



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 05, 2015

The Honorable Charles E. Grassley
Chairman
Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Melanie Pustay, Director, Office of Information Policy, before the Committee on March 11, 2014, at a hearing entitled "Open Government and Freedom of Information: Reinvigorating the Freedom of Information Act for the Digital Age." We hope that this information is of assistance to the Committee.

Please do not hesitate to contact this office if we may be of additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Peter J. Kadzik
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Member

Questions for the Record
Director Melanie Pustay
Office of Information Policy
“Open Government and Freedom of Information:
Reinvigorating the Freedom of Information Act for the Digital Age”
Committee on the Judiciary
United States Senate
March 11, 2014

Questions Posed by Chairman Grassley

1. **As discussed at the hearing, I look forward to receiving from you information regarding cases where the Department of Justice has applied the “foreseeable harm” standard and not defended an agency’s use of an exemption. That said, can you also describe or provide information whether, to your knowledge, agencies, including the Department of Justice, are applying the “foreseeable harm” standard when making initial determinations whether to apply an exemption to a FOIA request.**

Response:

When the Attorney General’s Freedom of Information Act (FOIA) Guidelines were issued in 2009, the U.S. Department of Justice’s (the Department) litigators immediately began applying their principles to their litigation cases. While the Department has not kept statistics on this point, there are a number of examples where the agency made a discretionary release of additional information during the course of litigation that was originally withheld at the administrative level. For example, after issuance of the Attorney General’s FOIA Guidelines the Office of Information Policy (OIP) conducted a systematic review of all its pending FOIA litigation cases to determine whether any information could be released as a matter of discretion. We determined that releases could be made in eight of those cases. Attached here is a chart OIP compiled in response to a FOIA request on this topic that was prepared in late 2009 and that lists the eight litigation cases where supplemental releases were made after issuance of the Attorney General’s FOIA Guidelines. There are also court decisions that reference the fact that releases were made as a matter of discretion, *see, e.g., Judicial Watch, Inc. v. DOJ*, 878 F. Supp. 2d 225, 233 (D.D.C. 2012) (referencing review that the Department had conducted in connection with the litigation and the decision to make discretionary releases as a result of that review); *ACLU v. DHS*, 810 F. Supp. 2d 267, 276 (D.D.C. 2011) (noting that agencies had applied the Attorney General’s Guidelines, which were issued during the pendency of the case, and had released records as a result).

More importantly, separate and apart from its impact on litigation, the foreseeable harm standard contained in the Attorney General’s FOIA Guidelines has had an ongoing impact on agency decision-making at the administrative level, when agencies are making their initial determinations on FOIA requests. After the Attorney General’s FOIA Guidelines were issued in

March 2009, OIP issued guidance to all agencies specifically addressing the foreseeable harm requirement. See DOJ, OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines – Creating a New Era of Open Government (2009). We also discuss the requirement in our Department of Justice Guide to the FOIA and we have made it a regular part of the many FOIA training programs OIP conducts each year. Through these efforts we are educating agencies about the standard.

Moreover, each year OIP has asked agencies to include in their Chief FOIA Officer Reports information about whether they have made discretionary releases of information after applying the foreseeable harm standard. After reviewing the first set of agency Chief FOIA Officer Reports submitted in 2010, OIP found a strong correlation between those agencies that reviewed their documents with the foreseeable harm standard in mind and those agencies that were able to identify additional information that could be released as a matter of discretion. Accordingly, OIP issued guidance that each agency "should institute a system, or add a step in their processing procedures, to affirmatively consider whether more information can be released as a matter of administrative discretion."

To provide greater transparency to this aspect of the Attorney General's FOIA Guidelines, for the past three years OIP has asked agencies to provide examples of discretionary releases made the previous year in their Chief FOIA Officer Reports. Many of these releases consist of information that could have been protected by the deliberative process privilege of Exemption 5, but information protected by other exemptions, such as Exemptions 2, 7(D), 7(E), and 8, has also been released as a matter of discretion. As reported in the 2015 Chief FOIA Officer Reports, for example, the Department of State, in response to several requests for information about American families' unsuccessful attempts to adopt children in Vietnam, made a concerted effort to release deliberative material to bring greater transparency to the consular and Department officers' decision-making process. The Department of Transportation released internal agency investigatory materials related to motor vehicle recalls and safety related defects in an effort to promote further transparency concerning those safety-related issues. The Federal Bureau of Investigation (FBI) continues to release information with historical value that could be protected by the FOIA's law enforcement exemptions, such as information about counterintelligence operations and records of discussion about whether to prosecute Alger Hiss for espionage and perjury.

We encourage the Committee to review agency Chief FOIA Officer Reports for 2013, 2014, and 2015, which are readily available on the Reports page of OIP's website, to get a complete picture of the many types of information released as a matter of discretion each year under the Attorney General's FOIA Guidelines.

2. In your testimony, you mentioned the need for standardizing FOIA regulations. As you'll recall, at last year's hearing I was concerned in general about the pace at which agencies were updating their FOIA regulations.

A. Has the Department of Justice updated its FOIA regulations since last year's hearing? If not, why and do you intend to update the Department's FOIA regulations?

Response:

The Department published its updated FOIA regulations on April 3, 2015.

B. Is your office working with other agencies and their FOIA officials to ensure that current law and the Attorney General's FOIA guidelines are followed so as to remove any doubt or uncertainty when responding to a FOIA request? On this point, please explain how your office handles this task and whether your office lacks any resources or authority to assist other agencies in this regard.

Response:

Yes, the Department and OIP take very seriously our responsibility of encouraging agency compliance with the FOIA and ensuring that the President's and Attorney General's FOIA Memoranda are implemented across the government. We satisfy this responsibility in a number of different ways both by providing agencies with the knowledge and resources they need to apply the law correctly and by holding them accountable for their FOIA administration. These efforts include:

- **Issuing policy guidance:** OIP regularly issues government-wide policy guidance on the proper implementation of the law and the President's and Attorney General's FOIA Memoranda. For example, shortly after the President's and Attorney General's FOIA Memoranda were issued, OIP issued guidance to agencies detailing their obligations in implementing the Administration's policies. See DOJ, OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines – Creating a New Era of Open Government (2009). Since then, we have issued guidance on a host of topics, including two addressing the importance of good communication with FOIA requesters, all of which are available on our website.
- **Conducting FOIA training:** OIP regularly provides training to agency personnel on both the application of the law and the implementation of the President's and Attorney General's FOIA Memoranda. Every year OIP provides training for thousands of FOIA professionals on a range of FOIA topics. We have recently launched a suite of four training resources designed to reach every level of the federal workforce, from the newly arrived intern to the senior executive,

which are designed to ensure that all agencies have important FOIA resources available to them. All of OIP's training sessions fully incorporate the Attorney General's FOIA Guidelines. Details about our training are available on our website.

- **Providing Counseling Services:** OIP provides individualized counseling to agency personnel on all aspects of the FOIA, including legal and policy considerations, through our *FOIA Counselor Service* which is provided by OIP's attorney staff.
- **Creating Reporting Guidelines:** As part of our responsibilities in overseeing agency compliance with the statute and the Attorney General's FOIA Guidelines, OIP issues reporting guidelines each year for agency Chief FOIA Officer Reports. In these reports we ask agencies to describe the steps they have taken to implement the Attorney General's FOIA Guidelines, including steps taken to apply the presumption of openness, to improve efficiency, to increase and enhance proactive disclosures, to increase use of technology in all aspects of FOIA administration, and to improve timeliness and reduce any backlogs. Each year, as agencies' implementation of the FOIA Guidelines has matured, we have revised the reporting requirements to continue to drive and incentivize agencies moving forward.
- **Assessing Agency Progress:** OIP conducts a review of agency activities as reported in both their Chief FOIA Officer Reports and their Annual FOIA Reports and assesses or "scores" their progress under a range of milestones as a way to hold agencies accountable. The assessment provides a visual snapshot of the five key topical areas of FOIA administration addressed in the Attorney General's FOIA Guidelines. For 2014, OIP expanded the assessment to include a five-step scoring system, overall scores for each assessed section, and additional narrative information from agency reports. OIP's assessments are available on our website.
- **Creating FOIA.gov:** Launched during Sunshine Week four years ago, FOIA.gov serves as the government's comprehensive FOIA resource for all information on the FOIA and FOIA data. Among many other functions, FOIA.gov takes the detailed statistics contained in agency Annual FOIA Reports and displays them graphically, so that they can be compared by agency and over time. The site also spotlights recent releases made by agencies under the FOIA and provides the public with an easy way to find all of the information needed for making a request to one of the hundred agencies subject to the FOIA. The Department is currently working in collaboration with the 18F team at the General Services Administration to continue to expand these important resources on FOIA.gov for the public.

3. Regarding your answer to Chairman Leahy's question about the growth in use of Exemption 5, you stated in part that one cause was due to the Department of Homeland Security and the Equal Employment Opportunity Commission's increased Exemption 5 reliance in order to "protect attorney work product and attorney-client information, which is not subject to discretionary release, like deliberative process." It's my understanding that these are, historically, areas of FOIA exemptions where discretionary disclosure is appropriate. In fact, the FOIA Guidance issued by your office, available at <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>, states that when applying the "foreseeable harm" standard to encourage discretionary release:

There is no doubt that records protected by Exemption 5 hold the greatest promise for increased discretionary release under the Attorney General's Guidelines. Such releases will be fully consistent with the purpose of the FOIA to make available to the public records which reflect the operations and activities of the government. Records covered by the deliberative process privilege in particular have significant release potential. In addition to the age of the record and the sensitivity of its content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed in determining whether a discretionary release is appropriate. Documents protected by other Exemption 5 privileges can also be subject to discretionary disclosures.

- A. Please clarify whether agencies are failing to follow OIP Guidance that encourages discretionary release of information that while otherwise covered by a valid Exemption can still be released if it is determined doing so would not cause any "foreseeable harm."

Response:

As described above in response to question one, agencies are applying the foreseeable harm standard and making discretionary releases of a wide range of information otherwise covered by a FOIA exemption. OIP has directed agencies to report each year on the steps to apply the foreseeable harm standard and for the past three years OIP has asked agencies to provide examples in their Chief FOIA Officer Reports of records they have released as a matter of discretion. Those Chief FOIA Officer Reports describe each agency's efforts to apply the foreseeable harm standard and to release records as a matter of discretion.

- B. Do you stand by your answer to Chairman Leahy that “attorney work product and attorney-client information” are not subject to discretionary release? If so, how does that align with the guidance your office has issued?**

Response:

My answer has been misunderstood. As you quote above, I responded to the question by stating that materials covered by the attorney client or attorney work product privileges are not subject to discretionary releases “like deliberative process.” When I said “like” I meant “in the same way as.” My answer was conveying the fact that attorney client and attorney work product material is not subject to discretionary release *in the same way as*, or *to the same extent as*, deliberative process material. As my guidance emphasizes, while documents protected by *any* privilege *can* be subject to discretionary release, those records “covered by the deliberative process privilege in particular have significant release potential.”

- 4. It has been three years since the Supreme Court’s decision in *Milner v. Department of the Navy*. I have asked you before whether the Department of Justice planned to submit a legislative fix to address the Court’s decision and you said we would receive a proposal. I have yet to see any language from the Department that addresses the *Milner* decision. Why? Does the Department no longer believe a fix is necessary? If so, please explain why.**

Response:

A number of agencies have been impacted by the decision in *Milner v. Department of the Navy*, all of which have a strong interest in a legislative solution. The Department has been working with these agencies on 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 (DOD) as part of DOD’s FY16 Defense Authorization Act proposal.

Questions Posed by Senator Leahy

- 5. Several Federal agencies have been participating in an online FOIA portal that allows the public to submit, track and review FOIA requests online. Congress is considering legislation to expand the FOIA portal government-wide. Do you support this proposal?**

Response:

The Department supports the concept of a government-wide FOIA portal for the submission of requests. Indeed, as part of the Administration's commitment to modernize FOIA in the Second Open Government National Action Plan, the Department has funded and is working closely with the White House Open Government Team and General Services Administration (GSA) to launch new functionality that will improve the FOIA intake process for both requesters and agencies. A key feature of this effort is the ability for requesters to make a request to any federal agency from a single website and to include other features to improve the customer experience. Given that there are one hundred agencies subject to the FOIA, with vastly different FOIA needs, the technical and fiscal challenges of attempting to establish a single site for the submission and tracking of requests are great. As this effort is fully underway, legislation requiring participation in a particular online portal or that specifies specific requirements for a portal, is unnecessary and could be counterproductive.

- 6. Congress is also considering a proposal to require that all records released under FOIA be posted online. Do you support this proposal? Please explain.**

Response:

The Department has consistently encouraged agencies to proactively post records online. The Attorney General emphasized in the 2009 FOIA Guidelines that "agencies should readily and systematically post information online in advance of any public request." However, imposing a broadly applicable legal requirement that all records released under the FOIA be posted online could have the unintended consequence of significantly impacting agencies' ability to timely process the ever-increasing numbers of requests that are received by the government each year. Prior to posting records online, agencies are obligated to ensure that the information being posted is accessible to individuals with disabilities, as required by Section 508 of the Rehabilitation Act of 1973. For many agencies the resources needed to ensure compliance with Section 508 would be taken from resources otherwise used to process FOIA requests in the first instance and so ensuring the proper allocation of resources for both releasing and posting is a critical consideration. Further, such a policy would need to take into account the privacy interests of requesters who ask for their own records.

Significantly, the FOIA already contains a provision that requires agencies to post records that are, or are likely to be, frequently requested, and that provision currently offers a structured and workable way to promote affirmative disclosures. In addition, the President's and Attorney

General's FOIA Memoranda encourage proactive disclosures of records above and beyond the statutory requirements. OIP issued guidance just last month addressing the importance of the FOIA's proactive disclosure provisions, with a focus on the requirement to post "frequently requested" records on popular topics. See DOJ, OIP Guidance: Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request (2015). We also ask agencies to report each year in their Chief FOIA Officer Reports on the steps they have taken to improve proactive disclosures at their agencies.

7. **A March 2014 study by the Center for Effective Government found that a majority of the Federal agencies that it graded on FOIA performance did not provide important online services, such as the tracking of FOIA requests via their websites.**

- A. **What is the Department of Justice doing to help Federal agencies utilize the Internet and other technologies to facilitate the FOIA process?**

Response:

The Department strongly believes in the importance of technology to improve FOIA administration. Indeed, in his 2009 FOIA Guidelines, Attorney General Holder emphasized President Obama's call for agencies to "use modern technology to inform citizens what is known and done by their Government." Notably, this marked the first time that an Attorney General's FOIA Guidelines addressed the use of technology in FOIA.

To reinforce the President's and Attorney General's call to use technology in FOIA, every year OIP has issued guidelines for agencies' Chief FOIA Officer Reports that require each agency to report on the steps they have taken to greater utilize technology in FOIA. As a part of the first Chief FOIA Officer Reports, submitted in 2010, agencies were surveyed to determine the extent to which they were using technology to receive, track, and process requests, and to prepare their Annual FOIA Reports. The 2010 Reports showed that the vast majority of agencies were using technology for those functions.

As has been done for each section of the Chief FOIA Officer Report, every year we have refined the questions for the technology section as the use of technology in FOIA has matured. For the 2012 and 2013 Reports, the Department expanded this section to survey agencies on the extent to which they were using more advanced technologies to assist with the actual processing of requests. Such technologies could include software that can sort and de-duplicate documents, shared platforms that facilitate the FOIA consultation process, and technology that improves the agency's search capabilities.

In addition to these questions, for the 2014 Chief FOIA Officer Reports agencies were asked whether they provide requesters the ability to track the status of their requests online, and if so, to provide details regarding the functionality of such online services. For their 2015 Chief FOIA Officer Reports, OIP again asked agencies to report on the technology they are using to provide online FOIA services and to process FOIA requests. We also asked agencies to describe their

use of technology to communicate with requesters and any new and different ways they are posting material online to make that information more useful for the public.

To further emphasize the important role of technology OIP established a FOIA Technology Working Group to explore the use of technology in improving agencies' FOIA administration. This Technology Working Group serves as an important forum for agency personnel to discuss the application of technological and digital tools to various aspects of FOIA administration and to share best practices on the use of technologies.

Moreover, OIP issued government-wide guidance to agencies on the use of technology to improve communications with requesters. See DOJ, OIP Guidance: *The Importance of Good Communication with FOIA Requesters 2.0: Improving Both the Means and the Content of Requester Communications (2013)*. As part of this guidance, agencies were directed to communicate electronically with requesters whenever possible and to make such a means of communication their default.

The Department has also championed the use of advanced technological solutions that assist with the core functions of document processing as a key component of improving FOIA administration. It is in this area where we believe technology can have the biggest impact on improving the efficiency with which agencies respond to requests. For example, conducting an adequate search for responsive records often involves the review of both paper and electronic records originating with multiple employees throughout the agency. In turn, these searches can locate hundreds, if not thousands, of pages of material that need to be reviewed for both responsiveness and duplication before a FOIA disclosure analysis can be conducted. With the widespread use of e-mail and the common practice of employees forwarding the same email to multiple other people, with each employee then building still further on that email, long chains of overlapping and duplicative email are frequently created. The benefits of using technology to de-duplicate and sort and thread all those emails automatically, rather than doing so manually, are readily apparent. OIP continues to lead the effort to explore the use of these more advanced technologies for the benefit of not only the Department's, but all agencies' FOIA administration.

Finally, as noted above, the Department is actively working on the Administration's commitment to launch a consolidated FOIA portal that allows the public to submit a request to any agency from a single website and that will include additional tools to improve the customer experience. In addition, as part of the Second Open Government National Action Plan's commitment to modernize FOIA and improve FOIA processing at agencies, we created a new series of agency *Best Practices* workshops where agency personnel can learn about, and leverage, the success of other agencies on specific topics in FOIA. Technology was a key part of our July 17, 2014 workshop which focused on proactive disclosures and making online information more useful to the public. On December 9, 2014, we held a workshop specifically focused on various ways that use of technology is improving FOIA administration. The best practices from that workshop are summarized on OIP's *Best Practices Workshop Series* webpage.

- B. Do you have any recommendations on how Congress can help Federal agencies facilitate the FOIA process in the digital age?**

Response:

Given the Department's focus on the use of technology in FOIA and all of the good work that is already underway in this area, as described above, we do not have a legislative recommendation at this time.

- 8. The Mountain Press, a local Tennessee newspaper, recently reported that it took the Office of Special Counsel 230 days to respond to its FOIA request seeking a single record -- only to deny the request.**

- A. Do you agree that it should not take our Government almost a year to respond to a simple FOIA request?**

- B. What is the Department of Justice doing to ensure that Federal agencies respond to FOIA requests in a timely manner?**

Response:

The Department has long focused on encouraging agencies to improve timeliness and reduce any backlogs of pending requests. Indeed, in his FOIA Guidelines the Attorney General emphasized that "[t]imely disclosure of information is an essential component of transparency."

While OIP cannot comment on a specific request to another agency, OIP has made substantial efforts to provide guidance on, and hold agencies accountable for, improvements in timeliness and reduction of any backlogs. Going back to Fiscal Year 2008, it was OIP that established the requirement for agencies to report on backlogs in their Annual FOIA Reports. In creating this requirement, OIP expanded on the reporting obligations set out in the OPEN Government Act, which did not include backlog as a reporting metric.

OIP has also emphasized that reduction of backlogs includes two distinct elements – reduction in the *numbers* of pending requests and reduction in the *age* of the oldest requests. Indeed, the closing of agencies' oldest pending requests is a distinct backlog reduction goal, which OIP has reiterated to agencies in April 2012, August 2012, and August 2013 guidance. Two years ago OIP established a new reporting requirement that agencies publicly report on a quarterly basis the size of any FOIA backlog and the status of their ten oldest pending requests. This information is then displayed on FOIA.gov, the Department's comprehensive FOIA resource.

Every year since 2010, OIP has asked agencies to report in their Chief FOIA Officer Reports whether they have achieved backlog reduction and closed their ten oldest pending requests and appeals from the prior fiscal year. Agencies that were not able to do so are required to provide an explanation and plan for improvement. OIP has also issued guidance to agencies specifically encouraging them to focus on responding to requests in their "simple" processing track within an

average of twenty working days. For the past two years in particular, OIP has held agencies accountable for this effort by scoring them on this metric, as well as their backlog reduction efforts, in the FOIA assessments we prepare and post publicly.

Given the importance of improving timeliness in responding to FOIA requests, OIP chose that topic for its inaugural *Best Practices* workshop series, held in May 2014. At that workshop a panel of agencies that had success in this area shared their strategies and approaches for achieving their goals. The panel provided a very robust discussion on various approaches their agencies had used to achieve backlog reduction and to improve the timeliness of responses at their agency. Based on the panel discussion, OIP issued government-wide guidance on best practices that agencies can utilize to achieve backlog reduction and improve timeliness. See DOJ, OIP Guidance: Reducing Backlogs and Improving Timeliness (2014).

9. **I have worked to improve proposed legislative exemptions to FOIA by including a requirement that Federal agencies weigh the public's interest in obtaining information before using the exemption to withhold the information from the public. What are your views on codifying a so-called "public interest balancing test" in the FOIA statute?**

Response:

As you know, there is a public interest balancing test already built into the FOIA's privacy exemptions, Exemptions 6 and 7(C), which requires agencies to balance the privacy interest of an individual against the public interest of shedding light on agency activities. Imposing a balancing test for other exemptions would be ill-advised as it could, upset the carefully created judicial framework for conducting litigation, disrupt agency decision-making processes, as well as increase the administrative burden at agencies and invite more requests and more litigation which itself would become more complex as evidentiary disputes over balancing would inevitably arise.

10. **During the March 11, 2014 hearing, you testified that the Office of Information Policy is leading an interagency team to develop a common FOIA regulation that will apply to all Federal agencies.**
- A. **When will this new regulation be complete?**
- B. **When do you expect Federal agencies will be ready to implement the new FOIA regulation government-wide?**

Response:

This project is active and on-going. As part of our commitments under the Second National Action Plan, OIP is leading the effort to determine the feasibility and potential content of a core FOIA regulation that is both applicable to all agencies and retains flexibility for agency-specific requirements. The timetable for completion of the commitment is the end of 2015. In May 2014 we kicked-off this effort by meeting with interested members of the open government community as well as with agency personnel. Since then OIP has formed an interagency task force comprising separate teams responsible for each part of the proposed core FOIA regulation. OIP also facilitated several meetings with those teams and civil society organizations to discuss in more detail the possible content of each specific subsection of the common regulation. OIP has just led a discussion with the agency teams on April 8, 2015 and we plan to meet again in another month. We will continue to meet regularly with the teams and will engage with civil society throughout the entire process.

Questions Posed by Senator Cornyn

11. On April 15, 2009, a month after Attorney General Eric Holder's FOIA memorandum was publicly released, Gregory Craig, Counsel to the President, sent a memorandum to the executive departments and agencies of the federal government ordering all executive departments and agencies to consult with White House Counsel "on all document requests that may involve White House equities" before releasing them in response to a FOIA request. While past administrations have required consultation on "White-House-originated" documents in FOIA requests, this administration has gone much further.

As Director of the Office of Information Policy, presumably you are aware of this memorandum. Please clarify how the phrase "White House equities" has come to be defined and applied in the Department of Justice and other agencies. Also, explain what types of records are being submitted to the White House for "consultation" under this memorandum.

Response:

As a matter of sound administrative practice, when one agency locates records that are of interest to another agency or entity, the government's policy has long been to consult with the other agency or entity to get its views on the sensitivity of the document's contents prior to making a disclosure determination. The April 15, 2009 Memorandum was a reminder to agencies of the longstanding policy of consulting with the White House when processing records that contain White House equities. The use of the term "equities" in the 2009 White House Memorandum did not change how or when agencies should consult with the White House. As with previous administrations, agencies typically consult with the White House whenever records processed for disclosure under the FOIA contain information that originated with, or are of interest to, the White House. This consultation process is similar to the one that occurs when an agency reviews records that originated with, or contain the interests of, another federal agency. On December 5, 2011, OIP issued guidance to agencies on the consultation process and the procedures for processing records that contain other agency equities. See DOJ, OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records when Another Agency or Entity Has an Interest in Them (2011).

As detailed in that guidance, such consultations procedures help ensure that agencies making release determinations are fully informed of any sensitivity in the content of the documents.

12. **Has the White House ever required that FOIA documents involving "White House equities" be redacted or withheld? If so, under which FOIA exemption were such documents redacted or withheld? Please list all examples of which you are aware.**

Response:

The agency in receipt of the FOIA request has ultimate responsibility for responding to that request and for asserting any exemptions that are appropriate. Documents containing White House equities could be releasable in full, or could potentially be subject, in whole or in part, to any of the FOIA's nine exemptions, although in my experience the most commonly applicable exemptions are Exemption 5 (privileged communications) and Exemption 6 (personal privacy). Even if exempt, some documents could be released as a matter of discretion. Whatever the disposition, the agency responding to the request will provide the requester with the legal basis for any withholdings that are made.

13. **Has the Department of Justice provided any guidance, formal or informal, within the Department of Justice or to other agencies, on the meaning or scope of the April 15, 2009 memorandum? If so, please provide the Committee with copies of those documents. If such documents do exist and you are unwilling to release them to the Committee, please provide an explanation of why they are being withheld.**

Response:

The Department has not issued guidance specifically on the April 15, 2009, memorandum. As noted above, this memorandum reminded agencies of the longstanding policy for conducting FOIA consultations with the White House. From our perspective the procedures for consulting with the White House did not change as a result of the memorandum. Moreover, as occurred in prior administrations, if we are asked for our views, we would advise agencies to consult with the White House, just as they would consult with another agency, if during the course of processing records the agency determines that the White House has equity in the records. This is the same process that agencies undergo when consulting with another agency that has equity in the records being reviewed for disclosure under the FOIA. As mentioned above, in 2011, OIP issued detailed guidance on FOIA consultations and the processing of records that contain outside equities. See DOJ, OIP Guidance: *Referrals, Consultations, and Coordination: Procedures for Processing Records when Another Agency or Entity Has an Interest in Them* (2011).

14. The April 15, 2009 memorandum also requires that agencies consult with White House Counsel on Congressional committee requests. What public policy justification is there for the White House ordering less information to be shared with Congress?

Response:

As mentioned above, when an agency *consults* with another entity it is simply obtaining the views of that entity to inform the disclosure decision that is ultimately the responsibility of the agency receiving the request. The fact that a consultation occurs does not somehow mean that information will be withheld. Indeed, after conducting a consultation, the agency may be in a position to release the requested information.