

**Questions for the Record**  
**Director Melanie Ann Pustay**  
**Office of Information Policy**  
**“Ensuring an Informed Citizenry:**  
**Examining the Administration’s Efforts to Improve Open Government”**  
**Committee on the Judiciary**  
**United States Senate**  
**May 6, 2015**

**Questions Posed by Chairman Grassley**

- 1. I continue to hear of challenges that impact FOIA compliance. It’s important that FOIA processors have a clear understanding of FOIA’s purposes, including the President’s directives on transparency and the “presumption of openness.” This is especially crucial given the increased FOIA litigation and claims that the only way to force government compliance is to sue.**
  - A. In what areas are FOIA processors and management in most need of additional training?**
  - B. What resources are most needed to ensure that FOIA processors can effectively do their jobs?**

**Response:**

As I mentioned during the May 6, 2015, hearing, I firmly believe that well-trained personnel are the foundation of any successful Freedom of Information Act (FOIA) program. It is vital that such personnel have a complete understanding of all of the FOIA’s legal requirements as well as the policy considerations set out in the President’s and Attorney General’s 2009 FOIA Memoranda. As a result, the Office of Information Policy (OIP) maintains a continuous focus on providing, and encouraging agencies to provide, substantive FOIA training. At the same time, with one hundred agencies subject to the FOIA, and hundreds of FOIA offices implementing the law in the context of a wide range of different types of records and requests, the kind of FOIA training that is needed by each agency will necessarily vary across the government. It is precisely for this reason that my office has focused on making available to all agencies a wide range of FOIA training and resources that address all aspects of FOIA law and policy.

Every year, OIP provides training to thousands of FOIA professionals covering, among other areas, the presumption of openness and the President’s and Attorney General Holder’s FOIA Memoranda, the FOIA’s procedural requirements, the proper application of FOIA exemptions, and the importance of good customer service. We also offer agencies specialized training with lectures designed for their specific FOIA training needs. In addition to providing training on the legal and policy requirements of the FOIA, we provide practical training and guidance to agencies to assist them with the various challenges concerning the management of a FOIA

program. For example, this past year OIP's Best Practices Workshop series covered key topics in FOIA administration such as reducing backlogs and improving timeliness, improving proactive disclosures, and utilizing technology for the benefit of FOIA processing. A summary of these sessions and the best practices discussed are posted on a designated page of our website for the benefit of all agencies. Finally, in an effort to make important FOIA training resources available to all agency personnel all over the world, OIP recently released a suite of four new electronic FOIA training resources. Embracing former Attorney General Holder's call that "FOIA is everyone's responsibility," these new resources have been designed for all levels of the federal workforce from the summer intern to the senior executives in the agency.

**2. I understand that in FY 2014, the State Department, for example, experienced a 60% increase in FOIA lawsuits.**

**A. Is it possible that communication or training challenges, particularly with respect to application of the "foreseeable harm" standard, are contributing to State's increasing FOIA litigation?**

**Response:**

I would respectfully direct you to the Department of State for specific questions regarding their FOIA administration.

**B. Has OIP provided any specialized training or services to assist the State Department in addressing:**

**I. Its FOIA processing issues?**

**II. Its FOIA backlog?**

**III. Its delays in responding to requests?**

**Response:**

OIP has provided specialized training at the request of the Department of State. Last year, OIP senior staff provided the agency training on the FOIA's procedural requirements and Exemption 2. The year before that OIP provided Department of State personnel training on the proper application of Exemptions 5, 6, and 7(C). Further, as discussed above, OIP provides a wealth of training resources and opportunities for all agencies. In addition to the newly available electronic FOIA training resources, OIP provides free training available for all agency personnel on every aspect of the law. Beyond the substance of the law, OIP has also provided training opportunities for agencies to learn best practices in managing their FOIA obligations. OIP's Best Practices Workshop series launched this past year brings agencies together to discuss various aspects of FOIA administration and to identify best practices and strategies that can be leveraged for success by all agencies. Our very first workshop was on the topic of backlog

reduction and improving timeliness. As noted above, as with all of our workshops, a brief synopsis of the event and the best practices highlighted can be found on our website.

Recognizing the importance of FOIA training, every year OIP requires agencies to report on their efforts to provide substantive FOIA training to staff and we score the agencies on this in our annual assessment. In its 2015 Chief FOIA Officer Report, the Department of State reported that all of its FOIA professionals attended FOIA training.

3. **In your testimony you discuss the administration's proposals responding to the Supreme Court's ruling in *Milner v. Department of the Navy*. You describe the proposals as not sweeping too broadly, while providing sufficient protection against the circumvention of the law. You've pointed out previously that it's critical for Congress to address the issue of the *Milner* decision. And I've asked you before whether the administration planned to submit a proposal to us for consideration.**

A. **Can you explain specifically what the proposed *Milner* "fixes" would do?**

**Response:**

The Administration recently submitted a single proposal to amend Exemption 2 of the FOIA as part of the Fiscal Year 2016 Defense Authorization Act bill. The proposal seeks to reinstate the protection that had long been afforded under Exemption 2 of the FOIA prior to *Milner v. Department of the Navy*, 131 S. Ct. 1259 (2011). The proposal has been very thoughtfully crafted so as to not sweep too broadly while providing adequate protection against disclosures that could be reasonably expected to risk impairment of effective agency operations or circumvention of statute or regulation.

B. **Can you explain why or why not Congress should support these reforms?**

**Response:**

It is important for Congress to support a proposed amendment to Exemption 2 in order to remedy the critical gap in the FOIA that arose as a result of the Supreme Court's dramatic narrowing of Exemption 2 in the *Milner* case. The recently submitted proposal seeks to amend Exemption 2 directly to reinstate the protection long afforded by FOIA jurisprudence to predominantly internal material where there was a risk that disclosure could cause circumvention of the law (i.e., what was known as "High 2"). There are many types of very sensitive records that are currently vulnerable in the absence of the proposed amendment.

- C. Would either of the proposals eliminate agency confusion over how to handle sensitive information, resulting in increased disclosure?**

**Response:**

Our intent is to amend Exemption 2 so as to eliminate agency confusion on the handling of certain sensitive information. As I mentioned above, the *Milner* decision left a critical gap in the law regarding protection that had long been afforded to material for which disclosure could risk causing harm. We believe it is preferable to address this matter directly by amending Exemption 2, rather than attempting to rely on other exemptions to cover this gap on an ad hoc basis. Our goal is to provide agency FOIA professionals a clear understanding of how to protect material that, if released, could impair agency operations or risk circumvention of the law.

- D. Might either proposal result in even more denials of FOIA requests?**

**Response:**

Our intent is to restore the law to where it was prior to the decision in *Milner*.

- E. Would your office, or someone from the Administration, be willing to brief Judiciary Committee staff about the proposals?**

**Response:**

Yes, I am happy to brief your Committee staff on this and on any matters regarding the government-wide administration of the FOIA. We briefed the Committee on the Judiciary on May 27, 2015, and we look forward to continuing our discussion with Committee staff concerning the best wording for the proposed amendment.

### Questions Posed by Senator Leahy

4. **In the last few years the number of FOIA requests has risen dramatically. In FY 2010 the Federal Government received 557,000 FOIA requests. In FY 2014 that number had risen to 715,000 FOIA requests. The overall backlog of FOIA requests continues to rise and two thirds of the agencies reviewed by the Center for Effective Government received a D grade or an F grade for FOIA compliance. Yet, in your testimony, you stated that last year the government experienced its lowest staffing levels dedicated to FOIA in over six years.**

**Given these challenging statistics, why is government staffing of FOIA so low? Has the Administration requested more funds to increase FOIA staff and help reduce the backlog? If not, why not? Can you briefly outline your plans to keep pace with the expected increase in the number of FOIA requests in the coming fiscal year?**

#### Response:

As I am sure you can appreciate, agencies' FOIA staffing levels are affected by a range of budgetary realities. This past fiscal year agencies faced challenging fiscal times and limited hiring authorities. Nonetheless, agencies have found success in many areas of FOIA administration, including improving processing times for both simple and complex requests and maintaining a high release rate. Moreover, the vast majority of agencies (72 out of 100) reported low backlogs of fewer than 100 requests.

Reducing backlogs and improving timeliness has been a key focus of my Office and our efforts to encourage government-wide compliance with the FOIA. As part of OIP's assessment of agencies' FOIA administration we score agencies on backlog reduction, as well as the closing of their ten oldest requests, and their processing times for simple requests. In addition, like we did in 2014, this past year we required any agency with a backlog above 1000 requests that had not reduced that backlog to provide a plan for backlog reduction in the year ahead. Several agencies have reported plans aimed at reducing their backlogs and improving timeliness.

As detailed in our Chief FOIA Officer Report, a number of Department of Justice components have reported plans to backfill or to hire additional FOIA professionals to meet the demands of our FOIA program. Additionally, OIP continues to work with each of the Department's components through our Component Improvement Initiative to identify causes contributing to backlogs and to assist components in overcoming those challenges and finding further efficiencies. Further, as the Department's Chief FOIA Officer, the Associate Attorney General continues to convene the Department's FOIA Council to manage the Department's overall FOIA administration and to provide top level support for backlog reduction efforts. I encourage you to review other agencies' backlog reduction plans in their 2015 Chief FOIA Officer Reports, all of which are available on OIP's website.

**Questions Posed by Senator Vitter**

5. **Criminal penalties are provided for the willful and unlawful destruction, removal, or private use of Federal records under 18 U.S.C. § 2071, which provides that the offender “shall be fined under this title or imprisoned not more than three years, or both.”**
- A. **What is the department’s history of enforcing this statute?**
- B. **Would a government official’s utilization of a private email account and server to conduct official business and later deletion of emails on that private server qualify as conduct that this provision addresses?**

**Response:**

These questions are beyond the purview of my Office, which is focused on the implementation of the Freedom of Information Act, 5 U.S.C. § 552 (2012).