).
14. Require OGIS to post contemporaneous ADR logs and closure letters as they did in the past.
 - a. OGIS annual reports appear materially false.
15. Require OGIS to conduct a statistically a significant sample of Annual FOIA report raw data to FOIA portal data to source records every year; else get GAO to do it.
 - a. OGIS essentially uses NARA Records Management support to review procedures and audits only limited sub-component data, such that it would take OGIS 400+ years to do a single statistically significant sample of one year's FOIA data.

- b. [Robert Hammond](#) - January 16, 2022 - Failure - FOIA Compliance Oversight & Funding. Part 2. No Joking Matter.

16. Require OGIS to re-institute and post ADR satisfaction surveys.

Related to DOJ Office of Information Policy

1. Allow OGIS and DJO OIP to make referrals to Special Council in egregious compliance violations or willful withholding.
2. Require DOJ OIP to post contemporaneous compliance inquiry logs with issues and resolution.
 - a. DOJ IOP's annual Litigation and Compliance Reports appear massively false.
3. Require DOJ OIP to stipulate the annual funding it requires, and study current DOJ OIP funding shortfall and mission failure.
 - a. [Robert Hammond](#) - October 28, 2021 - Failure: FOIA Compliance Oversight & Funding.
4. Stipulate what costs must be included in litigation costs and require agencies to preserve contemporaneous records (e.g., time sheets) for six years.

Acknowledgements

For years I have been complaining about the complete lack of compliance oversight by Department of Justice Office of Information Policy (DOJ OIP) and the NARA Office of Government Information Services.

It is encouraging that so many FOIA advocacy groups are saying the same thing & that Congress strongly agrees. See related presentation, “Senators Unite to Slam FOIA Compliance.”

FOIA Advisory Committee

The FOIA Advisory Committee has done fabulous work in its 2020 – 2022 term draft recommendations.

Wow! “**OGIS 2.0: Reimagining FOIA Oversight**” recommendations are the most consequential of any made by the Committee. Thank you, **David Cuillier, A.Jay Wagner, Thomas M. Susman, Patricia A. Weth!!!**

Direct funding from Congress (\$1.8M to start) and the ability for OGIS to review records in camera and release them would dramatically improve FOIA and save agencies and requesters time and money.

The FOIA Advisory Committee is the premier venue for making improvements.

Some of the smartest people on the planet! If you have a passion for FOIA or are just drowning at your agency and want to make things better, pls consider seeking appointment to next year's FOIA Advisory Committee.

The next FOIA Advisory Committee meeting is May 5, 2022.

Saving FOIA!

Also, congratulations to author **Margaret Kwoka** on her book, "Saving the Freedom of Information Act." An engaged free press is vital to our Democracy. Margaret, you ROCK!

Looking forward to "Saving FOIA Part II" & happy to contribute.

Muckrock.com - Best FOIA Portal

Best FOIA Portal is Muckrock.com. Correctly sends request to state & fed or you give address. Auto follow-up. File appeals. You can share request with the world or embargo until you are ready. Join others in "projects."

I hope Muckrock has someone on the FOIA Advisory Committee next year. Huge issue is replacement for FOIAonline and Muckrock has the expertise to help.



Senate Holds FOIA Hearing

By Staff March 31, 2022

On March 29, the Senate Committee on the Judiciary [held a hearing](#) on the Freedom of Information Act (FOIA) and how to improve transparency in the 21st century. All of the Senators were in agreement that FOIA needs work. They discussed that despite a decrease in FOIA requests, there has been an increase in backlog, as well as the incredibly long agency response time. The Alliance's coalition partner Open the Government submitted a [statement for the record](#) that highlighted some of FOIA's serious issues and potential solutions, including providing agencies resources and maximizing affirmative disclosures. The statement also points out how the [DOJ's recent FOIA guidelines](#) do relatively little to help the issues FOIA requesters are facing, despite taking over a year to release the memo. The hearing also showed the DOJ's lack of enforcement mechanisms, as the DOJ witness could only point to training and guidance as ways to ensure compliance with FOIA guidelines. [Read more here.](#)

Statement of Lisa Rosenberg @ Open The Government

Statement of Lisa Rosenberg
Executive Director at Open The Government
Before the Senate Judiciary Committee
On “The Freedom of Information Act: Improving Transparency and the
American Public’s
Right to Know for the 21st Century”
March 29, 2022

Chairman Durbin, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to submit a statement for the record regarding the Freedom of Information Act (FOIA). My name is Lisa Rosenberg and I serve as the Executive Director at Open The Government. Open The Government is an inclusive, nonpartisan coalition that works to strengthen our democracy and empower the public by advancing policies that create a more open, accountable, and responsive government. Open The Government and many of our coalition partners have long worked with this Committee to monitor trends in government transparency and to respond to challenges with agency compliance with the FOIA statute.

We write you today to discuss three key issues for the Senate Judiciary Committee to investigate while providing oversight on the FOIA: Increasing agency resources to support FOIA operations; maximizing affirmative disclosure; and the Attorney General’s recent memo on FOIA.

I. Increasing Agency Resources to Support FOIA Operations

A central obstacle that plagues FOIA offices across the federal government is a lack of dedicated funding and resources. Advocates—both inside and outside of government—have long cited deficient resources as the primary reason agencies are unable to meet FOIA’s statutory timelines for completing requests. The Department of Justice’s Office of Information Policy (OIP), which is required to monitor compliance with FOIA across the federal government, noted this concern over a dozen years ago and to date Congress has failed to address the issue.¹

Congress must demonstrate its commitment to access to information by providing the necessary resources that will allow agencies to comply with the FOIA statute. First, rather than funding FOIA operations out of agencies’ general administrative budgets, Congress must provide specific “line-item” budgets for agencies’ FOIA operations, just as they do for Inspectors General offices. Second, Congress should ensure agencies are addressing their FOIA backlogs and increase funding if necessary to reduce the backlogs. When Congress increased funding to the Department of Interior to reduce its FOIA

¹ Department of Justice. (1990, January 1). FOIA Update: FOIA Affected by Budget Restrains. <https://www.justice.gov/oip/blog/foia-update-foia-affected-budget-constraints>

backlogs, it achieved an impressive 10% reduction in a single year. Similarly, the Appropriations Committee is working with the Department of Homeland Security to monitor its long-term compliance with a court-mandated requirement to keep its FOIA backlog clear and increase funding to the Department if needed.²

Finally, Congress should invest in new and emerging technology, such as e-discovery tools, to improve staff efficiencies and the public's user experience.³ This recommendation has been endorsed by the FOIA Advisory Committee and accepted by the Archivist of the United States.

II. Maximizing Affirmative Disclosure

In FY 2020, government agencies received nearly eight hundred thousand FOIA requests.⁴ In order to return records to the public within the statutorily mandated twenty business days, Congress requires agencies maximize “affirmative disclosure”—mandating the release of specific documents without the need for a FOIA request. For example, when the Environmental Protection Agency unveiled its “MyProperty” tool, which allows the public to find commonly

² Nightingale v USCIS, No. 19-03512, 2020 WL 7640547 (N.D. Cal. Dec. 17, 2020)

³ National Archives. (2020, July 9). Report to the Archivist of the United States.

<https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf>

⁴ Department of Justice, Office of Information Policy. Summary of Annual FOIA Reports for Fiscal Year 2020

requested records on an online portal, its FOIA volume decreased by 33%.⁵ Under the FOIA Improvement Act of 2016, Congress required agency officials to search their records and begin to proactively disclose large categories of records. Unfortunately, agencies have treated these new obligations as a mere recommendation instead of an actual obligation and as a consequence the volume of FOIA requests continues to increase.

Moreover, rather than shining a light on government actions, FOIA has instead become a tool for individuals seeking information about themselves which the government holds. For example, 81 percent of requests to the Department of Veterans Affairs come from veterans seeking their own medical records. Such “first-party” requests dominate the FOIA requests received by the majority of agencies which receive a high volume of FOIA requests. As Professor Margaret Kwoka wrote in her book, *Saving the Freedom of Information Act*, 67 percent of the FOIA requests reviewed across the federal government (387,625 of 577,982) were for persons seeking records for themselves and not for the purpose of government oversight.⁶

These statistics reveal that agencies are not taking seriously their obligations to find ways to proactively disclose records and are instead using FOIA for

⁵ Kwoka, M. *Saving the Freedom of Information Act*. Cambridge University Press, 2021 (page 181)

⁶ Id.

purposes for which it was not designed. Further, the public commonly requests records such as visitor logs, calendars for agency heads, and reports submitted to Congress which are also not affirmatively disclosed by agencies. At the same time, the Department of Justice's Office of Information Policy provides agencies some training and guidance but does not have strong oversight on compliance. For example, when OIP found the Department of Housing and Urban Development (HUD) made zero proactive disclosures for two years, it only asked HUD if its numbers were accurate but didn't provide oversight on *why* HUD was not proactively disclosing documents.⁷

By all these measures, it is clear that FOIA's affirmative disclosure requirements are being ignored by agencies across the federal government.

III. The Attorney General's Recent Memo on FOIA

For well over a year, members of civil society raised serious concerns about the slow pace at which the Department of Justice (DOJ) was issuing its FOIA guidelines. These concerns caused the Senate Judiciary Committee to send a bipartisan letter to the DOJ to inquire why the guidelines were so delayed.⁸ It

⁷ Government Accountability Office. (2021). Freedom of Information: Actions Needed to Improve Agency Compliance with Proactive Disclosure. (GAO Publication No. 21-254). Washington, D.C.: U.S. Government Printing Office. <https://www.gao.gov/assets/gao-21-254.pdf>

⁸ Mattela, T. (2022, February 23). Lawmakers Press Garland on Access to Documents for Public, Congress, Wall Street

was only after numerous inquiries by Congress that DOJ released the current guidelines which should be viewed with deep skepticism as there are few substantive changes from prior FOIA memos. The new guidelines are, at best, a mere recitation of what agencies should already be doing under existing legislation. For example, Attorney General Garland's guidelines state that agencies should apply a "presumption of openness" to records, which has been DOJ's FOIA policy since 1993.⁹ Similarly, the FOIA memo states agencies should avoid using exemptions merely because information could *technically* be withheld. This position was articulated by Attorney General Holder in 2014 and has been largely unimplemented by agencies. Finally, the Garland memo directs agencies to maximize proactive disclosure, which, as noted above, is already mandated yet is not being implemented.

Another major deficiency of the Garland FOIA memo is its lack of any creative, new policy initiatives. Attorney General Janet Reno issued FOIA guidance that included a "presumption of openness," a novel approach by the Department of Justice that embraced the public's right-to-know. The Garland memo offers no new ways to improve agency compliance with FOIA and seems to have been an exercise in "checking the box" rather than a meaningful attempt to improve

Journal. <https://www.wsj.com/articles/lawmakers-press-garland-on-access-to-documents-for-public-congress-11645649962>

⁹ Department of Justice. (1993). FOIA Update: Attorney General Reno's FOIA Memorandum. <https://www.justice.gov/oip/blog/foia-update-attorney-general-renos-foia-memorandum>

access to information.

When Congress enacted the Freedom of Information Act, it embarked on a bold experiment in government transparency and accountability. The statute has been effective in exposing malfeasance, waste, fraud, and abuse by bad actors. However, FOIA operations are strained due to neglect, particularly with funding and technology. Agencies are inundated with requests and struggle to process them because of a large volume of “first-party” requests which are not being affirmatively disclosed. And the Office of Information Policy, which ostensibly monitors compliance with FOIA, has abdicated its responsibilities with inaction.

Congress has the ability to address many of the obstacles to creating a more open government. We appreciate the commitment of this Committee to strengthening the public’s right to know and are committed to working with you to reform FOIA to fulfill its original mission.

We thank the Committee for allowing us the opportunity to provide this testimony.



Senators Unite to Slam FOIA Compliance

+

POGO Statement for the Record

**PUBLIC COMMENT
March 31, 2022**

**by Robert Hammond
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**Copy to: Senate Judiciary, Senator Patrick
Leahy, House Oversight, Vanita Gupta
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Outline

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POLITICO

'There is a big problem': Senators unite to slam FOIA compliance

The premier transparency law is hobbled by backlogs and mountains of electronic data, lawmakers are told.



“My conclusion from this is: there is a big problem,” Sen. Dianne Feinstein (D-Calif.) said during an oversight hearing on the federal government’s ongoing struggle to implement the records-access law in a timely way. | Alex Wong/Getty Images

By JOSH GERSTEIN
03/29/2022 02:22 PM EDT

The often bitterly divided Senate Judiciary Committee had little difficulty Tuesday finding consensus that the nation’s premier transparency law, the Freedom of Information Act, isn’t working well.

“My conclusion from this is: there is a big problem,” Sen. Dianne Feinstein (D-Calif.) said during an oversight hearing on the federal government’s ongoing struggle to implement the records-access law in a timely way.

Sen. Jon Ossoff (D-Ga.) said he believes the half-century-old statute allowing journalists, advocacy groups and members of the public to request federal agency records appears to be failing to live up to its original ambitions.

“My impression is the chasm is massive — it’s vast,” he said. “We’re talking about timelines that are worse than routinely unmet, but almost never met. We’re talking about massive backlogs.”

One particular focus Tuesday was on the impact of the coronavirus pandemic on federal agencies' compliance with FOIA.

Senators heard good and bad news on that front: As the pandemic spread, new requests were down, but agencies fell even further behind in processing them. During fiscal year 2020, which covered the first six months of the pandemic, agencies received 8 percent fewer requests but processed 12 percent fewer, according to the Government Accountability Office.

That caused a spike in the already substantial backlog of requests, which reached 142,000 at the end of September 2020, up 18 percent from a year earlier, GAO official James McTigue said.

McTigue said some agencies faced challenges getting FOIA processing staff set up to telework when the pandemic broke out and others had paper records stranded at offices workers weren't allowed to enter. Others, such as the FBI, would not authorize telework for FOIA processing due to security concerns and therefore had to establish protocols for workers to come into the office, which created a greater delay, he said.

A GAO report issued Tuesday found that agencies are not fully complying with a requirement to post certain types of records online. The panel's ranking member, Sen. Chuck Grassley (R-Iowa), pressed the Justice Department's top FOIA

official on what happened to a pledge President Barack Obama's administration made in 2016 to post most responses to FOIA requests on agency websites under a so-called "release to one, release to all" policy.

The DOJ official, Babak Talebian, declined to commit to broad implementation of such an approach but said officials are moving in that direction.

"We conducted a pilot....There were some challenges," Talebian said. "We are still encouraging agencies to make proactive disclosures, and some agencies are implementing that at a 'release to one, release to all' level....We want to continue working towards a time where agencies can have the capacities to get to a point where they can release more and more records on their websites, getting to a 'release to one, release to all.'"

The federal government's FOIA ombudsman, Alina Semo, said some agencies are still sluggish in posting completed requests online because of concerns they'll receive complaints that the records aren't accessible to the disabled.

"There's an inherent tension, and agencies are sometimes technologically hamstrung in posting large amounts of data," Semo said.

Grassley also pressed Talebian on why it took Attorney General Merrick Garland until earlier this month to issue written guidance urging agencies to lean in favor of disclosure when answering FOIA requests. There was no explicit discussion at

the hearing of how the Trump administration implemented the transparency law, but a similar memo from then-Attorney General Eric Holder during the Obama administration emerged in March 2009.

“Why did it take so long?” Grassley asked.

“In his first full day of his first full week in office, the attorney general joined us for Sunshine Week to provide public remarks to reinforce the importance of FOIA,” said Talebian, director of Justice’s Office of Information Policy. “Under his leadership, we continue to apply our guidance and our training.”

Judiciary Committee Chair Dick Durbin (D-Ill.) said one challenge with implementing FOIA is the volume of emails and other electronic records that have to be searched and processed — sometimes so many records that having a human apply each necessary redaction is all but impossible. Durbin pressed Talebian on whether officials are considering using artificial intelligence to make such requests more manageable.

“We’re seeing records in volumes in different forms that could not have been envisioned when FOIA was enacted,” Talebian said. “Certainly, we’re definitely looking at advanced technology, including artificial intelligence to help us with the search and maybe even the processing of records.”

“Is our federal government flirting with the idea or serious?” Durbin asked.

“I would say: serious. We want the best tools,” Talebian added.

Sen. Sheldon Whitehouse (D-R.I.) used the session to complain about the Justice Department’s ongoing resistance in court to a FOIA request for an Office of Legal Counsel opinion detailing DOJ’s legal rationale why sitting presidents cannot be criminally prosecuted. U.S. District Court Judge Amy Berman Jackson ordered the release of the opinion, prepared in connection with the release of Special Counsel Robert Mueller’s report. She rejected the department’s arguments that the memo was part of the deliberative process and found that it was an after-the-fact justification for the decision not to prosecute then-President Donald Trump.

The Justice Department appealed that ruling to the D.C. Circuit Court of Appeals, where the case remains pending.

“There was no decision to be made,” Whitehouse said, noting that he and other senators have filed an amicus brief urging the appeals court to force disclosure of the opinion. The Rhode Island Democrat said DOJ’s interpretation would allow the exemption for deliberative process “to just run wild through the agencies.”

Talebian acknowledged he was involved in decision-making in the case but declined to explain further, citing a need to protect the same type of deliberative process that Whitehouse criticized.



**Statement of Melissa Wasser, Policy Counsel
Project On Government Oversight
Before the Senate Judiciary Committee
On “The Freedom of Information Act: Improving Transparency
and the American Public’s Right to Know for the 21st Century”
March 29, 2022**

Chairman Durbin, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to submit a statement for the record regarding problems with the Freedom of Information Act (FOIA). I am Melissa Wasser, a policy counsel at the Project On Government Oversight (POGO). POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

Four years ago this month, this Committee held a similar hearing on FOIA reform with agency witnesses.¹ That hearing demonstrated a bipartisan interest in strengthening FOIA and increasing proactive disclosure of records. Unfortunately, not much has changed since 2018. It is time for Congress to act and realign agency FOIA implementation with the spirit of the law.

Despite the fact that FOIA is one of the most useful tools the public has to educate itself about what the federal government is doing — and hold the government accountable — the last round of substantive reforms to FOIA was passed back in 2016. Those reforms were a step in the right direction, but there are still numerous issues that impact the law’s effectiveness. Today, I will highlight those existing problems, explain why they deserve your attention, and discuss several recommendations to improve the system and promote greater access to information.

Departures From the Statute

When agencies apply expansive redactions to requests for information and ignore statutory proactive disclosure guidelines, these problems complicate the FOIA implementation process. The overly expansive use of exemptions, combined with the avoidance of proactive disclosures, means that agencies continue to cause severe backlogs and delays for requesters seeking information from their own government. Congress should address these problems.

FOIA provides a statutory right of access to federal agency records.² Anyone can request information by submitting a request to a federal executive branch agency and asking for records. The law provides nine exemptions that allow an agency to withhold or redact records. When reasonable exemptions are applied

¹ *The Freedom of Information Act: Examining the Administration’s Progress on Reforms and Looking Ahead: Hearing before the Senate Committee on the Judiciary*, 115th Cong. (March 13, 2018), <https://www.judiciary.senate.gov/meetings/the-freedom-of-information-act-examining-the-administrations-progress-on-reforms-and-looking-ahead>.

² 5 U.S.C. § 552 (2021), <https://www.law.cornell.edu/uscode/text/5/552>.

properly, government agencies strike a balance between protecting sensitive information and leaving large portions of information available to the public, adhering to the letter and the spirit of the law.

However, as POGO has previously reported, agencies often use FOIA exemptions improperly, withholding records simply because they may reveal problems at the agency or just “paint the agency in a bad light.”³

Reporting shows that requesters consistently receive large swaths of arbitrarily redacted information, including fully redacted pages, rather than substantive responses.⁴ POGO has been on the receiving end of several requests with entire pages of text redacted. These redactions are obviously arbitrary, given that similar requests by other organizations resulted in the release of the same records with significantly less information withheld.⁵

The FOIA Improvement Act of 2016 codified a foreseeable harm provision that required agencies to withhold information only if “the agency reasonably foresees that disclosure would harm an interest protected by an exemption.”⁶ Agencies are allowed this discretion, but they should balance the possibility of harm against public interest even when they can technically withhold the information, especially considering FOIA’s presumption of openness.

POGO therefore recommends that any future FOIA legislation include the addition of a public interest balancing test. Adding such a test to FOIA’s foreseeable harm standard would have agencies determine, before they decide not to release information, whether the harm of releasing agency information outweighs the public interest in accessing it. This fix could help prevent improper withholding of information and over-redaction when agencies respond to requests.

When requesters fail to receive information in a timely manner, they can ask a court to order the agency to respond on a specific timeline. However, it should not take costly FOIA litigation and appeals for agencies to comply with the law. At the 2018 hearing, Senator Grassley agreed, stating “instead of litigating over a FOIA request, agencies should proactively release that information now for all to see.”⁷ It is not enough for agencies to promote compliance with FOIA: these agencies have a statutory duty to comply with the law, and they are failing to do so with impunity.

When Congress passed the FOIA Improvement Act of 2016, it required proactive disclosures intended to increase access to government information.⁸ Agencies are now required to “make available for public

³ Nick Schwellenbach and Sean Moulton, “The ‘Most Abused’ Freedom of Information Act Exemption Still Needs to Be Reined In,” Project On Government Oversight, February 6, 2020, <https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in/>.

⁴ Sharon Lerner, “NIH Sent The Intercept 292 Fully Redacted Pages Related To Virus Research in Wuhan,” *The Intercept*, February 20, 2022, <https://theintercept.com/2022/02/20/nih-coronavirus-research-wuhan-redacted/>; see also Jason Leopold and Anthony Cormier, “A New Version of the Mueller Report Reveals That Mueller Declined to Charge Donald Trump Jr. And Roger Stone With Computer Crimes,” *Buzzfeed News*, February 11, 2022, <https://www.buzzfeednews.com/article/jasonleopold/robert-mueller-declined-charge-trump-jr-roger-stone>.

⁵ Nick Schwellenbach and Sean Moulton, “The ‘Most Abused’ Freedom of Information Act Exemption Still Needs to Be Reined In,” Project On Government Oversight, February 6, 2020, <https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in/>.

⁶ 5 U.S.C. § 552(a)(8) (2021), <https://www.law.cornell.edu/uscode/text/5/552>.

⁷ Prepared Statement by Senator Chuck Grassley for Hearing on “The Freedom of Information Act: Examining the Administration’s Progress on Reforms and Looking Ahead,” March 13, 2018, <https://www.judiciary.senate.gov/download/03-13-18-grassley-statement>.

⁸ FOIA Improvement Act of 2016 (P.L. No. 114-185), <https://www.congress.gov/114/bills/s337/BILLS-114s337enr.xml>.

inspection in an electronic format,” records “that have been requested 3 or more times.”⁹ However, only one of three agencies that the Government Accountability Office (GAO) reviewed in 2021 had policies in place to address and document compliance with proactive disclosure requirements.¹⁰ Furthermore, none of the three agencies reviewed by GAO fully complied with requirements to track and report the number of records disclosed each year.¹¹

POGO recommends that commonly requested records, like visitor logs, calendars for agency heads, reports, and testimony submitted to Congress should be proactively disclosed by agencies. These records hold significant importance to the public.

Congress should pay particular attention to proactively disclosing the work of one office. The Department of Justice’s Office of Legal Counsel (OLC) is responsible for advising executive branch agencies and the president on the legality of proposed actions. Its opinions are not consistently released to Congress or the public, who lose the opportunity to scrutinize and question the legal analysis of these opinions in real time. The opinions effectively become secret law, with no consistent way for Congress or the public to access them.

OLC has avoided complying with FOIA requests and takes the position that its opinions are exempt from open records laws,¹² even as a court held that some of these opinions should be proactively made available to the public.¹³ This lack of transparency hinders this Committee’s and Congress’s ability to conduct robust congressional oversight and make legislative corrections to increase transparency when necessary.

POGO is recommending that Congress require the Justice Department to publicly post all final interpretations of law issued by OLC online within 30 days. This would allow Congress to take their power back and act as a check on this increasingly powerful office. Proactive disclosure of these records would free up capacity for FOIA offices to use resources elsewhere, help reduce FOIA backlogs, and lower litigation costs for both agencies and requesters. This necessary fix provides additional ways to streamline agency communication with other FOIA requests.

Unintended Interpretations

When another branch of government interprets the language of FOIA in ways that decrease transparency and conflict with the spirit of the law, it is up to Congress to rectify these interpretations and clarify intent. Two such relatively recent interpretations have worked to limit the information the public and individual Members of Congress can receive.

⁹ Department of Justice, “OIP Summary of the FOIA Improvement Act of 2016,” <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016>.

¹⁰ U.S. Government Accountability Office, Freedom of Information Act: Actions Needed to Improve Agency Compliance with Proactive Disclosure Requirements, GAO-21-254 (March 2021), 4, <https://www.gao.gov/assets/720/712947.pdf>.

¹¹ U.S. Government Accountability Office, Freedom of Information Act: Actions Needed to Improve Agency Compliance with Proactive Disclosure Requirements, GAO-21-254 (March 2021), 13, <https://www.gao.gov/assets/720/712947.pdf>.

¹² David Janovsky, “Rubber Stamp or Rule of Law?”, Project On Government Oversight, March 23, 2021, <https://www.pogo.org/analysis/2021/03/rubber-stamp-or-rule-of-law/>.

¹³ Knight First Amendment Institute at Columbia University, “Office of Legal Counsel May Be Required to Release Many of Its Legal Opinions, Court Says,” September 12, 2020, <https://knightcolumbia.org/content/office-of-legal-counsel-may-be-required-to-release-many-of-its-legal-opinions-court-says>.

A 2019 Supreme Court decision made it significantly more difficult for the public to access certain types of corporate information about businesses that receive taxpayer money through government programs.¹⁴ By adopting a broader reading of what can be deemed “confidential” under FOIA’s Exemption 4, the court made it easier for agencies to withhold more of the information submitted to the government by private businesses.

A standard more consistent with the goal of providing maximum transparency to the public is that business records should be considered confidential only if their release would likely result in substantial competitive harm to the business. POGO supports passage of the Open and Responsive Government Act of 2021, S. 742, which would restore a longstanding legal interpretation regarding confidential commercial information and limit the amount of information that could be considered confidential.¹⁵ This fix would allow greater transparency into entities spending government funds.

Another unintended interpretation of FOIA prevents individual Members of Congress from receiving information vital to conducting oversight. Under current interpretation of the statute, the executive branch has used FOIA exemptions to justify withholding information from Members of Congress unless those Members request documents while acting in the capacity of committee or subcommittee chairs. The Justice Department’s Office of Information Policy issued guidance in 1984 allowing agencies to respond to all other congressional requests for information with documents that have been subject to FOIA redactions.¹⁶

Congress’s intent for the law is clear: The limits that FOIA establishes to protect sensitive information (such as classified documents or personal information) do not apply to Members of Congress. Applying FOIA redactions to congressional information requests severely limits Congress’s ability to conduct oversight and pass legislation to address issues facing the public. No Member of Congress should be denied access to the information they need to do their job simply because the law allows the agency to withhold those documents from release to the public under FOIA.

This is a simple fix. Adding the phrase “or any member thereof” after the word “Congress” in 5 U.S.C. § 552(d) would clarify that FOIA cannot be used to redact information from any Member of Congress, regardless of their status as a committee or subcommittee chair.¹⁷

Delays and Funding Issues

Under FOIA, an agency must provide a response within 20 business days of receiving the request.¹⁸ However, in fiscal year 2020, agencies took an average of 97 days to process requests, with responses to more complex requests averaging six months.¹⁹ Budgetary issues and shortfalls regularly plague FOIA offices and often contribute to an agency’s failure to meet the 20 business-day deadline to respond.²⁰

¹⁴ Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356 (2019).

¹⁵ Open and Responsive Government Act of 2021, S. 742, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/742/text>.

¹⁶ Department of Justice Office of Information Policy, “FOIA Update: OIP Guidance: Congressional Access Under FOIA,” January 1, 1984. <https://www.justice.gov/oip/blog/foia-update-oip-guidance-congressional-access-under-foia>.

¹⁷ This change passed the House of Representatives in December 2021 as Section 525 in H.R. 5314, the Protecting Our Democracy Act.

¹⁸ 5 U.S.C. § 552(a)(6)(A) (2021), <https://www.law.cornell.edu/uscode/text/5/552>.

¹⁹ Melissa Wasser, “Fact Sheet: Reforms to the Freedom of Information Act,” Project On Government Oversight, January 26, 2022, <https://www.pogo.org/resource/2022/01/fact-sheet-reforms-to-the-freedom-of-information-act/>.

²⁰ “The Increase in FOIA Lawsuits Isn’t the Problem – It’s Agencies Underfunding their Transparency Obligations,” American Oversight, March 17, 2020. <https://www.americanoversight.org/the-increase-in-foia-lawsuits-isnt-the->

When agencies fail to meet their obligations to make timely determinations on FOIA requests, they add to already significant backlogs.

Agencies determine how they allocate funding for administrative activities, including FOIA. To address a pattern of poor funding, each agency should be required to evaluate what it needs to comply with FOIA and communicate to Congress how much it will budget to meet its FOIA obligations. Then, Congress should appropriate a direct line item to agencies' FOIA offices, rather than including said funding in the overall category of general administrative activities. Dedicating adequate funding for FOIA offices would allow the offices to increase capacity where needed and respond to requests in a timely manner, while also reducing backlogs.

Congress should also address agency-specific fixes to FOIA in any future FOIA reform legislation, especially for agencies that handle a high volume of requests annually. Currently, there is a problem contributing to inefficiencies in FOIA processing at the Department of Homeland Security (DHS). If a person is looking for information on foreign-born individuals, they can request access to an alien file, or A-file, through a FOIA request. An A-file includes documents that DHS maintains on foreign-born individuals that document the person's immigration history.²¹

But because A-files are stored off-site, it takes DHS longer to retrieve them, slowing overall FOIA processing times.²² It is predictable that there will be a significant demand for these records. But including these A-file requests in the same system as public FOIA requests creates greater inefficiency in DHS's FOIA process. In fact, a majority of the agency's backlog is held by agency components that "process records related to immigration."²³

POGO therefore recommends that Congress direct the agency to create a separate system to respond to those specific A-file requests and ensure the agency has the resources to do so. Removing A-files from the FOIA process could help make the agency's FOIA office more effective and efficient in responding to its many requests.

Recommendations

We at POGO are encouraged to see bipartisan conversations about necessary improvements to FOIA and hope to see further legislative action soon. Congress has an opportunity to maximize access to information and relieve agency FOIA burdens in the process. As such, POGO urges the Committee to prioritize the following issues when considering legislation to reform FOIA:

- Require agencies to weigh the public's interest in the release of information against the specific, identified foreseeable harm releasing information could bring.

[problem-its-agencies-underfunding-their-transparency-obligations](#); Department of Justice Office of Information Policy, "FOIA Update: FOIA Affected By Budget Constraints," January 1, 1990.
<https://www.justice.gov/oip/blog/foia-update-foia-affected-budget-constraints>.

²¹ U.S. Citizenship and Immigration Services, Policy Manual, Chapter 2 - Record of Proceeding,
<https://www.uscis.gov/policy-manual/volume-1-part-c-chapter-2>.

²² U.S. Citizenship and Immigration Services, "Avoiding Common Index and Records Request Issues with A-Files,"
<https://www.uscis.gov/records/genealogy/historical-record-series/a-files-numbered-below-8-million>.

²³ "DHS increased the number of requests processed between FY 2014 and FY 2018 by 92 percent compared to the number processed between FY 2009 and FY 2013." U.S. Department of Homeland Security Departmental Freedom of Information Act (FOIA) Backlog Reduction Plan: 2020 - 2023, A Business Modernization Roadmap (March 2020), 7, https://www.dhs.gov/sites/default/files/publications/final_dhs_backlog_reduction_plan_2020-2023_3.6.20.pdf.

- Require agencies to proactively disclose categories of commonly requested records, including visitor logs, calendars for agency heads, and reports and testimony submitted to Congress.
- Require the Department of Justice to publicly post Office of Legal Counsel opinions.
- Pass the Open and Responsive Government Act (S. 742) to re-establish public access to government information about businesses.²⁴
- Close the loophole that allows agencies to treat requests for information from Members of Congress as Freedom of Information Act requests from the public.
- Designate a line item in each agency's budget for specific funding for FOIA offices.
- Direct and resource the Department of Homeland Security to create a system to respond to individual A-file requests outside of the FOIA process.

Conclusion

POGO thanks the Committee for holding this important hearing, and we urge you to fix the broken FOIA system by implementing our recommendations. It is encouraging to see bipartisan legislative efforts to improve FOIA. POGO is here to be a resource as the Committee navigates potential legislative options to strengthen this critical law. We stand ready to assist you in these endeavors however we can.

²⁴ Open and Responsive Government Act of 2021, S. 742, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/742/text>.