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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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March 15, 2017

VIA ELECTRONIC TRANSMISSION

Melanie Pustay
Director, Office of Information Policy
U.S. Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, D.C. 20530

Dear Director Pustay:

We write to express our unified sense that compliance with both the letter and spirit of the Freedom of Information Act (FOIA) should be and always remain a top priority for any administration. Enacted over 50 years ago, FOIA is a critically important tool for Americans to ensure government transparency and accountability, as it establishes clear rules for informing the people about what their government is doing. Without FOIA, countless stories of government waste, fraud, and abuse, as well as important historical documents, would have remained in the dark.

Despite its successes, however, a culture of obstruction and reflexive secrecy across government has undermined FOIA. This has been the case under both Democratic and Republican administrations. Last year, a strong bipartisan and bicameral effort resulted in the enactment of the FOIA Improvement Act of 2016. This important piece of legislation accomplishes some of the most sweeping and meaningful improvements to FOIA in history. The amendments made by the FOIA Improvement Act of 2016 were guided by an overriding principle—to make government transparency the norm, not the exception.

The Senate Committee on the Judiciary has jurisdiction over—and is charged with conducting oversight of—FOIA. Complete implementation of FOIA's statutory requirements, including its most recent amendments, is necessary to ensure that the public can exercise its right to know. Accordingly, we request detailed information regarding the implementation of the FOIA Improvement Act of 2016, as well as information regarding your office's role in FOIA matters. Please provide a numbered, written response to the following questions by no later than April 5, 2017.

1. What specific actions has the Office of Information Policy (OIP) taken or does it intend to take to ensure government-wide compliance with the “foreseeable harm standard,” as codified by the FOIA Improvement Act of 2016?
2. What specific actions has OIP taken or does it intend to take to ensure government-wide compliance with the FOIA Improvement Act's requirement that agencies proactively make available certain categories of information “for public inspection in an electronic format”?

3. The FOIA Improvement Act of 2016 requires “the operation of a consolidated online request portal that allows a member of the public to submit a request for records ... to any agency from a single website.”¹
 - a. What is the current status of, and what specific actions has OIP (or the Department of Justice more broadly) taken in furtherance of, this requirement?
 - b. Please explain in detail the status of funding for the portal, as well as OIP’s and the Department’s specific involvement in the portal’s development.
 - c. Please provide a specific date upon which requesters should anticipate the availability of the portal.
4. What specific actions, if any, has OIP taken or does it intend to take to encourage a more customer-friendly, collaborative FOIA response process? Has OIP identified agency best practices that encourage communication and dialogue early in the FOIA request process between requesters and processors, and if so, what is OIP doing to ensure that these practices are encouraged and ultimately adopted government-wide?
5. Please provide a comprehensive and detailed update on the status and anticipated finalization date of the Department’s “Release to One, Release to All” policy. What specific obstacles, if any, has OIP identified in finalizing and encouraging government-wide implementation of this policy?
6. On January 11, 2017, OIP issued guidance to agencies entitled “Defining a ‘Record’ Under the FOIA.” The guidance document, issued in response to a 2016 U.S. Court of Appeals for the District of Columbia Circuit decision,² instructs agencies “to ensure that they are carefully defining what is a ‘record’ responsive to a request so that they are not unnecessarily processing material that is not what the requester sought.”³ It further urges agencies to “use the definition of record found in the Privacy Act.... Thus, a ‘record’ can potentially constitute an entire document, a single page of a multipage document, or an individual paragraph of a document.”⁴ On its face, this guidance appears troubling, inconsistent with both the letter and spirit of FOIA, and seemingly provides agencies with significant discretion in avoiding disclosure of information that should otherwise be publicly made available.
 - a. Please explain the legal basis, if any, *within* 5 U.S.C. §552 that justifies this interpretation of what constitutes a “record” for purposes of responding to FOIA requests, including OIP’s determination that the Privacy Act’s definition of a “record” is the appropriate definition for agencies to utilize, as opposed to other definitions in the United States Code.

¹ 5 U.S.C. §552(m)(1).

² *American Immigration Lawyers Association v. EOIR*, 830 F.3d 667 (D.C. Cir. 2016).

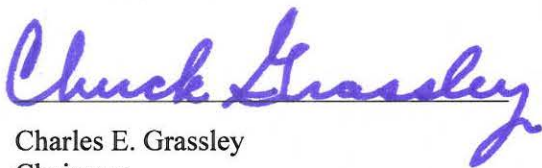
³ “Defining a ‘Record’ Under the FOIA,” Office of Information Policy, U.S. Dept. of Justice (Jan. 11, 2017) available at https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia (last visited Mar. 10, 2017).

⁴ *Id.*

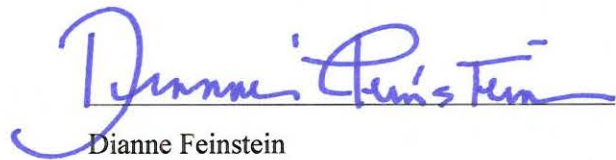
- b. Please explain the factual basis for OIP's statement that "a common practice has been for an agency to process only the responsive portion and redact the other portions as 'non-responsive' or 'outside the scope' of the request."
 - c. Please explain how this guidance is consistent with or advances a government-wide "presumption of openness."
7. According to the Department's website, OIP "handles the defense of certain FOIA litigation cases" and "Defend[s] certain FOIA matters in litigation." We would like to gain a clearer understanding of OIP's specific litigation functions and roles.
- a. Please explain the types of litigation matters that OIP "handles" or defends and the nature of its involvement.
 - b. Please explain the factors and considerations that determine whether OIP will provide assistance in, or have primary responsibility for, handling or defending a FOIA litigation case.

Thank you for your prompt attention to this important matter. If you have any questions, please contact Kyle McCollum of the Majority Staff at (202) 224-5225 or Lartese Tiffith of the Minority Staff at (202) 224-7703.

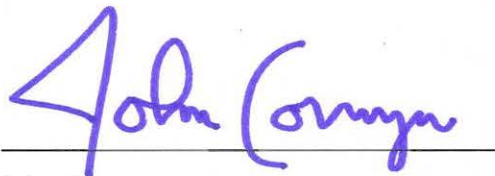
Sincerely,



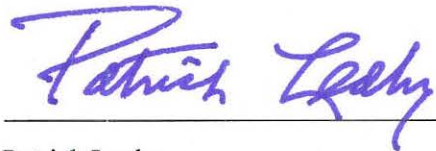
Charles E. Grassley
Chairman



Dianne Feinstein
Ranking Member



John Cornyn
Chairman
Subcommittee on Border Security and Immigration



Patrick Leahy
Former Ranking Member