



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 18 2010

The Honorable Patrick Leahy
Chairman
Committee on Judiciary
United States Senate
Washington, D.C. 20515

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Associate Attorney General Thomas J. Perrelli before the Committee on September 30, 2009, at a hearing entitled "Advancing Freedom of Information in the New Era of Responsibility." We apologize for the delay in responding to these questions, which apparently resulted from a miscommunication between our staffs.

We hope this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ronald Weich", is located below the "Sincerely," text.

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Jeff Sessions
Ranking Minority Member

Written Questions for Associate Attorney General Thomas J. Perrelli

PENDING LITIGATION

1. During the hearing, I asked you about the impact of the Attorney General's new guidelines on pending FOIA cases. You testified that you would provide the Committee with more information about these cases. The Attorney General's FOIA memorandum states that the new guidelines should apply to pending cases only when the Government lawyers working on those cases believe that there is a substantial likelihood that application of the new guidelines would result in a "material disclosure of additional information." This policy appears to be a departure from the case-by-case FOIA review policy adopted by former Attorney General Janet Reno, which led to significant new disclosures of information in pending FOIA cases.
 - (a) **How many times has the Department released additional information in a pending FOIA case since the new guidelines went into effect?**
 - (b) **Will the Department consider adopting a case-by-case review policy for pending FOIA cases, like the policy implemented by former Attorney General Reno?**

Response

- (a) The FOIA guidelines have been successful in getting more information out to the American public. The Department has been actively engaged in educating and training agencies with respect to the new guidelines, and agencies are releasing information that may be technically exempt under FOIA but that can nevertheless be disclosed as a matter of discretion. Pending FOIA cases have been reviewed, as required by the Attorney General's Guidelines, to determine whether additional information can be released, and in numerous cases additional information has been released. It is not possible to provide a truly accurate count of the number of times information has been released in a pending case since the issuance of the guidelines because we do not maintain statistics of that kind for these types of cases that are litigated all around the country by various offices.
- (b) Under the defensibility standard announced by the Attorney General in the FOIA Guidelines, the Department will defend a denial of a FOIA request "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law." The Department does, in fact, review every newly filed FOIA litigation case under this standard. One year ago, at the time the new FOIA Guidelines were issued, there were FOIA litigation cases already pending. In an effort to not unnecessarily divert resources away from processing new requests, the FOIA Guidelines directed that as to those then-pending cases, the new guidance should be applied as practicable whenever it was determined that there was a

substantial likelihood that their application would result in a material disclosure of additional information. Since that time, for all litigation cases filed after issuance of the new Guidelines, each case is reviewed under the new standards.