



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

The Honorable Richard J. Durbin
Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chair Durbin:

Please find enclosed responses to questions arising from the appearance of Bobak Talebian, Director of the Office of Information Policy, U.S. Department of Justice, before the Committee on March 29, 2022, at a hearing titled, "The Freedom of Information Act: Improving Transparency and the American Public's Right to Know for the 21st Century."

We hope this information is helpful. Please do not hesitate to contact this office if we may provide 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,

Christina M. Calce
Deputy Assistant Attorney General

Enclosure

cc:

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

**Hearing on “The Freedom of Information Act:
Improving Transparency and the American Public’s Right to Know for the 21st Century”
March 29, 2022**

**Questions for the Record for
Mr. Bobak Talebian, Director Office of Information Policy,
U.S. Department of Justice**

Questions From Senator Patrick Leahy

1. During the hearing you confirmed the Office of Information Policy’s (OIP) commitment to adhering to the Freedom of Information Act (FOIA) and applying the FOIA with a presumption of openness as codified in the FOIA Improvement Act of 2016. You also said your office would implement Attorney General Merrick Garland’s March 15, 2022 memorandum providing guidance to executive branch agencies about how to improve their compliance with FOIA.

- a. **Have you already begun issuing guidance and training materials that reinforce the Attorney General Garland’s guidelines? If not, when will this work be completed?**

OIP has begun incorporating many aspects of the Attorney General’s FOIA Guidelines in its training and guidance and plans to continue to do so over the upcoming year. At the April 12, 2022, Chief FOIA Officers Council Meeting, the Associate Attorney General of the United States provided keynote remarks emphasizing the important principles in the new FOIA Guidelines. I then provided a more detailed overview of the Attorney General’s new FOIA Guidelines. In July, I provided training on the FOIA Guidelines to hundreds of FOIA professionals attending a FOIA conference held by the American Society of Access Professionals. The presumption of openness codified in the FOIA and reemphasized in the Guidelines is also incorporated in OIP’s regular government-wide trainings.

Further, OIP issued guidance on August 25, 2022, highlighting two key elements of the Attorney General’s FOIA Guidelines – proactive disclosures and removing barriers to access.¹ The guidance focuses on the timing and format of proactive disclosures and on providing alternative means of access for commonly requested records. On September 14, 2022, OIP also issued the 2023 Chief FOIA Officer Report Guidelines,² which were revamped to fully incorporate the Attorney General’s new FOIA Guidelines. The new Chief FOIA Officer Report Guidelines ask agencies to answer questions on five key areas of FOIA administration tied directly to the Attorney General’s 2022 FOIA Guidelines.

¹ Available at <https://www.justice.gov/oip/oip-guidance-further-improvement-based-2022-chief-foia-officer-report-review-and-assessment>.

² Available at <https://www.justice.gov/oip/guidelines-2023-chief-foia-officer-reports>.

1. FOIA Leadership and Applying the Presumption of Openness;
2. Ensuring Fair and Effective FOIA Administration;
3. Proactive Disclosures;
4. Steps Taken to Greater Utilize Technology; and
5. Steps Taken to Remove Barriers to Access, Improve Timeliness in Responding to Requests, and Reduce Backlogs.

In addition to other new questions, the Guidelines ask agencies to describe steps taken to incorporate FOIA into their core mission and to explain whether they are confirming in their response letters to requesters that they have considered the “foreseeable harm” standard when reviewing records and applying FOIA exemptions. OIP will continue to work with agencies on the implementation of the Guidelines through trainings, additional guidance, and other initiatives.

b. When the Office of Information Policy is notified that an agency FOIA program is not compliant with FOIA or Attorney General Garland’s guidelines, what type of guidance will you provide to the agency? Will OIP track agency FOIA programs’ efforts to bring themselves in compliance with the Attorney General’s guidelines?

As part of its oversight and guidance responsibilities, OIP reviews inquiries made by the public raising issues regarding agencies’ compliance with the FOIA statute and the Attorney General’s FOIA Guidelines. An OIP attorney reviews each inquiry and, when appropriate, reaches out to the agency to get additional information. If an agency is not in compliance with the FOIA or the Attorney General’s FOIA Guidelines, the OIP attorney will provide guidance directly to the agency explaining why and what corrective measures would improve compliance. OIP works with the agency directly on these issues or, in the alternative, if we do not believe there is a compliance issue, in explaining this to the individual who raised the issue.

Agencies’ implementation of the Attorney General’s FOIA Guidelines are tracked through the agency Chief FOIA Officer Reports. As noted above, for the 2023 Chief FOIA Officer Report Guidelines, OIP restructured the report to address the topics presented in the Attorney General’s new FOIA Guidelines. As in prior years, OIP will also assess agencies on their implementation of the FOIA and the Attorney General’s FOIA Guidelines based on their responses in the Chief FOIA Officer Reports.

2. In 1984, OIP issued guidance with respect to “withholding information from Congress” under FOIA, concluding that agencies cannot withhold information from Congressional committees and subcommittees, or committee or subcommittee chairs with relevant jurisdiction, unless there is “specially authorized claim of executive privilege.” On the other hand, this guidance states that FOIA requests from individual members of Congress do not trigger special access procedures under FOIA and are to be treated like a request from “any person” under FOIA.

- a. Isn't this OIP position in conflict with the basic principle that members of Congress have constitutionally-rooted oversight powers that should give them greater access to information than "any person" under the FOIA statute? If not, why not?**

It is the longstanding policy of the Executive Branch to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. The 1984 guidance that forms the basis of your question is outdated and is no longer operative. The most recent comprehensive statement of the Department's views on providing information in response to requests from individual members of Congress is an Office of Legal Counsel (OLC) opinion issued in February 2019, titled *Requests by Individual Members of Congress for Executive Branch Information*, 43 Op. O.L.C. __ (2019). The 2019 Opinion acknowledges that "[i]ndividual members, even those who are not chairmen of committees that have been delegated the oversight authority of a House of Congress . . . may 'request . . . information from the executive agencies' about Executive Branch programs or activities—whether for legislation, constituent service, committee activities, or other purposes arising from members' legislative 'responsibilities' (such as Senators' role in providing advice and consent for presidential appointments)." *Id.* at *7 (quoting *Murphy v. Dept' of the Army*, 613 F. 2d 1151, 1157 (D.C. Cir. 1979)). It also reaffirmed the Executive Branch's longstanding policy and practice of responding and providing information, as appropriate, in response to such requests.

To be sure, and as that opinion explains, the House and Senate have generally delegated greater authorities (such as the power to issue subpoenas) to committees and their chairs than they have to individual members, and those differences affect how the Executive Branch responds to requests. Nonetheless, "[a]s a matter of comity, the Executive Branch's appropriate respect for the legislative functions of individual members supports Executive Branch officials' practice of giving due weight and sympathetic consideration to [their] requests." *Id.* at *2. "[A]n Executive Branch policy of providing good-faith responses to [individual members'] requests exhibits a proper respect for members of a coordinate branch of the government. *Id.* at *7. And in providing such responses, "the Executive Branch may—and often does—provide information to individual members that is more than what is required under the Freedom of Information Act," including "correspondence that answers substantive questions, supplies a reasoned justification for existing policy, or explains why the Executive Branch's established confidentiality interests preclude it from providing requested information." *Id.* at *8.

- b. Does OIP track how many FOIA requests agencies receive from individual members of Congress that are treated like a request from "any person" under FOIA and do not trigger the special access procedures? If not, will OIP begin tracking such requests and provide annual reports to Congress detailing the number and nature of such requests?**

OIP does not track congressional requests for information made to the Executive Branch unless an individual member of Congress expressly presents his or her request as a FOIA request. The Department's policy for responding to congressional requests outside of FOIA is described in the OLC opinion noted above. These requests are generally handled outside of the FOIA and agencies' Annual FOIA Reports capture only those requests that involve the FOIA. Agencies similarly do not report on records fully provided to a requester under the Privacy Act of 1974 when the FOIA is not involved. Additionally, agency Annual FOIA Reports in general do not track the types of requesters submitting FOIA requests.

3. In some ways there is an inherent tension between the OIP's role and the Justice Department's broader litigation responsibilities. DOJ OIP is charged with encouraging FOIA compliance and transparency, while the Justice Department is simultaneously in court defending agencies' decisions to withhold information from the public. In other words, the very agency that is responsible for improving our government's transparency is the same agency responsible for shielding against transparency.

a. How do you navigate that inherent tension between the Justice Department's roles to ensure your office can credibly carry out its mission to improve FOIA compliance and transparency?

We do not believe there is tension between OIP's role of encouraging government-wide compliance with the FOIA and the Department's representation of agencies in FOIA litigation. Continually improving government transparency and ensuring full compliance with the FOIA and the Attorney General's FOIA Guidelines are mutual goals. In every aspect, the Department strives to apply the FOIA, whether through OIP's government-wide guidance and training or in defense of FOIA litigation, with a presumption of openness. As the Attorney General's Guidelines state, "[i]n determining whether to defend an agency's nondisclosure decision, the Justice Department will apply the presumption of openness described [in the guidelines]. The Justice Department will not defend nondisclosure decisions that are inconsistent with FOIA or with [the new] guidelines." At the same time, the FOIA contains nine exemptions that are designed to protect legitimate governmental and private interests that might be harmed by the disclosure of certain types of information. "FOIA expressly recognizes that 'important interests [are] served by [its] exemptions,'" and "[t]hose exemptions are as much a part of [FOIA's] purpose[s and policies] as the [statute's disclosure] requirement." *Food Mktg. Inst. V. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (internal citations omitted).

Questions From Senator Amy Klobuchar

The Freedom of Information Act has served as a critical tool for investigative journalists who have used it to uncover abuses in government programs. As part of the department-wide FOIA guidelines issued on March 15, 2022, Attorney General Garland directed agencies to "continue their efforts to remove barriers to requesting and accessing government records."

- **How has the Office of Information Policy responded to the Attorney General's directive, particularly with respect to journalists seeking information?**

OIP has incorporated many aspects of the Attorney General's FOIA Guidelines, including efforts to remove barriers to access, in its training, guidance, and agency reporting requirements. The Department has also led by example in this area by revisiting the most efficient means of providing access to some of its own records. For example, as the Guidelines note, in March, the Department's Executive Office for Immigration Review adjusted its policies so that individuals would no longer need to file FOIA requests to obtain official copies of their records of immigration court proceedings. On August 25, 2022, OIP issued new guidance reemphasizing the importance of agencies examining their records for similar opportunities where quicker access can be provided to requesters through alternative means outside of FOIA. This guidance also focuses on the timing and format of proactive disclosures, which are also key elements of removing barriers to access. In line with the Attorney General's emphasis on proper training for successful FOIA administration, OIP continues make available current FOIA training and other resources to help ensure that all personnel are familiar with the FOIA's requirements, including those of particular interest to journalist such as fee matters and expedited processing. OIP is also continuing to improve FOIA.gov, including developing functionality that could help requesters find the right agency to make a request and government-wide searchability of records that are already available online. Further, OIP is ensuring that agencies take action on Attorney General's directives through their Chief FOIA Officer Reports. A whole section of the 2023 Chief FOIA Officer Guidelines is dedicated to "Steps Taken to Remove Barriers to Access, Improve Timeliness in Responding to Requests, and Reduce Backlogs." These efforts are all designed to improve FOIA implementation across all agencies and for all requesters, including journalists.

Questions From Ranking Member Charles E. Grassley

1. In response to questions from Senator Johnson and me relating to an October 2018 incident where a firearm owned by Hunter Biden was discarded near a school the ATF cited the Freedom of Information Act as a basis to not produce a single page of records to us.

Senator Johnson and I've also asked the Justice Department for records relating to the Mueller team erasing data from their government phones. In response, we received a very small production with improper FOIA redactions.

Congress didn't intend for FOIA to be used as a shield for the Executive Branch to use against the United States Congress.

- a. **What are you and this Administration doing to make sure agencies aren't hiding behind FOIA when they respond to questions from Congress?**

The mission of the Office of Information Policy is to encourage and oversee agency compliance with the FOIA. It is the longstanding policy of the Executive Branch to respond to Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.