



# Department of Justice

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**STATEMENT OF**

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DIRECTOR  
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**BEFORE THE**

**COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**AT A HEARING ENTITLED**

**“ENSURING AN INFORMED CITIZENRY: EXAMINING THE  
ADMINISTRATION’S EFFORTS TO IMPROVE OPEN GOVERNMENT”**

**PRESENTED  
MAY 6, 2015**

**Melanie Ann Pustay**  
**Director**  
**Office of Information Policy**  
**Before the Senate Judiciary Committee**  
**Washington, D.C.**  
**May 6, 2015**

Good morning, Chairman Grassley, Ranking Member Leahy, and Members of the Committee. I am pleased to be here today to discuss the Freedom of Information Act and the Department of Justice's ongoing efforts to encourage agency compliance with the statute as well as with President Obama's Memorandum on the FOIA and Attorney General Holder's FOIA Guidelines. The Department of Justice is strongly committed to the President's and Attorney General's vision of open government. My office, the Office of Information Policy (OIP), has undertaken a range of initiatives this past year designed to assist agencies in improving their FOIA administration. Today I would like to highlight some of those efforts, provide an overview of key FOIA statistics and agency successes from this past fiscal year, and outline some of the exciting new initiatives we are undertaking that are designed to help further improve FOIA in the years ahead.

OIP takes very seriously its obligation to encourage agency compliance with the FOIA. We believe that the foundation of any FOIA program are personnel who have a complete understanding of the FOIA's legal requirements and the policy considerations set out in the President's and Attorney General's FOIA Memoranda. Accordingly, one of the primary ways OIP encourages compliance with the FOIA is through the offering of a range of government-wide training programs and the issuance of policy guidance that assists agencies in their implementation of the law. In 2014 alone, my Office provided training to thousands of individuals through a variety of training programs, including seventy-six specialized presentations given at the request of various agencies, which were designed to meet their specific FOIA training needs.

In addition to providing training on all aspects of the FOIA, OIP also issues policy guidance to agencies on the proper implementation of the law and the President's and Attorney General's FOIA Memoranda. All of the guidance issued by OIP can be found on the [Guidance](#) page of our website. Just this past March, OIP issued new [guidance](#) addressing proactive disclosures. In this guidance, OIP emphasized that when agencies make proactive disclosures they are enhancing transparency by ensuring that certain key information about the operations and activities of the government are readily and efficiently made available to everyone. In addition to discussing the FOIA's proactive disclosure requirements, the new guidance addresses ways in which agencies can take further steps to increase proactive disclosures in keeping with the President's and Attorney General's FOIA directives. The guidance provides information on methods of disclosure, strategies for identifying "frequently requested" records, and tips on ensuring that posted information is usable. To assist agencies even further, OIP included as part of its guidance a "[Proactive Disclosure Checklist](#)."

In 2014 OIP issued a series of guidance to agencies on [ensuring timely determinations on requests for expedited processing](#), [reducing backlogs and improving timeliness](#), and [providing](#)

[status information to requesters](#). As in years past, OIP also issued [guidance](#) for further improvement based on our review and assessment of agencies' 2014 Chief FOIA Officer Reports. That guidance highlighted the importance of agencies: 1) ensuring that their FOIA professionals receive substantive FOIA training, 2) adding distinct steps to their FOIA processes to identify potential discretionary disclosures, and 3) taking an active approach to making proactive disclosures.

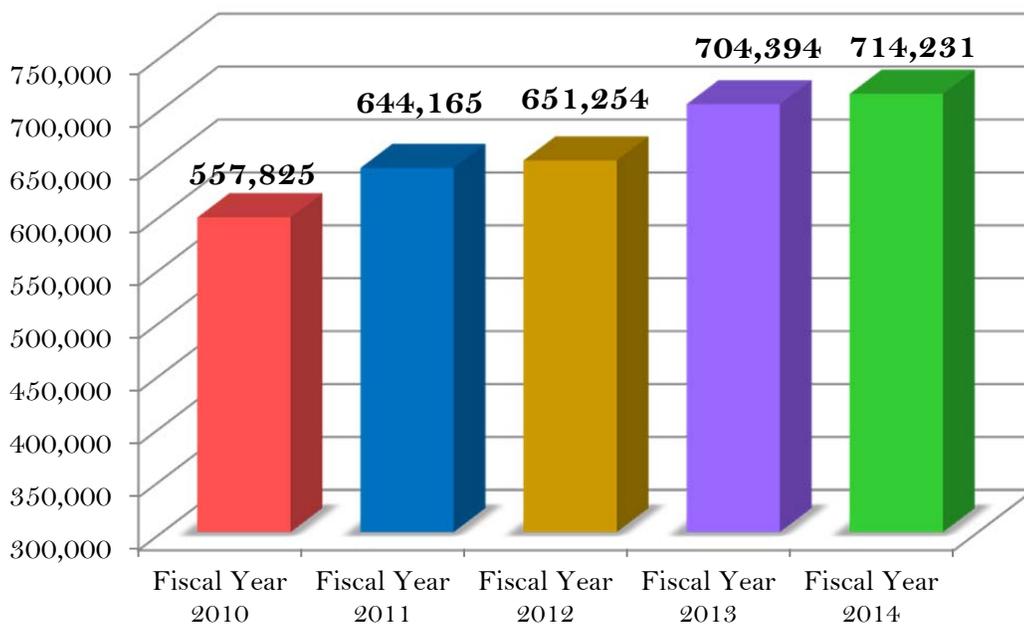
As you know, last month we celebrated the sixth anniversary of Attorney General Holder's FOIA Guidelines. Issued during Sunshine Week on March 19, 2009, the Attorney General's FOIA Guidelines address the presumption of openness that the President called for in his FOIA Memorandum, the necessity for agencies to create and maintain an effective system for responding to requests, and the need to improve timeliness and to work to reduce backlogs. The Guidelines also direct agencies to promptly and proactively make information available and they emphasize the importance of agencies using "modern technology to inform citizens about what is known and done by their Government." Finally, stressing the critical role played by agency Chief FOIA Officers in improving FOIA performance, the FOIA Guidelines direct all Chief FOIA Officers to review their agencies' FOIA administration each year and to report to the Department of Justice on the steps taken to achieve improved transparency.

OIP uses the Chief FOIA Officer Reports as a vital tool in our efforts to promote accountability and encourage agency compliance with the FOIA and the President's and Attorney General's FOIA Memoranda. Each year OIP has developed guidelines for agency Chief FOIA Officer Reports. While we have maintained five key topical areas for agencies to address, each year OIP has modified the specific questions asked of agencies to build on the responses of previous years. As a result, the Chief FOIA Officer Reports have become a valuable resource for tracking and documenting agencies' efforts to improve all aspects of their FOIA administration over the past six years. I highly recommend that the Committee review these Reports, which are available at <http://www.justice.gov/oip/chief-foia-officer-reports-2015>, to see the broad array of activities that agencies have undertaken to improve their FOIA administration.

In 2014, for the fourth straight year, OIP conducted a formal assessment of agencies' FOIA administration by scoring all ninety-nine agencies that are subject to the FOIA on a series of milestones tied to each of the five key areas addressed in the Attorney General's FOIA Guidelines. OIP uses a wide range of milestones to capture a broad spectrum of FOIA activity, from applying the presumption of openness, to increasing use of technology and improving timeliness. We post the assessment each year on the Department's website, along with a summary of agency activity and guidance for further improvement. As agency implementation of the Attorney General's FOIA Guidelines has matured, OIP has continually refined the milestones that are assessed. We have also engaged with civil society organizations to identify new milestones to be included in the assessment. This collaboration has been very productive and we greatly appreciate the ideas and suggestions we have received. For the 2014 assessment OIP used twenty-four separate milestones. We expanded our scoring system for those milestones from three scores to five, gave overall scores for each assessed section, and added narrative information to provide greater context to the milestones.

We are currently in the process of reviewing and assessing agencies' 2015 Chief FOIA Officer Reports, which were posted this past March. Based on our initial review of those reports and our review of agency Annual FOIA Reports for Fiscal Year 2014, it is clear that agencies have persevered through a difficult year of tight resources in an effort to meet the ever-increasing demands of their FOIA administration. This past fiscal year marks another record high in terms of the numbers of requests received by agencies. During Fiscal Year 2014, agencies received 714,231 requests, which rose from the previous high of 704,394 requests received in Fiscal Year 2013. Since Fiscal Year 2010, the number of FOIA requests received by the government has increased each year.

### Total Number of Requests Received



In addition to the ever-increasing numbers of incoming requests, Fiscal Year 2014 posed other challenges for agencies' administration of the FOIA as well. During Fiscal Year 2014, the government overall reported its lowest staffing levels dedicated to FOIA in the past six fiscal years and agency FOIA offices began the year with a nearly three-week government shutdown during which time no requests could be processed. Taking into account that the government processed 647,142 requests during Fiscal Year 2014, we roughly estimate that this three-week period could have resulted in over 32,000 more FOIA requests being processed.

As a result of these challenges and the record high number of incoming requests, the government's overall backlog of pending requests increased. Given the importance of reducing backlogs, in 2014 for the first time my Office directed any agency that had a backlog of more than 1,000 pending requests which had not reduced that backlog by the end of the fiscal year, to include in its Chief FOIA Officer Report a plan for achieving backlog reduction. For the 2015 Chief FOIA Officer Reports, agencies were required to respond to this question again, and those agencies that formulated plans in 2014 were asked to describe their efforts in implementing those plans.

While there were a number of challenges that agencies worked through during Fiscal Year 2014, there were also several areas of success that I am pleased to highlight. First, the majority of agencies (72 out of 100) were able to maintain low backlogs of fewer than 100 requests. Notably, fifty-nine of these agencies had a backlog of less than twenty requests, including twenty-nine that reported having no backlog at all.

Further, when processing requests for disclosure, the government continued to maintain a high release rate of over 91%, marking the sixth straight year in which the government's release rate was above 90%. This means that records were released, either in full or in part, in response to 91% of requests where the government was in a position to make a disclosure determination. Notably, the government also continued to improve its processing times for both simple and complex track requests. OIP has for a number of years focused on agency efforts to process simple track requests within an average of twenty working days. This past fiscal year, the government overall reported an average of 20.51 days to process its simple track requests.

Agencies also continued to make marked improvements in a number of areas that are not easily captured by statistics. As evidenced by the 2015 Chief FOIA Officer Reports, as well as from prior years' Reports, agencies continue to embrace the President's and Attorney General's FOIA directives by proactively posting information online. In addition to the various examples of proactive disclosures noted in agency Chief FOIA Officer Reports, many agencies also describe the steps they have taken to make the information they post online more useful to the public. More and more agencies are posting information in open formats whenever possible and taking steps to make the information easier to find on their websites. In addition, agencies are taking steps to publicize their proactive disclosures on social media and other platforms to ensure that the public is aware of their availability. These efforts fully embrace the President's message for agencies to "use modern technology to inform citizens about what is known and done by their Government."

In response to the Attorney General's 2009 FOIA Guidelines, agencies have also continued to look for opportunities to make discretionary releases of information when processing records. A range of examples of discretionary releases made by agencies just this past year can be found in the 2015 Chief FOIA Officer Reports. These examples include information that could have been withheld under Exemptions 2, 5, 7(D), and 7(E) of the FOIA, with Exemption 5 material forming the majority of the discretionary releases. Of course, exemption use will fluctuate from year to year depending on the types of records that are requested and the numbers of requests that are processed. Further, the number of times an agency uses exemptions in responding to a request does not correspond with the volume of information withheld. Keeping this in mind, it is still noteworthy that during Fiscal Year 2014, the government overall reduced by 14% the number of times it cited to Exemption 5. As has been the case for many years, the most cited exemptions in Fiscal Year 2014 were the FOIA's privacy exemptions, Exemptions 6 & 7(C). When exemptions were used by agencies, the privacy exemptions were used 53% of the time. Notably, the number of times Exemption 5 was cited amounts to less than 13% of the government's entire usage of FOIA exemptions.

As to Exemption 2, the Department of Justice has been working with a number of agencies impacted by the Supreme Court's ruling in *Milner v. Department of the Navy*, 131 S. Ct. 1259 (2011), which substantially narrowed the scope of that exemption. Through those efforts we developed a thoughtful legislative proposal that does not sweep too broadly, but at the same time provides sufficient protection against circumvention of the law and the safeguarding of our national security. That proposal was recently submitted to Congress by the Department of Defense as part of its FY16 Defense Authorization Act proposal.

In addition to enhancing transparency through proactive disclosures and discretionary releases of otherwise exempt material, agencies continue to look for ways to increase their use of technology for the benefit of FOIA administration. As agencies receive more requests every year it has become even more important to find efficiencies through the use of new technologies. One area in which we have found technology to be particularly beneficial is the use of tools and applications that assist with the core tasks of processing FOIA requests, such as technology that assists in the search and review of documents, shared platforms that allow for simultaneous review and comment on documents, and electronic capabilities that automatically identify duplicative material. Automating many of the internal processes for handling FOIA requests can bring great benefits in efficiency. While some of these tools can sometimes be difficult for agencies to acquire, many agencies have reported that they are taking steps to utilize more advanced tools in order to build efficiencies in their FOIA programs.

As you can see, while facing many challenges, agencies have found a number of ways to improve their FOIA administration. I am particularly pleased to highlight for you today the substantial progress we have made on five initiatives to further modernize FOIA as part of our commitments under the United States' Second Open Government National Action Plan (NAP). Our first initiative is the creation of a consolidated online FOIA service that will allow the public to make a request to any agency from a single website and that will include additional tools to improve the customer experience. OIP has been working closely with the General Services Administration's 18F Team on this commitment and the development of a new resource to be added to the features available on FOIA.gov, the government's comprehensive resource on FOIA.

As you know, the Department launched FOIA.gov during Sunshine Week 2011 as the flagship initiative under our first Open Government Plan. FOIA.gov provides the public educational material about how the FOIA works, where to make requests, and what to expect through the FOIA process. Explanatory videos are embedded into the site and there is a section addressing frequently asked questions. The videos alone have received well over 2.5 million visitors. We also include a glossary of FOIA terms and list the contact information for each agency's FOIA Requester Service Centers and FOIA Public Liaisons. The site includes links to the over 100 FOIA offices that use online portals, making it easier for requesters to begin their request process right from FOIA.gov.

In addition, FOIA.gov serves as a visual report card on agency compliance with the FOIA by graphically displaying all of the data from agency Annual FOIA Reports and allowing users to compare the data by agency and over time. The site alerts the public to FOIA news posted by the Department of Justice and spotlights examples of FOIA releases made by agencies. As an

additional resource, the site encourages the public to first look to see what is already publicly available on agency websites before submitting a FOIA request. A search feature is provided to the public where they can use keywords to find records posted on any government website. With our continued focus on encouraging agencies to post documents proactively, enhancing the public's ability to locate that posted information is critical. We look forward to continuing to enhance the features on FOIA.gov to further improve the customer experience.

The second NAP initiative that we have been working on focuses on reviewing the feasibility and potential content of a core FOIA regulation. There are many steps in the FOIA process that are generally shared across agencies. By standardizing these common aspects we can potentially make it easier for requesters to understand the FOIA process while at the same time making it easier for agencies to publish new regulations. In 2014, OIP launched this project by meeting with both agencies and civil society to get their initial input from the very start. We then formed an interagency taskforce which began the process of exploring the streamlining of agency FOIA regulations. As part of our process we have analyzed current agency FOIA regulations in comparison to a "model FOIA regulation" provided to us by civil society. Based on that analysis, our team is now hard at work drafting initial language for a potential common regulation. We look forward to continuing our engagement with civil society as we collaborate on this project.

Our third NAP initiative is designed to improve internal agency FOIA processes by leveraging best practices and successful strategies across the government. In 2014, OIP launched a series of Best Practices Workshops. Each workshop focused on a specific topic in FOIA administration where agency representatives with particular success in that area shared their best practices and successful strategies. These workshops, which we will continue in the years ahead, provide a unique opportunity for agencies to learn from each other and to apply innovative solutions more broadly across the government. After each workshop my Office published the best practices discussed, as well as any related guidance and resources, on a [designated page](#) of our website as a reference for all agencies. Since its launch, we have had five very successful workshops on the topics of reducing backlogs and improving timeliness, proactive disclosures, implementing best practices observed by requesters, utilizing technology to improve FOIA processing, and FOIA customer service. The series has been well received by agencies and we look forward to continuing our workshops with new topics in 2015.

As part of a fourth NAP initiative, I have been serving as a government member of the newly formed FOIA Federal Advisory Committee. The FOIA Advisory Committee has met four times (June 24, 2014, October 21, 2014, January 27, 2015, and April 21, 2015) and discussed a range of issues related to FOIA administration, including assessment of fees under the statute and proactive disclosures.

Finally, the fifth initiative is one that OIP is very proud to have successfully completed. The commitment was to enhance FOIA training by making standard e-Learning resources available for all federal employees. As I mentioned at the start, I believe that it is vitally important that all agency personnel, and not just FOIA professionals, have the proper training to understand the important role they play in implementing the FOIA. Just in time for Sunshine Week, after a year of preparation, my Office released a suite of new e-learning FOIA training

resources. These resources target the entire spectrum of federal employees, from the newly arrived intern to the senior executive, to ensure that all employees know their obligations and responsibilities under the law.

The new training resources include:

- An infographic that serves as a resource on FOIA basics for all employees new to the federal workforce;
- A brief video designed specifically for senior government executives, which provides a general overview of the FOIA and emphasizes the importance of their support to their agency's FOIA program;
- An in-depth e-Learning training module specifically designed for FOIA professionals, which addresses all the major procedural and substantive requirements of the law, as well as the importance of good customer service; and
- A separate e-Learning training module for all other federal employees that provides a primer on the FOIA and highlights ways in which they can assist their agency in administering the law.

This new suite of FOIA training tools not only provides important resources for all agencies, but it reemphasizes the important message from the Attorney General's FOIA Guidelines that "FOIA is everyone's responsibility."

In closing, I want to thank you for the opportunity to be here today to discuss agencies' administration of the FOIA and all of our efforts here at the Department to encourage compliance with this important law. The Department of Justice looks forward to working together with the Committee on matters pertaining to the government-wide administration of the FOIA. We are fully committed to achieving the President's and Attorney General's vision of open government. While this past fiscal year presented many challenges for agencies, we have accomplished a great deal since the issuance of the President's and Attorney General's 2009 FOIA directives. Our work is not done, however, and OIP looks forward to continuing to work diligently to help agencies achieve even greater transparency in the years ahead. I would be pleased to address any question that you or any other Member of the Committee might have on this important subject.