



**U.S. Department of Justice**

Office of Legislative Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

August 19, 2014

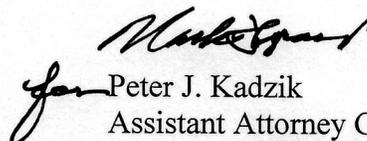
The Honorable Patrick Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Melanie Pustay, Director of the Office of Information Policy, before the Committee on March 13, 2013, at a hearing entitled: "We the People: Fulfilling the Promise of Open Government Five Years After the OPEN Government Act."

We apologize for our delay in responding to this request. 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 from the perspective of the Administration's program there is no objection to submission of this letter.

Sincerely,

  
Peter J. Kadzik  
Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley  
Ranking Minority Member

**Written Questions of Chairman Patrick Leahy, to  
Melanie Pustay, Director, Office of Information Policy, Department of Justice  
Senate Judiciary Committee Hearing on "We the People: Fulfilling the  
Promise of Open Government Five Years After the OPEN Government Act"**

OPEN Government Act Reforms – Tracking of Requests

1. A key reform in the OPEN Government Act requires all Federal agencies to establish a tracking system and a telephone or Internet hotline to help FOIA requesters obtain information about the status of their requests. **How many agencies have FOIA hotlines and a FOIA request tracking system in place?**

**Response:**

On November 18, 2008, the Office of Information Policy (OIP) issued detailed guidance (copy enclosed) specifically addressing the Open Government Act provision requiring agencies to assign and provide to requesters "an individualized tracking number for each request received that will take longer than ten days to process." 5 U.S.C. §552(a)(7)(A) (2006 & Supp. IV 2010). OIP's guidance also addressed the requirement that agencies "establish a telephone line or Internet service that provides information about the status of a request . . . using the assigned tracking number." 5 U.S.C. §552(a)(7)(B).

In accordance with the Freedom of Information Act (FOIA) statute and OIP's guidance, every agency should have a system in place to assign individualized tracking numbers to those requests that take longer than ten days to process. Additionally, every agency should have established a telephone line and/or Internet service that allows requesters to obtain status information by using the tracking number assigned to their request.

All ninety-nine agencies subject to the FOIA have established points of contacts that FOIA requesters can use to ask any questions they might have related to their FOIA requests, including the status of the requests. To facilitate the public's ability to contact agency FOIA personnel, OIP has collected detailed contact information for all ninety-nine agencies subject to the FOIA and we then make that information available in a central location on the Department's government-wide FOIA website, FOIA.gov. Each agency is separately listed on the website. When a member of the public clicks on the agency, they can then use a drop-down menu to select a specific component of the agency. Once they do, they are provided the telephone numbers designated by each agency for their FOIA Requester Service Centers and FOIA Public Liaisons, which are places where requesters can call to obtain status information about their requests. Additionally, many agencies can also receive and respond to requests for status updates

through designated e-mail accounts. Some agencies have also established online tracking features that allow users to track the status of their requests through an online portal. The Department also provides live links to those online portals and designated email accounts. This information, as well as other important contact information, such as the names of the agencies' Chief FOIA Officers, is made centrally available to the public by OIP through the [FOIA Contacts](#) page of [FOIA.gov](#).

### Fee Waivers

2. The Freedom of Information Act requires that Federal agencies waive or reduce the search and copying fees for FOIA requests if the disclosure significantly contributes to the public's understanding of government operations and is not primarily in the commercial interest of the requester. The OPEN Government Act also makes clear that independent journalists -- including online bloggers -- are eligible to receive fee waivers. Last year the National Security Archive cited the Department's practice of denying fee waiver requests from students and online bloggers as one of the reasons for awarding the Department its "Rosemary Award" for worst open government performance.

**(a) Is the Department of Justice routinely denying fee waiver requests from online journalists and students?**

### Response:

No. The Department evaluates all fee waiver requests on a case-by-case basis using the statutory standard established for such requests. The FOIA provides for a waiver or reduction of fees "if disclosure of the information [requested] is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). In determining whether any requester, including a student or online journalist, has satisfied this statutory standard, the Department evaluates six distinct factors, which are detailed in guidance issued by the Department and which is applicable to all agencies. OIP's guidance entitled "New Fee Waiver Policy Guidance," can be accessed directly from OIP's website at [http://www.justice.gov/oip/foia\\_updates/Vol\\_VIII\\_1/viii1page2.htm](http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm). These six factors are also incorporated into the Department's FOIA regulations. See 28 C.F.R. § 16.11(k). These factors have been referenced and applied by the Court of Appeals for the District of Columbia Circuit. See *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (opining that for "[f]or a request to be in the 'public interest,' four criteria must be satisfied," citing DOJ's multifactor fee waiver regulation).

The first four factors concern the statutory requirement that the disclosure of the requested information be "in the public interest because it is likely to contribute

significantly to public understanding of the operations or activities of the government." These factors include:

1. The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government";
2. The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to the understanding of government operations or activities;
3. The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding"; and
4. The significance of the contribution to public understanding: Whether disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

The final two factors concern the statutory requirement that disclosure of the requested information be "not primarily in the commercial interest of the requester." These factors include:

5. The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
6. The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, so that disclosure is "primarily in the commercial interest of the requester."

The Department makes fee waiver determinations for any requester by applying these six fee waiver factors.

**(b) What guidance is the Department providing to federal agencies on granting fee waivers?**

**Response:**

The Department provides agencies with the same guidance that it uses itself, i.e., the Department's published guidance on fee waivers, which establishes six factors to be applied in making fee waiver determinations. As mentioned above, the Department's fee waiver guidance can be accessed directly from OIP's website at [http://www.justice.gov/oip/foia\\_updates/Vol\\_VIII\\_1/viii1page2.htm](http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm). This guidance, and the relevant caselaw on FOIA fee waivers, are referenced and summarized in the Fees and Fee Waivers chapter of the *Department of Justice Guide to the Freedom of Information Act*. This chapter of the *Guide* can be accessed directly from OIP's website at <http://www.justice.gov/oip/foia-guide13/fees-feewaivers.pdf>. The *Guide*

is a comprehensive legal treatise on the FOIA that is published by the Justice Department and is widely relied on by agencies in their administration of the law.

In addition to our written policy guidance on fee waivers, OIP has a designated office expert on the topic who is available to provide individualized guidance and assistance to agency personnel in making fee waiver decisions. OIP also provides extensive training on FOIA fees and fee waivers to thousands of agency personnel across the government each year. In our comprehensive two-day training course held multiple times throughout the year entitled "The Freedom of Information Act for Attorneys and Access Professionals," OIP provides instruction from expert attorneys and FOIA professionals on a wide range of issues, including fee waivers. To bring greater exposure to the topic, OIP has moved what had long been a workshop on fees and fee waivers to a plenary session so that all the students would have the benefit of instruction in this important area. Training on FOIA fees and fee waivers is also part of OIP's "Introduction to the FOIA" course and "Advanced Freedom of Information Act Seminar." Additionally, on May 17, 2011, OIP conducted the first ever FOIA Fee Summit, in which OIP experts provided in-depth instruction to agency personnel on the FOIA's fee and fee waiver provisions. OIP held a second Fee Summit on August 8, 2013. A copy of OIP's training slides for instructing FOIA personnel on fee and fee waivers are available to both the public and agency personnel on the "Training" section of OIP's website at <http://www.justice.gov/oip/training-materials.html>.

#### FOIA Portal

3. The National Archives and Records Administration, the Environmental Protection Agency, the Department of Commerce, the Department of the Treasury, the Federal Labor Relations Authority, and the Merit Systems Protection Board are all participating in a multi-agency FOIA portal that automates and stores FOIA requests and responses in electronic format. The online FOIA portal is making it easier for FOIA requesters to submit requests to the participating agencies. But, unfortunately, only a few Federal agencies are participating in the online FOIA portal program. **Does the Department support expanding the FOIA portal concept government-wide?**

#### Response:

The Department supports the concept of a government-wide FOIA portal. We have begun working as part of a task force to determine the best way to establish a service that will allow the public to make a request to any federal agency from a single website and that will include additional tools to improve the customer experience.

We support the efforts of all agencies as they look for ways to improve their administration of the FOIA. To this end, we have provided guidance to the developers of FOIAonline, conducted extensive testing and review of the site's reporting capabilities, and are currently serving on its Governance Board. The agencies using FOIAonline as of March 26, 2014 include those cited above with the exception of the Department of the Treasury, which recently completed the construction of its own system that has been underway for several years and now collects requests via its own web-form. There have also been additions to the agencies using FOIAonline, which now includes U.S. Customs and Border Protection, Department of the Navy, and Pension Benefit Guaranty Corporation. A number of other agencies are also in the process of implementing the FOIAonline service. Based on current activities, a non-mandated approach that allows agencies the ability to determine what solution(s) best address their organization's needs appears to be working.

We are mindful that there are ninety-nine agencies subject to the FOIA across the government with vastly different FOIA demands and needs. There are many variables that these agencies will need to consider before adopting a new FOIA system, foremost of which will be the assurance that the new system will be more effective than the current technology being utilized. In addition, many agencies have cyber security requirements that make it impossible to participate in a multi-agency FOIA portal without increasing costs to those agencies that have lower security requirements. Specifically, not all agencies are on the same network, making it cost prohibitive to connect a multi-agency system to different Internet networks to connect with internal agency systems. Some agencies maintain sensitive, privacy-protected information that must be safeguarded, such as confidential tax return information, and a multi-agency portal must be able to accommodate those privacy interests. Moreover, over one hundred offices across the government already offer the ability to make requests via online request forms and many also offer online tracking. Further, some agencies have developed sophisticated document management systems that include other aspects of FOIA processing, such as features that help with the most time consuming parts of the FOIA process. These other systems represent additional options to be considered by agencies when evaluating the type of tracking system that will best serve their individual agency's particular needs.

As you can see, there are many factors that will need to be considered in establishing a consolidated online FOIA service. We will be employing an interdisciplinary approach to this initiative to seek innovative ways to carry it out. As part of the Administration's Second Open Government National Action Plan, we are serving on a task force that will review current practices, seek public input, and determine the best way to implement such a consolidated FOIA service.

National Security Information /OLC Memos

4. During the March 13 FOIA oversight hearing, I called on the Department of Justice to be more transparent about the legal opinions issued by its Office of Legal Counsel (“OLC”), including legal opinions related to national security. According to a study by the Sunlight Foundation, the Office of Legal Counsel is withholding more than a third (39%) of the legal opinions that this office promulgated between 1998 and 2012. **Please provide the Committee with a list of all OLC memoranda that are currently in force.**

**Response:** As I indicated at the March 13, 2013 hearing, this request is beyond the purview of my Office, which is focused on the implementation of the FOIA.

Mug Shot Photographs

5. In December, the Marshals Service announced that it would no longer release these photographs under FOIA, a policy change that appears to be in direct conflict with the Sixth Circuit Court of Appeal’s decision in *Detroit Free Press v. Department of Justice*. In that case, the court held that booking photographs must be disclosed under FOIA when the subject of the photograph has already appeared in open court in connection with an ongoing criminal proceeding. **What is the Department’s policy regarding the disclosure of booking photographs under FOIA?**

**Response:**

The Department has long believed that the routine release of booking photographs causes an unwarranted invasion of personal privacy. While the Court of Appeals for the Sixth Circuit held that such photographs should be released in certain circumstances, two other Courts of Appeals, specifically the Courts of Appeals for the Tenth, *World Pub’g Co. v. DOJ*, 672 F.3d 825 (10th Cir. 2012), and Eleventh, *Karantsalis v. DOJ*, 635 F.3d 497 (11th Cir. 2011) (per curiam), cert denied, 132 S. Ct. 1141 (2012), Circuits have since ruled that the photographs should be protected given the privacy interests at stake and the lack of a public interest in disclosure. This issue is currently the subject of litigation within the Sixth Circuit, which we hope will give that circuit an opportunity to re-examine its prior holding. See *Detroit Free Press Inc. v. DOJ*, No. 13-12939 (E.D. Mich. filed July 6, 2013).



United States Department of Justice  
OFFICE OF INFORMATION AND PRIVACY

# FOIA Post



## **OIP GUIDANCE: ASSIGNING TRACKING NUMBERS AND PROVIDING STATUS INFORMATION FOR REQUESTS**

Section 7 of the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, imposes two new requirements on agencies connected with tracking the status of FOIA requests. First, Section 7 requires agencies to assign an individualized tracking number to requests that will take longer than ten days to process. Second, it requires agencies to establish a telephone line or Internet service that requesters can use to inquire about the status of their requests using the request's assigned tracking number. This Section is yet another provision of the OPEN Government Act that builds on procedures established by Executive Order 13,392. Like Section 6 of the OPEN Government Act, Section 7 will take effect on December 31, 2008, and will apply to FOIA requests "filed on or after that effective date." § 7(b).

### Assigning a Tracking Number

The first requirement imposed by Section 7 requires agencies to establish a system whereby any request that will take more than ten days to process is assigned a tracking number. That number, in turn, must be provided to the requester. The simplest way to provide the number, and the method already employed by many agencies, is to include the tracking number in any acknowledgment letter sent to the requester upon receipt of the request.

As a threshold matter, for those requests where an agency can quickly make a response, i.e., can respond within ten days or less, there is no requirement that a tracking number be assigned. In those circumstances, the agency can simply respond to the requester by providing the responsive records and need not be slowed down by the necessity of assigning a tracking number to the request. Nevertheless even though an individualized tracking number is not required to be

utilized for such requests, agencies should be certain to keep track of all requests they handle so that all the information required to be included in agency Annual FOIA Reports is compiled and reported.

**Question:** What if an agency can respond to a request within ten days, but it still would prefer to assign the request a tracking number. Is that permissible?

**Answer:** Yes. Agencies are free to assign all requests tracking numbers if they find it efficient to do so. As mentioned above, because agencies need to keep track of all FOIA requests they receive and process so that they may be included in the agency Annual FOIA Report, the use of a tracking number for all requests can be beneficial.

**Question:** What if an agency does not use tracking numbers, but instead keeps track of requests by some other method, such as by the name of the requester. Is that still allowed?

**Answer:** No. Section 7 mandates that agencies assign "an individualized tracking number for each request that will take longer than ten days to process." § 7(a). Thus, if the request will take longer than ten days to process, agencies will now be required to assign tracking numbers to each such request and to provide that number to the requester.

#### Providing a Telephone Line or Internet Service

Section 7 also requires agencies to establish a phone number or an Internet site that will provide information to the requester "using the assigned tracking number." § 7(a). The information required to be provided to the requester includes the date the request was received by the agency and an estimated date by which the agency will finish the processing of the request. These requirements are similar to those imposed by Executive Order 13,392, which addressed the need to provide requesters with information about the status of their request.

Agencies have two alternatives for providing this information to requesters. They can establish an Internet service which can be accessed by the requester using his or her tracking number. Alternatively, agencies can establish a telephone line where requesters can contact the agency by phone to inquire about the status of their request. Agencies have already established FOIA Requester Service Centers for the purpose of providing status information to requesters and that system can easily continue to be used. Whatever method is utilized to provide status information concerning a given request, Section 7 mandates that both the date of receipt and the estimated date of completion for the request be provided to the requester.

**Question:** What if the agency does not know when the processing of the request will be completed, because, for example, it is still searching for records and does not know yet how many will be found to be responsive, or whether there will be a need to conduct consultations. How does the agency respond?

**Answer:** Section 7 requires agencies to provide an "estimated date" by which processing will be complete. Agencies should make a reasonable judgment as to when they believe processing will be complete, based upon what remains to be done in a given case and in light of the agency's experience with processing similar requests. The important point is that the agency and the requester are able to communicate easily regarding the status of a request.

### **Conclusion**

Beginning with requests received on December 31, 2008, the OPEN Government Act will require agencies to assign individual tracking numbers to requests that will take more than ten days to process. It will also require agencies to establish a telephone line or Internet service that requesters can use to access information about the status of their requests. These provisions are designed to ensure that FOIA requesters can readily learn from the agency when they can expect a response to their FOIA request. *(posted 11/18/2008)*

Go to: **[Main FOIA Post Page](#)**



U.S. Department of Justice

Office of Information Policy

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Telephone: (202) 514-3642

March 21, 2013

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

We would like to follow up on the Committee's hearing on March 13, 2013, regarding review of the OPEN Government Act of 2007, with particular reference to our testimony about the many ways in which agencies are implementing the Attorney General's Freedom of Information Act (FOIA) Guidelines and increasing transparency. Unfortunately, it appears that certain statements made during the second panel have caused confusion about the meaning of my testimony. While there were multiple statements with which we respectfully, but strongly, disagree, there were two topics in particular that we believe should be addressed promptly in order to complete the hearing record. The fact that a subsequent witness questioned the veracity of my testimony and, by implication, the Department's bona fides renders this supplemental statement especially important. Accordingly, we request that you include this letter in the Committee's hearing record.

**Agency Release Rates**

As I testified, we are very proud that both the Department and the government overall have maintained a high release rate, releasing records in over 93% of requests processed for disclosure during Fiscal Year 2012. Indeed, during the past four years, the government has maintained a release rate of over 92%. We believe that this sustained high release rate, coupled with significant reductions in backlogs and improvements in average processing times, illustrates the achievements agencies have made over the past four years in implementing the Attorney General's FOIA Guidelines. Because the validity of this calculation and the truthfulness of our reliance on it were questioned during testimony by the second panel, we want to clarify for the record precisely how a "release rate" is calculated.

The Department began calculating release rates in 2009. We did so by comparing the number of requests resulting in disclosure to the total number of requests in which

agencies either released or denied access to records based on exemptions. These figures are readily available in agency Annual FOIA Reports, where the Department requires agencies to publicly report, inter alia, 1) the number of requests resulting in a full grant of the requested information, 2) the number resulting in a partial grant, and 3) the number resulting in a full denial of the requested information based on the FOIA's exemptions. These figures are included in the first three columns of the chart located in Section V.(B)(1) of agencies' Annual FOIA Reports.

To determine the release rate for Fiscal Year 2012, the Department added the numbers of requests where agencies reported that they released records in whole or in part, which totaled 434,258 requests. We then compared that number to the total number of requests that were processed for disclosure, which is the sum of the requests where records were released in full, released in part, and withheld in full. That number totaled 464,985. By comparing these two figures, the Department determined that in Fiscal Year 2012, agencies released information, either in full or in part, in response to over 93% of requests processed for exemption applicability. The release rate is straightforward: among the total number of FOIA requests which were processed for disclosure, it is the percentage of requests where a release was actually made, either in whole or in part.

This calculation does not include those requests that are closed for procedural reasons, unconnected to the application of FOIA exemptions. The Department requires agencies to publicly report on those procedural reasons in the same section of the Annual FOIA Report where they include dispositions based on exemptions. There are eight procedural reasons listed, and agencies are given a column to include any additional procedural reasons. These procedural dispositions do not involve the application of exemptions, and include, for example requests in which no records were located, requests that were withdrawn, and requests where all the records located originated with another agency and thus were properly referred to that agency for processing. Because the agencies never make decisions about whether to release or withhold records in these nine disposition categories, it would make little sense to include them in calculating the release rate.

These procedural dispositions, just like the dispositions based on exemptions, are clearly set forth in each agency's Annual FOIA Report. Those reports in turn are posted by agencies and are available at a single site on the Department's website under the Office of Information Policy (OIP), as well as on FOIA.gov. The full summary of these Annual FOIA Reports, which OIP issues every year, also discusses all of these statistics. These summaries can be accessed from the Department's website under OIP at <http://www.justice.gov/oip/reports.html>. Under these circumstances, we were surprised as well as concerned that the testimony of another hearing witness ignored the government's published information about both the calculation of release rates and the nine categories of procedural dispositions that are distinctly and separately reported.

### FOIA Regulations

Our hearing testimony also indicated that neither the OPEN Government Act nor the Attorney General's FOIA Guidelines require implementing regulations. This statement was challenged by a witness on the second panel without any legal citation or authority supporting the claim that implementing regulations were required. A review of the OPEN Government Act reveals that Congress did not find it necessary to require agencies to modify their regulations in order to implement the statute, and we are aware of no judicial opinion to the contrary.

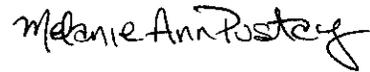
We are very concerned by the confusion that may result from the false notion that agencies are not in compliance with the law or the Administration's policies merely because they have not issued new FOIA regulations since the enactment of the OPEN Government Act or issuance of the President's FOIA Memoranda and Attorney General's FOIA Guidelines. As with any regulation, agencies issue FOIA regulations to facilitate procedural implementation of statutory provisions that are not fully detailed in the statute, such as where and how to make FOIA requests and what fees are involved in such requests. In some areas of the statute, Congress clearly directed agencies to issue implementing regulations, but for other provisions, Congress left it up to the agencies to determine if additional regulations are necessary. As indicated in my testimony, we believe that agencies should regularly review their FOIA regulations to assess whether they require updating, and we encourage this practice. However, as I testified, neither the provisions of the OPEN Government Act nor the Attorney General's FOIA Guidelines require implementing regulations.

Regardless of whether an agency has issued new FOIA regulations, the amendments to the law became effective either immediately upon the enactment of the OPEN Government Act, or, for certain provisions, one year following enactment. Similarly, the provisions of the President's FOIA Memorandum and the Attorney General's FOIA Guidelines became effective upon issuance. For this reason, OIP's focus, as for any change in FOIA law and policy, has been to ensure that agencies fully understand their FOIA obligations and promptly change their practices as needed. Accordingly, OIP issued detailed guidance explaining each of the provisions of the OPEN Government Act and the key areas addressed in the Attorney General's Guidelines. We revised the *Department of Justice Guide to the Freedom of Information Act* to fully incorporate these changes and have provided comprehensive training on this material to thousands of FOIA professionals across the government. Many agencies, such as the Department of Defense, have also distributed their own directives to ensure compliance with both the OPEN Government Act and the Attorney General's Guidelines. See DOD FOIA Directive 5400.07, available at <http://www.dtic.mil/whs/directives/corres/pdf/540007p.pdf>, and DOD memoranda dated December 3, 2008 and July 20, 2010, available at [http://www.dod.mil/pubs/foi/dfoipo/foia\\_guidance.html](http://www.dod.mil/pubs/foi/dfoipo/foia_guidance.html).

We hope that this information is helpful. The suggestion by any witness that the Department's testimony before this or any Committee is untruthful is a very serious

concern and we appreciate the opportunity to clarify the record of this hearing. We also hope that the foregoing information resolves any outstanding questions and uncertainties about the Department's dedication to fulfilling the letter and spirit of the OPEN Government Act. Please do not hesitate to contact the Department if we may provide additional assistance in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melanie Ann Pustay". The signature is written in a cursive, flowing style.

Melanie Ann Pustay  
Director  
Office of Information Policy

cc:

The Honorable Charles E. Grassley  
Ranking Member