

To: FOIA Advisory Committee
From: Proactive Disclosure Subcommittee
Re: Proposed recommendation to publish FOIA logs
Date: 10/23/17

This proposal outlines a possible recommendation that agencies publish in their reading rooms a standardized version of their logs of FOIA requests on an ongoing basis.

I. The Value of FOIA Logs

It has long been understood that there is value in requiring agencies to be transparent about their FOIA practices. Congress itself has required agencies to submit annual reports detailing, among other things, how many requests were received, how many requests were processed, a breakdown of the agency's determinations as to those requests, the average and median response times, the oldest pending requests, the number of appeals and their associated processing data, the cost of agency FOIA operations, total amount of fees collected, and fee waivers requested and granted. 5 U.S.C. § 552(e)(1). These reports are useful in painting an aggregate picture of an agency's FOIA operations. They show year-over-year trends in agency performance, including the speed of responses, frequency of withholding requested records, and resources spent.

But these reports do not allow disaggregation of data that might further help policymakers, including agency officials and Members of Congress, researchers, and civil society concerned with transparency reform and innovation. Additional data that agencies commonly collect as they process FOIA requests could shed light on critical aspects of this key transparency system. For example, it would be useful to know more about who is using FOIA. For the purposes of charging fees, agencies sort requesters into one of three categories: commercial requesters, preferred fee status and other. Requesters who are given preferred fee status are journalists and people affiliated with educational or non-commercial scientific institutions. Agencies releasing information about fee categories would help transparency proponents tell whether, for example, commercial requesters are paying their fair share in fees, or whether news media requests take less or more time, on average, to process. Having this information would also allow research into whether certain requesters are having more success, for example, by having fewer requests result in denials in full or in part.

Annual FOIA reports also do not provide any insight into the subject matters of the requests, even in broad categories or descriptions. Knowing what agency records are accessed most often can often help understand an agency's FOIA activities, and can help agency officials make informed decisions about whether information can be released proactively or if there is a better way to supply the public with the information.

Researchers have found that access to an agency's underlying FOIA log has improved overall understanding of FOIA operations on the ground. To begin, government itself studies FOIA logs on occasion to understand how FOIA is being used. As early as 1978, only twelve years after FOIA's enactment, the GAO conducted a study of how well FOIA was functioning, one chapter of which was entitled "Who is requesting data under the Freedom of Information Act?" *See*

Comptroller Gen., Gen. Accounting Office, LCD-78-120, *Government Field Offices Should Better Implement the Freedom of Information Act* (1978). The overall conclusions of that portion of the study were, in the words of the GAO, “hindered by a lack of pertinent agency records,” but nonetheless reported that of 2,515 requests studied, 58% were surprisingly made up of businesses and law firms, including “for purposes not contemplated by the Congress.” *Id.* at 36, 42. The GAO proceeded to detail specific examples of various uses of FOIA as illustrations both of the public benefits of the act and of the private interests being served. *Id.* at 36-42. Based on this analysis, the GAO recommended that, “[r]ather than attempting to limit the act’s use by certain groups, consideration should be given to increasing public awareness and use of the act.” *Id.* at 42. Such an analysis and policy recommendations based thereon are not possible without the underlying FOIA data from the agencies.¹

Nonprofit groups have also used underlying FOIA data to shed light on agency FOIA operations. For example, the National Security Archive published a list of the ten oldest pending FOIA requests in an attempt to highlight a sometimes decades-long process requesters are subject to. *See* National Security Archive, *Knight Open Government Survey 2007*. To find the oldest pending requests, it had to file FOIA requests at each agency asking for the data. *Id.* As if to highlight the problem, one-third of agencies failed to respond to the request for data on the ten oldest pending requests. *Id.* at 8. The metric of reporting the ten oldest pending requests proved useful as a measure of agency FOIA performance, and as evidence of that success, Congress later incorporated it into agencies’ reporting requirements under FOIA. *See* 5. U.S.C. 552(e)(1).

Another group, the now-disbanded Coalition of Journalists for Open Government, analyzed a month’s worth of FOIA logs from each of 17 federal agencies, detailing first the breakdown of requesters: more than 60% commercial, with more than 25% of those filed by professional data brokers, and only 6% media requests. *Frequent Filers: Businesses Make FOIA Their Business*, Soc’y Prof. Journalists (July 3, 2006). But further analysis of particular agencies’ logs revealed interesting variation. For example, “almost every request to the Parole Commission came from a prisoner.” *Id.* Again, however, the group reported that “[i]n the course of the survey, the Coalition ran into many of the same delays and roadblocks that requestors [sic] complain of,” resulting in fewer than the full number of targeted agencies being included. *Id.*

Journalist Michael Doyle conducted an extensive survey of FOIA logs for his master’s thesis, detailing dominant uses of FOIA at various federal agencies in depth. Michael Doyle, *The Freedom of Information Act In Theory and Practice* (May 2001) (unpublished M.A. thesis, Johns Hopkins University). Again, commercial uses were prevalent, but interesting agency-specific uses again emerged as well. For example, at the NSA, the largest single category of requests were about UFOs, comprising 12% of all requests received. *Id.* at 80.

My own academic research has convinced me of the value of the FOIA logs. In an article published last year, I use FOIA logs, which I requested under FOIA, to explore the use of FOIA by businesses in depth, documenting not only the extent of commercial requesting at many federal agencies, but

¹ Though I am unable to locate it, the Congressional Research Service evidently conducted a similar study of 1,503 requests in 1972 in which it concluded that 43% of requests came from corporations and law firms, 6% from the news media, and 2% from Congress.

the nature of those requests as almost entirely routine. That is, businesses at many agencies request the same types of records repeatedly, revealing potential opportunities for agencies to use targeted proactive disclosure of categories of records to preempt the need for large volumes of commercial requests. See Margaret B. Kwoka, *FOIA, Inc.*, 65 *Duke Law Journal* 1361 (2016); see also Margaret B. Kwoka, *Inside FOIA, Inc.*, 126 *Yale Law Journal Forum* 265 (2016).

In an ongoing study, I am now examining the use of FOIA by individuals requesting their own records—their own medical files, their own immigration records, or their own investigation files, for example. In fact, these requesters—whom I call first-person FOIA requesters—are likely to outnumber commercial requesters; at the Department of Homeland Security alone, more than 200,000 such requests are filed each year. These accounts suggest that FOIA may be suffering under the weight of unintended uses, but also reveal various possible strategies for designing sensible processes for obtaining commonly needed personal information without having to resort to FOIA. In short, careful analysis of FOIA logs may prove a valuable source of transparency reform proposals.

Yet, I myself have encountered the difficulty of obtaining agency FOIA logs. For each round of my research, I have given agencies a full year from the date of my request, while continuously following up, appealing denials and even in one recent case, bringing a lawsuit (still pending). Access to this valuable underlying data, while easily obtained at some agencies, is frustratingly uneven across the federal government.

One more recent example of the power of the FOIA logs is worth mentioning. Max Galka, a data analyst and entrepreneur, having used FOIA extensively in his various career ventures, founded a website called the FOIA Mapper. Recently, he compiled the largest ever database of requests from FOIA logs, totaling 229,000 requests, and broke down the identity of requester by various categories. *Who Uses FOIA? – An Analysis of 229,000 Requests to 85 Government Agencies*, FOIA Mapper, <https://foiamapper.com/who-uses-foia/> (Mar. 13, 2017). Indeed, this study was the first to identify particular entities, including news media, watchdog groups, and research institutions, that make the most requests across the federal government, rather than at one agency. Again, something very interesting is to be learned from understanding what makes an organization turn to FOIA for its sources.

Because of the difficulty of obtaining data, I imagine, no one (including me) has broken down potentially interesting data by type of requester or individual requester, such as response times or outcomes. Further research could shed important light on how agencies are using their FOIA resources, what interests are best served, and what types of reforms or changes to agency practices would promote maximum transparency.

A final use of FOIA logs worth mentioning is that journalists (and other users) can use the logs an investigative tool to help them figure out what information an agency has, identify the “keywords” that will help them describe a request in specific terms (e.g. the names of record systems, form numbers, etc.). This use also works in the agencies' favor as well since it helps to avoid broad “fishing expedition” requests.

II. Legal Considerations and Current Agency Practice

As mentioned above, though agencies are required to report a great number of aggregate statistics about their FOIA activities to the Attorney General each year, there is no requirement that agencies provide to the Department of Justice, Congress, OGIS, or the public, an accounting of the underlying data that makes up those reports or information about individual requests. Yet, most agencies keep such logs so that they can report the aggregate statistics and assign individualized tracking numbers to requests that will take more than ten days to process. *See* 5 U.S.C. § 552(a)(7).

The only instance in which an agency would have a requirement to post their FOIA logs is if they become frequently requested records within the meaning of the reading room provision, which requires agencies to:

make available for public inspection in an electronic format—

...

(D) copies of all records, regardless of form or format—

(i) that have been released to any person under paragraph (3); and

(ii) (I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times

5 U.S.C. § 552(a)(2).

As I have requested dozens of agency FOIA logs across the federal government and over different time-spans, the only claim of redaction I have encountered is based on personal privacy under 5 U.S.C. § 552(b)(6), (7)(C).² These claims, when made, are typically made as to the names of requesters, and sometimes a portion of the subject matter of the request if it has personally identifying information in it.

However, DOJ has issued guidance to agencies explaining that “FOIA requesters, except when they are making first-party requests, do not ordinarily expect that their names will be kept private; therefore, release of their names would not cause even the minimal invasion of privacy necessary to trigger the balancing test.” U.S. Dep’t of Justice, FOIA Guide, 2004 Edition: Exemption 6 (May 2004), *available at* <https://www.justice.gov/oip/foia-guide-2004-edition-exemption-6>; *see also* *Holland v. CIA*, No. 91-1233, 1992 WL 233829, at **15-16 (D.D.C. Aug. 31, 1992) (holding that researcher who sought assistance of presidential advisor in obtaining CIA files he had requested is comparable to FOIA requester whose identity is not protected by Exemption 6); *Martinez v.*

² Veering only slightly off this course, the IRS has claimed the names and organizational affiliations of requesters are exempt under the taxpayer information exemption, which is codified in a 5 U.S.C. § 552(b)(3) statute. I am currently in litigation with the agency over this claim.

FBI, No. 82-1547, slip op. at 7 (D.D.C. Dec. 19, 1985) (denying protection for identities of news reporters seeking information concerning criminal investigation) (Exemption 7(C))

Whether first-party requesters have a private interest in their names has not been decided by a court,³ but given the DOJ's guidance on all other requesters, it seems straightforward at least to recommend that agencies disclose the names of third-party requesters as part of their logs. There are no other obvious exemption issues that should stand as a barrier to publishing agency FOIA logs.

Indeed, many agencies currently publish some version of their FOIA logs. However, there are vastly inconsistent in their practices, including how long a lag there is before they are posted and which fields of information are contained. For example, the IRS does not include any field for the name or organizational affiliation of the requester, or which exemptions were cited. *See* IRS FOIA Logs, <https://www.irs.gov/uac/irs-foia-logs>. The last FOIA log posted by ICE was in December 2016. *See* ICE FOIA Logs, <https://www.ice.gov/foia/library>. The SEC posts detailed FOIA logs, but does not include any fee information. *See* SEC FOIA Logs, <https://www.sec.gov/foia/docs/foia-logs.htm>. Standardization across agencies in the method and format of publishing FOIA logs would facilitate research, oversight, and policy reform, and give agency officials insight into their FOIA operations.

III. Proposal

1. All agencies should publish in their electronic reading room their FOIA logs on an ongoing basis, at least monthly, unless the agency receives less than 100 requests per year in which case annually or semi-annually would be appropriate.
2. In order to be the most useful, agency FOIA logs should contain each of the following fields:
 - a. Tracking number of the request
 - b. Date of the request
 - c. Name of the requester – Note: The subcommittee seeks input on this item. Subcommittee members have discussed alternatives including removing the item to suggesting that names should only be published for commercial requesters and those in the preferred fee status category (the name of “other” requesters would be withheld or replaced with a pseudonym like “Jane Doe”).
 - d. Organizational affiliation of the requester
 - e. Subject matter of the request
 - f. Status of the request (pending, closed, etc.)
 - g. Date the request was perfected

³ The DOJ cites no caselaw, and I am not aware of any, addressing this question. Its explanation is, in full: “In addition, the identities of first-party requesters under the Privacy Act of 1974 should be protected because, unlike under the FOIA, an expectation of privacy can fairly be inferred from the personal nature of the records involved in those requests.” U.S. Dep’t of Justice, FOIA Guide, 2004 Edition: Exemption 6 (May 2004), *available at* <https://www.justice.gov/oip/foia-guide-2004-edition-exemption-6>

- h. The result of each FOIA request (granted, granted in part, denied, withdrawn etc.)
 - i. Exemptions cited, if any
 - j. Date on which the request was resolved
 - k. Fee category assigned to requester (commercial, educational, news media, other)
 - l. Whether a fee waiver was requested
 - m. If a fee waiver was requested, whether it was granted
 - n. Fees charged to the requester, if any
 - o. Whether the request was processed under the Privacy Act as well
3. The logs should be posted in Excel or CSV format, not in a PDF.