U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 3, 2011

The Honorable Charles E. Grassley
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

This responds to your letter dated October 28, 2011, in which you expressed concerns with one of the provisions concerning statutory exclusions that is contained in the Department's proposed revisions to its Freedom of Information Act (FOIA) regulations. Since issuance of Attorney General Holder's March 2009 FOIA Guidelines, the Department has taken a number of steps to become more transparent in its handling of records that are, by statute, excluded from the FOIA. Having now received a number of comments on the Department's proposed regulations in this area, the Department is actively considering those comments and is reexamining whether there are other approaches to applying exclusions that protect the vital law enforcement and national security concerns that motivated Congress to exclude certain records from the FOIA and do so in the most transparent manner possible. If the proposed regulations can be improved in these respects, we will work to improve them. We believe that Section 16.6(f)(2) of the proposed regulations falls short by those measures, and we will not include that provision when the Department issues final regulations.

Exclusions, which by statute can be applied only in very specific contexts, are different from exemptions, which are more common. Congress excluded certain records from the FOIA in 1986 to protect three narrow categories of law enforcement and national security information that, if disclosed, could compromise vital interests. To take the simplest example, Section 552(c)(1) of the FOIA recognizes that if a requester seeks information relating to an ongoing criminal investigation, of which the target is unaware, and when even acknowledging the existence of responsive documents would tip off the criminal to the ongoing investigation, those records are not subject to the FOIA.

Since 1987, the Department has handled records excluded under these provisions according to guidance issued by Attorney General Meese. The Meese Guidance provided, among other things, that where the only records responsive to a request were excluded from FOIA by statute, "a requester can properly be advised in such a situation that 'there exist no records responsive to your FOIA request,'" and that agencies must ensure that its FOIA responses to requests that involve exclusions and those that do not involve exclusions "are consistent throughout, so that no telling inferences can be drawn by requesters." The logic is simple: When a citizen makes a request pursuant to the FOIA, either implicit or explicit in the

request is that it seeks records that are subject to the FOIA; where the only records that exist are not subject to the FOIA, the statement that "there exist no records responsive to your FOIA request" is wholly accurate. These practices laid out in Attorney General Meese's memo have governed Department practice for more than 20 years.

While the approach has never involved "lying," as some have suggested, the Department believes that past practice could be made more transparent. Accordingly, as part of an effort to update its FOIA regulations and other aspects of its Open Government initiative, the Department took a number of steps designed to bring its handling of exclusions in line with Attorney General Holder's commitment to open government.

- First, to ensure that exclusions are invoked only when absolutely necessary, Section 16(f)(1) of the proposed regulation requires that the head of the FOIA office of any Department of Justice component contemplating use of an exclusion obtain approval for such use from the Office of Information Policy.

- Second, to promote greater public accountability, Section 16.6(f)(3) requires components to maintain records of any uses of an exclusion and its approval, and the Department has, for the first time, required agencies to publicly report in their Chief FOIA Officer Reports on the number of times that they invoke exclusions.

- Third, to promote greater public awareness of exclusions than existed under the 1987 Attorney General Meese policy, Sections 16.4 and 16.6(f)(2) of the proposed regulations sought to advise requesters of how exclusions may be used. Section 16.4 reminded requesters that, under the FOIA, records that are excluded from FOIA are not subject to FOIA's requirements and are not considered responsive to a FOIA request. Section 16.6(f)(2), in turn, sought to remind claimants that the exclusion of records from a particular FOIA response is not noted in the response. As the 1987 Guidance recognized, consistent responses are necessary to avoid disclosing the ongoing criminal investigation or other sensitive law enforcement or national security information that the FOIA excludes.

Taken together, these steps were aimed at shining further light on a practice that, while expressly contemplated by statute and necessary to protect vital law enforcement and national security interests, operated for years with much less transparency. As you know, the initial comment period on these regulations closed earlier this year, with no public comment on the provisions in question. As a result, however, of this Administration's commitment to openness, the Department reopened the comment period on these regulations precisely so that it could receive additional input. That reopened comment period has recently concluded, and the Department is now in the process of reviewing those submissions. We are also taking a fresh look internally to see if there are other options available to implement Section 552(c)'s requirements in a manner that preserves the integrity of the sensitive law enforcement records at stake while preserving our continued commitment to being as transparent about that process as possible.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Chairman