

United States Senate

WASHINGTON, DC 20510

March 14, 2019

VIA ELECTRONIC TRANSMISSION

Melanie Pustay
Director, Office of Information Policy
U.S. Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, D.C. 20530

Dear Director Pustay:

As original supporters of the FOIA Improvement Act of 2016, and steadfast defenders of the public's right to know, we write to reiterate the importance of the Freedom of Information Act (FOIA) and its faithful administration. Equally important, we write to express concern about recent trends in FOIA compliance and reports indicating a continued culture of reflexive secrecy across the government.

According to the Justice Department's most recent aggregate statistics, the government in FY2017 processed the highest number of FOIA requests ever, with an 8.3% increase over FY2016.¹ However, it was reported that requesters received censored files or nothing at all in 78% of requests, a record over the past decade.² The number of FOIA lawsuits also continues to break records. In FY2018, a record-high 860 FOIA lawsuits were filed against agencies, representing a 67% increase in filings compared to the final year of the Obama administration.³ The Justice Department, for example, was sued more frequently under FOIA than ever before.⁴ Further, we have recently seen proposed updates to agency FOIA regulations that appear to restrict, rather than encourage, public access to records, and could delay the processing of FOIA requests.⁵

Furthermore, FOIA processing delays and backlogs continue to grow unchecked. The average processing times at many agencies are hundreds of days longer than the 20-day response time established by law.⁶ Some pending FOIA requests are even decades old.⁷ Making matters worse, there are a number of agencies with tens of thousands of backlogged FOIA requests.⁸

¹ See *Summary of Annual FOIA Reports for Fiscal Year 2017*, U.S. Department of Justice (June 7, 2018) available at <https://www.justice.gov/oip/page/file/1069396/download>.

² *Federal government sets new record for censoring, withholding files under FOIA*, CBS News (Mar. 12, 2018) available at <https://www.cbsnews.com/news/foia-federal-government-sets-new-record-for-censoring-withholding-files-trump-administration/>.

³ Christine Mehta, *Annual Report: FOIA Lawsuits Reach Record Highs in FY 2018*, The FOIA Project (Nov. 12, 2018) available at <http://foiaproject.org/2018/11/12/annual-report-foia-lawsuits-reach-record-highs-in-fy-2018/>.

⁴ *Id.*

⁵ See bicameral letter to Acting Secretary of Interior David Bernhardt (Mar. 5, 2019) available at <https://www.grassley.senate.gov/news/news-releases/cummings-leahy-grassley-and-cornyn-raise-concerns-regarding-proposed-interior>.

⁶ *25-Year-Old FOIA Request Confirms FOIA Delays Continue Unabated*, National Security Archive (Mar. 8, 2019) available at <https://nsarchive.gwu.edu/foia-audit/foia/2019-03-08/25-year-old-foia-request-confirms-foia-delays-continue-unabated>.

⁷ *Id.*

⁸ *Id.*

The Senate Committee on the Judiciary, of which we are members, has jurisdiction over FOIA. Compliance with FOIA's statutory requirements, including the 2016 amendments, is necessary to ensure that the public can fully exercise its right to know. To assist the Committee in better understanding the administration's commitment to transparency, please provide numbered, written responses to the following questions by no later than April 17, 2019.

1. The FOIA Improvement Act of 2016 requires "the operation of a consolidated online request portal that allows a member of the public to submit a request for records ... to any agency from a single website."⁹ We were pleased to see that on March 8, 2018, the Department "released the first iteration of the National FOIA Portal on FOIA.gov."¹⁰ A year later, however, the public still cannot submit FOIA requests to many agencies and departments, including some that are annually the largest recipients of FOIA requests. For example, as of the date of this letter, an attempt to submit a request to U.S. Customs & Border Protection, U.S. Citizenship & Immigration Services, or the State Department results in an alert to the requester that "[c]urrently, this agency's FOIA system is not linked to FOIA.gov."
 - a. What is the status of OIP's efforts to ensure that members of the public may use the FOIA portal to submit a request for records "to *any* agency from a single website"?
 - b. Please provide a complete list of departments or agencies whose FOIA systems are currently "not linked to FOIA.gov."
2. What specifically is causing the significant increase in FOIA lawsuits filed against agencies in FY 2018? In other words, what violations of FOIA's requirements are being cited most by litigants? And what specific steps is OIP taking to reduce the number of FOIA requests that end up in litigation?
3. What specific steps, beyond its 2014 guidance on the subject, is OIP taking to reduce the delays caused by inter-agency consultations and referrals of FOIA requests?
4. What specific steps is OIP taking to ensure that agency FOIA regulations are consistent with the letter and spirit of FOIA, including the 2016 amendments?
5. The FOIA Improvement Act of 2016 requires agencies to make records available in an electronic format if they have been requested three or more times. According to a 2018 audit by the Government Accountability Office, one agency responded that it does not comply with this statutory requirement because "it does not have the time to post all such records that have been requested."¹¹
 - a. Should agencies be able to disregard FOIA's statutory requirements if they "do not have the time"? And on what authority do agencies rely to ignore statutory law?

⁹ 5 U.S.C. §552(m)(1).

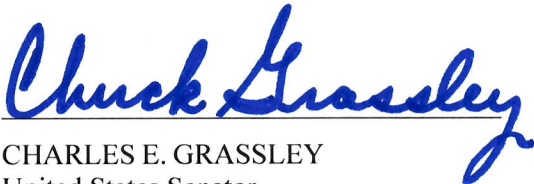
¹⁰ DOJ Announces the First Iteration of the New National FOIA Portal on FOIA.gov, Office of Information Policy, U.S. Department of Justice (Mar. 8, 2018) available at <https://www.justice.gov/oip/blog/doj-announces-first-iteration-new-national-foia-portal-foiagov>.

¹¹ U.S. Gov't Accountability Office, GAO-18-365, *Freedom of Information Act – Agencies Are Implementing Requirements, but Additional Actions Are Needed* 24 (June 2018) available at <https://www.gao.gov/assets/700/692782.pdf>.

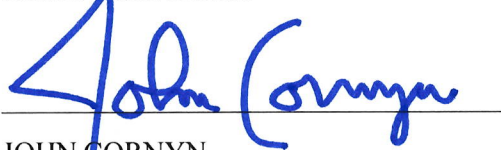
- b. What specific steps is OIP taking to ensure that *all* agencies are complying with the letter and spirit of the proactive disclosure requirements of the FOIA Improvement Act of 2016?
 - c. How would stricter compliance with the proactive disclosure requirements of the FOIA Improvement Act impact FOIA request processing delays and backlogs?
6. The FOIA Improvement Act of 2016 codified a “foreseeable harm” standard, to ensure that agencies may only withhold information from the public if the agency “reasonably foresees that disclosure would harm an interest protected by an exemption[.]” This change in the law tells agencies to make openness and transparency, instead of knee-jerk secrecy, their default setting. OIP plays the central role in ensuring government-wide compliance with the “foreseeable harm” standard.
- a. Has OIP published any government-wide directives concerning the implementation or proper interpretation of the “foreseeable harm” standard? If not, why?
 - b. What specific steps is OIP taking to ensure government-wide compliance with the “foreseeable harm” standard?
7. What is the current status and anticipated finalization date of the Department’s “Release to One, Release to All” policy? Why has this policy not been finalized yet?

Thank you for your prompt attention to this important matter. If you have any questions, please contact Kyle McCollum of Senator Grassley’s staff at (202) 224-3744, Rajiv Venkataramanan of Senator Leahy’s staff at (202) 224-3466, Franci Rooney of Senator Cornyn’s staff at (202) 224-8582, or Christina Calce of Senator Feinstein’s staff at (202) 224-3841.

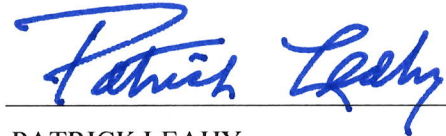
Sincerely,



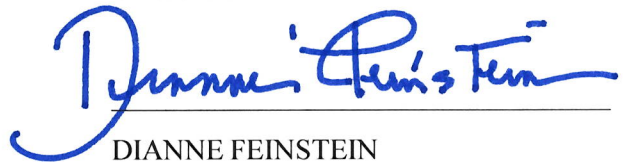
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United States Senator



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