

QUESTIONS FOR THE RECORD FROM SENATOR CHARLES GRASSLEY

TO

MELANIE PUSTAY

FOLLOWING THE SENATE JUDICIARY COMMITTEE HEARING:

**“THE FREEDOM OF INFORMATION ACT: ENSURING TRANSPARENCY
AND ACCOUNTABILITY IN THE DIGITAL AGE.”**

HELD ON MARCH 15, 2011

1. According to its website:

The Office of Information Policy (OIP) is responsible for encouraging agency compliance with the Freedom of Information Act (FOIA) and for ensuring that the President’s FOIA Memorandum and the Attorney General’s FOIA Guidelines are fully implemented *across the government*. OIP develops and issues policy guidance to *all agencies* on proper implementation of the FOIA. ... OIP provides individualized guidance to agencies on questions relating to the application of the FOIA, regularly conducts training programs for FOIA personnel across the government, including specialized agency programs, and provides general advice to the public on use of the FOIA. In addition to its policy functions, OIP *oversees agency compliance with the FOIA....*

(Emphasis added).

Thus, the OIP’s responsibilities are not limited to the Department of Justice (“DOJ”). It is responsible for overseeing FOIA compliance by all agencies “across the government.”

Last year, Ted Bridis of *The Associated Press* uncovered that for at least a year, the Department Homeland Security (“DHS”) was diverting requests for records to senior political advisers, who delayed the release of records they considered politically sensitive.

Specifically, the AP’s July 21, 2010 article revealed that in July of 2009, the DHS introduced a directive requiring a wide range of information to be vetted by political appointees, no matter who requested it. Career employees were ordered to provide Secretary Napolitano’s political staff with information about the people who asked for records — such as where they lived, whether they were private citizens or reporters — and about the organizations where they worked.

At the hearing, you testified that “if” the story was true, the DOJ would have serious concerns. You also testified that the DOJ has not investigated the DHS’s political vetting policy.

The AP’s article is now nine months old. It was based on and quoted DHS emails. Those emails either say what they say or they don’t.

(a) Has the DOJ obtained copies of the DHS emails at issue?

Response: The Office of Information Policy (OIP) has not obtained copies of the DHS emails.

(b) Did the DOJ ever review the DHS emails?

Response: OIP has not reviewed the DHS emails, but has seen excerpts of them in news articles.

(c) Does the DOJ know whether the DHS withheld any emails or other documents which were responsive to the AP's FOIA request?

Response: OIP does not have any independent knowledge of whether DHS withheld documents in response to the AP's FOIA request. The AP has not sought the assistance of OIP in connection with its request.

(d) Was any consideration at all given by the DOJ to commencing an investigation of the DHS's political vetting of FOIA requests? If so, describe in detail what consideration was given. If any consideration was given and any documents were prepared by the DOJ in connection with that analysis, provide copies of those documents.

Response: OIP became aware of the processing procedures at DHS through news reports. OIP does not have independent investigatory responsibilities and so it had no occasion to consider whether to commence an investigation of DHS. OIP's formal interagency oversight authority is exercised in connection with agencies' Annual FOIA Reports and Chief FOIA Officer Reports, which by law agencies must submit to the Department of Justice. OIP develops guidelines for those reports, issues guidance and provides training to agencies to help them complete the reports, and reviews and compiles summaries of both agency Annual FOIA Reports and Chief FOIA Officer Reports. Nonetheless, as the Office responsible for encouraging agencywide compliance with the FOIA, OIP contacted the Chief FOIA Officer at DHS upon reading the news reports, and was assured that the procedures for handling FOIA requests had been revised and that the new procedures were designed to ensure that responses were not unnecessarily delayed.

(e) Who made the decision that the DOJ would not conduct an investigation of the DHS's political vetting policy?

(f) Describe in detail the justification or reasoning behind the DOJ's conclusion that an investigation should not be commenced. If any documents were created by the DOJ in connection with its decision not to investigate the DHS's political vetting policy, provide copies of those documents.

Response to (e) and (f): As explained above, OIP has no investigatory authority and so had no occasion to consider whether an investigation was warranted. After reading the news reports, however, OIP did contact the Chief FOIA Officer at DHS and was assured that the procedures for handling requests had been revised.

- (g) If the AP's article is accurate, what laws were violated and what are the potential penalties for those violations?

Response: OIP can only speak to the legal requirements of the FOIA. Under the FOIA, there are provisions establishing time periods to respond to FOIA requests. If those time periods are not met, FOIA requesters are deemed to have exhausted their administrative remedies and may seek relief in court. The agency, in turn, can then request a stay of those court proceedings by demonstrating that it faces exceptional circumstances and is exercising due diligence in responding to FOIA requests. The court would then decide whether a stay was appropriate and, if so, for how long a period. A detailed discussion of these statutory provisions is contained in the *United States Department of Justice Guide to the Freedom of Information Act*, which is available at http://www.justice.gov/oip/foia_guide09.htm.

- (h) Is the OIP the unit within the DOJ that would conduct an investigation of potential misconduct in the processing of a FOIA request? If not, which unit within the DOJ would investigate such misconduct?

Response: OIP, as mentioned above, has no investigatory authority. OIP believes that an agency's own Office of the Inspector General is the most appropriate office to review an allegation of potential misconduct connected with FOIA processing at the agency.

- (i) Has any unit of the federal government investigated the DHS's political vetting policy? If so, which unit and what conclusions were reached? If you have copies of any documents created as part of the investigation please provide copies.

Response: OIP is aware through news reports that DHS's Office of the Inspector General is conducting a review.

- (j) Has any disciplinary action been taken against the political appointees who created and/or implemented the political vetting policy at the DHS?

Response: OIP has no knowledge of whether disciplinary action has been taken against any political appointees at DHS in connection with the handling of FOIA requests.

- (k) Assuming that it has actually been discontinued, what corrective actions have been taken to prevent the DHS's political vetting policy from being repeated there or in other agencies?

Response: DHS is in the best position to provide an explanation of the corrective steps taken specifically at DHS. As to ensuring that proper FOIA procedures are followed at all agencies, OIP engages in a wide variety of initiatives to help agencies fully comply not only with the legal requirements of the FOIA, but also with the President's FOIA Memorandum and that Attorney General's FOIA Guidelines. First, OIP writes the *Department of Justice Guide to the FOIA*, which is a legal treatise addressing all aspects of the law, including all its procedural provisions. Second, OIP issues guidance to agencies on proper implementation of the statute and the new guidelines, which includes guidance on the procedural aspects of the law and the need to ensure that there is an effective and efficient system in place for responding to requests. Third, OIP trains thousands of FOIA professionals each year on all aspects of the FOIA, including the law's procedural requirements. Fourth, OIP provides daily legal counseling services to FOIA professionals, who can call OIP on a dedicated phone line and speak to an attorney about any matter connected with the administration of the FOIA. Fifth, agencies are required to file two reports each year to the Department of Justice. The Annual FOIA Report contains detailed statistics regarding the numbers and disposition of FOIA requests, and the time taken to respond. The Chief FOIA Officer Report describes narratively the steps taken to improve transparency at the agency, specifically including the steps taken to ensure that the agency has an effective and efficient FOIA process. Sixth, the Department now makes available on a new website called FOIA.Gov all the detailed statistics on agency FOIA compliance in order to "shine a light" on FOIA compliance itself. The statistics are displayed graphically and allow not only the Department, but any member of the public or any interested party, to compare and contrast the data between agencies and over time. Through all these initiatives OIP is both encouraging proper compliance with the FOIA and ensuring agency accountability.

2. According to the news reports, the Office of Government Information Services ("OGIS") mediated or facilitated the AP's request for emails from the DHS. Those emails became the basis for Ted Bridis' July 2010 article. Once the OGIS learned about the political vetting policy at DHS, did it have a legal obligation to report what it had learned to any other agency, including but not limited to the DOJ? If so, describe in detail the OGIS's legal obligations under the circumstances.

Response: While OIP is unaware of any legal requirement to report "political vetting" of FOIA requests, we would encourage any agency that becomes aware of facts that raise a concern as to whether proper FOIA procedures are being followed to bring such facts to OIP's attention. Although OIP has no investigatory powers, we would raise the issue with the agency's Chief FOIA Officer and any other appropriate official.

3. In a February 10, 2011 blog posting, Christian Adams set forth his detailed analysis of FOIA logs for the DOJ's Voting Section in its Civil Rights Division. Mr. Adams is a former DOJ attorney. His review of the logs reveals that requests from liberals or politically connected civil rights groups are often given same day turn-around. By contrast, requests from conservatives or Republicans faced long delays, if they are fulfilled at all. Indeed, according to Mr. Adams' analysis in no instance did a conservative or Republican requestor receive a reply in the time period prescribed by FOIA.

On March 1, 2011, Representative Frank Wolf questioned Attorney General Holder about Mr. Adams' blog posting. The Attorney General testified that he had looked into the issues and assured Congressman Wolf that there is no ideological component to how the DOJ answers FOIA requests. The Attorney General maintained that Mr. Adams' analysis was misplaced and compared "apples to oranges." You repeated that phrase and the Attorney General's conclusion at the hearing.

Describe in detail the DOJ's investigation into the allegations made in Mr. Adams' article, including the date it commenced and the date it was completed.

If a report has been written in connection with the investigation, please provide a copy.

If the investigation is ongoing, describe in detail what has been done to date and what remains to be done.

Response: In response to inquiries from Chairman Smith, Chairman Issa, Chairman Wolf, and Representative Nadler, the Department has begun a review of the allegations raised in the blog posting you have cited. The Department has provided these Members with a detailed explanation of that review to date, including the different types of requests made to the Voting Rights Section of the Civil Rights Division, and has found no evidence to substantiate the allegations in the blog post. The letter to Chairman Wolf, in response to his questions at the hearing cited, is attached.

4. Mr. Adams' blog posting identified 16 FOIA requests by liberals or other friends of the administration and 11 FOIA requests by conservatives or Republicans. Two of the 11 requests from conservatives or Republicans had received no reply. In order to accept the Attorney General's and your testimony, it would seem to mean that all of the FOIA requests from conservatives or Republicans were "complex" and all of the liberal FOIA requests were "simple."

Moreover, in connection with the FOIA hearing, Mr. Adams submitted written testimony. In relevant part, it statements as follows:

Attorney General Eric H. Holder, Jr. testified before an appropriations subcommittee chaired by Representative Frank Wolf on Tuesday, March 1, 2011. When confronted by Mr. Wolf with the data about the log which I described in the

Pajamas Media story, the Attorney General claimed that there may be differing degrees of complexity in the differing FOIA requests. This is inaccurate. There is no difference in complexity in request for submission files created under Section 5 of the Voting Rights Act. The comparison is an “apples to apples” comparison.

Further contradicting the Attorney General’s testimony is the structure of the files in question. The Section 5 submission files are already pre-segregated between public and non-public content. The public and non-public content occupy literally different portions of the file folder. I have seen them myself. It takes hardly any effort whatsoever to access the requested Section 5 file, walk to a copier machine, and copy the public portion of the file and mail it to the requestor. The Attorney General should look more carefully at the issue, for he will discover different requests are being treated differently.

What is your response to Mr. Adams’ written statement?

Please provide copies of all of the FOIA requests identified in Mr. Adams’ article.

Response: The Civil Rights Division explains that it is inaccurate to state that the “public portion” of Section 5 submission files can simply be copied and mailed to a requester. In fact, before producing any files in response to a request, the Voting Section must review files for completeness (i.e., to ensure that every document related to the submission that has been created or received up to the moment of the request – whether transmitted by letter, email, or otherwise – has been added to the Section 5 file) and when necessary, must refer the files to the Division’s FOIA Branch to make any redactions that are appropriate under the FOIA. In addition, while files for pending Section 5 submissions are generally accessible on site, files for closed Section 5 submissions may need to be retrieved from archives off-site, which entails additional delay. While the Voting Section makes every effort to fulfill incoming requests efficiently, the process is more complex than the statement cited suggests.

The Department is currently working on compiling copies of the FOIA requests identified in Mr. Adams’ article.

5. At the hearing, we heard about the FOIA training sessions run by the OIP. The OIP also emphasizes its training sessions on its website.

(a) Prior to the uncovering of the political vetting policy at the DHS, did the OIP training sessions address this issue? If so, please describe in detail how it was covered.

Response: OIP provides a wide range of FOIA training to FOIA professionals as a key part of our mission to encourage agency compliance with the FOIA. This training covers all aspects of the FOIA, from procedural considerations, to the scope of the exemptions, to the requirements for assigning fee categories and assessing fee waiver requests, to litigation

considerations. The principles announced in the President's FOIA Memorandum and the Attorney General's FOIA Guidelines have been incorporated into all these training sessions. The sessions address not only the legal requirements established by the FOIA statute and the case law interpreting it, but also include practical, procedural approaches to managing the FOIA process. The training is primarily designed for FOIA professionals who are career public servants at federal agencies. These training sessions have not expressly addressed the issue of any possible "political vetting" of requests, but have addressed the proper procedures that should be followed by agencies.

(b) Since the uncovering of the political vetting policy at the DHS, have the OIP's training sessions been revised to directly address the improper political vetting of FOIA requests? If so, describe in detail how this issue is now covered in OIP's training sessions. In particular, are career employees instructed that they should report any orders from superiors or political staff to vet FOIA requests?

(c) If this issue is not currently covered by the OIP training sessions, why isn't it?

Response to (b) and (c): OIP's FOIA training programs focus on the proper implementation of the statute. That was the case before the news reports you reference and remains the case afterward. Moreover, OIP has been, and is always available to respond to any specific question that may be raised about an agency's internal review process. Ensuring that agencies have efficient and effective systems in place to respond to requests is one of the focuses of the Attorney General's FOIA Guidelines. Indeed, it is one of five specific elements that agencies are required to address each year in their Chief FOIA Officer Reports.

6. Are political appointees required to attend the training sessions given by the OIP? If so, describe in detail exactly who must attend and which sessions they must attend.

If they are not required to attend, do you believe that mandatory training sessions for political appointees is appropriate, especially in light of the political vetting of FOIA requests by the DHS?

Response: OIP provides training to thousands of federal employees each year, both at the courses offered by OIP and at agency-specific FOIA conferences. OIP also provides training at conferences sponsored by the American Society of Access Professionals and other organizations, and gives executive briefings to senior officials at agencies upon request. Some of the attendees at these various sessions are political appointees. There is no requirement, however, that any group attend FOIA training. OIP does believe that it is important for all employees of agencies to be aware of their obligations under the FOIA. The Attorney General's FOIA Guidelines expressly state that the FOIA is everyone's responsibility, not just that of the FOIA professionals within an agency.

7. According to its website, the OIP publishes the *United States Department of Justice Guide to the Freedom of Information Act*, which is a comprehensive legal treatise addressing all aspects of the FOIA.

Prior to the uncovering of the political vetting policy at the DHS, did the Guide address this issue?

If not, has the Guide been revised to directly address the improper political vetting of FOIA requests? If the Guide has not been revised, why hasn't it?

Response: The *United States Department of Justice Guide to the FOIA* is a legal treatise that contains a comprehensive discussion of all aspects of the FOIA, as well as the President's Memorandum on the FOIA and the Attorney General's FOIA Guidelines. Because it is a legal treatise, the *Guide* is based on case law and policy documents. The current edition, the 2009 edition, does not address the issue of "political vetting" inasmuch as there is no existing case or policy document specifically addressing the issue. In the absence of such an authority to cite to, the next revision of the *Guide* likewise would not specifically address the topic. The current *Guide* does contain, and future revisions will continue to contain, detailed discussions of all the legal requirements of the FOIA, including its time limits and the principle that the identity of the FOIA requester generally has no bearing on their right of access under the statute. (The three narrow exceptions to this rule, which are not relevant here, are discussed at pp. 40-46 of the current *Guide*).

8. On March 17, 2011, Ted Bridis of *The Associated Press* reported that Catherine Papoi, formerly the Deputy Chief FOIA Officer at the DHS was effectively demoted and denied a promotion. According to news reports, Ms. Papoi had complained to the Inspector General of the DHS about the political vetting policy implemented by Secretary Napolitano's political staff. Also according to news reports, the day after she spoke with investigators, Ms. Papoi was told of her replacement as the Deputy Chief FOIA at the DHS and was told to clear out her office.

Is the OIP investigating Ms. Papoi's effective demotion?

Are any other units of the DOJ investigating Ms. Papoi's effective demotion? If so, which ones?

Response: As mentioned above, OIP has no investigative authority. OIP has no knowledge of whether any other office within DOJ is investigating.

9. The adverse employment action taken against Ms. Papoi appears to be retaliatory. It is sure to deter other career employees in all agencies from reporting misconduct about the handling of FOIA requests or any other misconduct.

What is the OIP/DOJ doing to counter the negative message sent by the demotion or effective demotion of Ms. Papoi?

Response: As mentioned above, OIP has no investigative authority and cannot speak to the allegations referenced in your question. More generally, however, OIP makes available to all agency FOIA professionals a FOIA Counselor line, which is a dedicated phone line staffed by OIP attorneys. Agency FOIA professionals can use the FOIA Counselor line to discuss with OIP any issue connected with the FOIA. OIP responds to nearly 3000 calls each year on its FOIA Counselor line. In addition, on our new website FOIA.Gov we have a dedicated feedback line specifically for agency personnel. In addition, OIP regularly responds to a wide variety of questions from agency FOIA professionals at our many training programs, and OIP personnel are available during those training programs to speak to FOIA professionals about any issue they may have. In these ways, OIP is available to support agency FOIA professionals in our collective efforts to not only ensure that the FOIA is being implemented properly, but also that all agencies are working to achieve a more open and transparent government in keeping with the Attorney General's FOIA Guidelines.

10. In August of last year, Representative Darrell Issa and I wrote the Inspectors General for 29 agencies and asked them to review whether their agencies were taking steps to limit responses to FOIA requests from lawmakers, journalists, activist groups and watchdog organizations. In particular, the IGs were asked to determine the extent to which political appointees are systematically made aware of FOIA requests and their role in decision-making.

The agencies that have not responded are: the DHS, the Central Intelligence Agency, the Federal Housing Financing Authority, the Department of Commerce, the Department of the Interior, the Department of Defense, the Department of Education, the Environmental Protection Agency, the Federal Trade Commission, the Government Accountability Office, the General Services Administration, the Department of Health and Human Services, the National Archives and Records Administration, the National Aeronautics and Space Administration, the Nuclear Regulatory Commission, the Small Business Administration, the Social Security Administration, Veterans' Affairs, and the Energy Department.

What can the OIP do to obtain answers to my letters from the agencies that have not responded?

Response: As you know, OIP is responsible for encouraging agencywide compliance with the FOIA and for ensuring that the President's Memorandum on the FOIA and the Attorney General's FOIA Guidelines are fully implemented. Responses to Congressional inquiries are generally handled by the agencies themselves. With respect to the letters you reference, which were directed to agency Inspectors General, it is likely that the respective Offices of the Inspector General will handle the matter directly. As such, it would not be appropriate for OIP to interpose itself in that process.

**Questions from Chairman Patrick Leahy
To Melanie Pustay
Hearing on “The Freedom of Information Act:
Ensuring Transparency and Accountability in the Digital Age”**

STATUTORY EXEMPTIONS

1. I have been troubled for some time about the increasing number of statutory exemptions to FOIA that are finding their way into new legislation. According to guidance that the Department provided to Federal agencies last year, there are more than 60 statutory exemptions to FOIA on the books. **Has the Department reviewed the existing statutory exemptions to FOIA to determine whether all of these exemptions are still needed? If not, will the Department conduct this review and report back to the Committee?**

Response: In order to shine more light on the issue of Exemption 3 the Department’s Office of Information Policy (OIP) has compiled a chart which includes all statutes that have been found by the courts to be proper Exemption 3 statutes. The chart is available on OIP’s website at <http://www.justice.gov/oip/exemption3-october-2010.pdf> and is updated as new decisions are rendered. OIP is also currently in the process of preparing a chart listing all statutes asserted by agencies under Exemption 3 during Fiscal Year 2010, including the number of times those statutes were asserted by each agency. When finished, we will make this chart publicly available on OIP’s website. This analysis will give a factual predicate for any review of the use of Exemption 3 statutes as it will allow for a comparison of those statutes that are used extensively and those that are used only a handful of times.

MILNER DECISION

2. During the hearing, you testified that the Department is reviewing the Supreme Court’s decision in Milner v. Navy and that the Department may propose legislation to address

that decision and the so-called “High 2” Exemption to FOIA. **Will you consult with me on this issue and keep the Committee informed of any legislative proposals related to the Milner case?**

Response:

OIP has serious concerns about the impact of the *Milner* decision and as a result is actively considering the issue and possible solutions. OIP will be pleased to consult with the Committee, and will keep the Committee informed, regarding any legislative proposals related to the *Milner* case.

ONLINE DISCLOSURES

3. In the digital age, computers and other technologies make it much easier for the Government to share information with the public. The Electronic Freedom of Information Act Amendments of 1996, which I authored, requires that agencies post records that are frequently requested under FOIA online. **How many Federal agencies are complying with this law? What is the Department doing to ensure that Federal agencies fully utilize electronic reading rooms and new technologies to release more information to the public?**

Response: A key part of both the President’s Memorandum on the FOIA and the Attorney General’s FOIA Guidelines was the focus on proactive disclosures. Making information available to the public without the need to submit a FOIA request is a vital aspect of increasing transparency. In keeping with that premise, OIP issued guidance on the new transparency guidelines advising agencies to significantly increase the amount of material made available on their websites. OIP encourages agencies to post far more than what is frequently requested and to anticipate interest in records even before one request is made. To further emphasize this important responsibility, OIP has added to its basic FOIA training seminar for federal employees a specific session on proactive disclosures which emphasizes both the legal requirements to post certain records, including those that become frequently requested, and the policy imperative to post information as a means of making known to the public what the agency is doing. Agencies are answering this call. All agencies were required to describe the steps they have taken to increase proactive

disclosures in their Chief FOIA Officer Reports. Those Reports are all collected on OIP's website, at <http://www.justice.gov/oip/reports.html>, and illustrate a wide range of initiatives being utilized by agencies to increase proactive information disclosure. Many agencies have adopted innovative ways to make information available, using social networking sites and holding webinars to increase public awareness of agency activities. Other agencies reported making improvements to the quality of the material they posted. OIP has created a summary of success stories from the key agencies that are taken from their Chief FOIA Officer Reports, which can be found here: <http://www.foia.gov/2011foiapost03.html>. These success stories highlight agency efforts to improve transparency through proactive disclosures.