



**U.S. Department of Justice**

Office of Legislative Affairs

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Office of the Assistant Attorney General

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June 10, 2013

The Honorable Darrel E. Issa  
Chairman  
The Honorable Elijah Cummings  
Ranking Minority Member  
Committee Oversight & Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Issa and Ranking Minority Member Cummings:

This responds to your letter dated February 4, 2013, which requested responses to twenty-three questions regarding the federal government's compliance with the Freedom of Information Act (FOIA). We appreciate the opportunity to address these issues, both in writing and in a previous briefing for Committee staff.

As you know, the Department of Justice's Office of Information Policy (OIP) is responsible for encouraging agency compliance with the FOIA and providing guidance and direction to agencies in their implementation of President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines. OIP has issued detailed guidance, trained thousands of FOIA professionals, engaged regularly with open government stakeholders, and conducted regular assessments of agency progress.

Our responses to your specific questions about agency FOIA regulations, fee assessments, FOIA backlogs, use of exemptions, and dispute resolution services, are set forth by topic below.

**Agency FOIA Regulations**

As an initial matter, we respectfully note that while updating agency FOIA regulations is undoubtedly an important step—one that the Department itself is in the process of doing—it is not accurate to assert that without new regulations compliance with the Attorney General's FOIA Guidelines "is unknown." Agencies' implementation of the FOIA Guidelines is documented in their annual Chief FOIA Officer Reports. Agencies are required to explain in these reports the steps they have taken to implement each part of the Attorney General Guidelines, including steps taken to: (1) apply the presumption of openness; (2) ensure that there is an efficient and effective system in place for responding to requests; (3) increase proactive disclosures; (4)

improve the use of technology in FOIA administration; and (5) reduce any backlogs and to improve timeliness in responding to requests.

As the OIP Director testified last year before your Committee's Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, agencies have continued to improve FOIA compliance and increase transparency each year since issuance of the Attorney General's FOIA Guidelines. During these past four fiscal years, agencies processed nearly 2.5 million requests and reduced the backlog of pending requests by nearly 45%. In doing so, agencies have maintained a high release rate, releasing records, either in full or in part, in response to over 92% of requests where records were processed for disclosure. Agencies also have continued to meet the public demand for information by proactively posting new material on their websites without waiting for a FOIA request and have taken steps to make that information more useful to the public. These are only a few of the accomplishments achieved by agencies, which are described in greater detail in agency Chief FOIA Officer Reports, as well as OIP's summaries and assessments of agencies' progress. See <http://www.justice.gov/oip/reports.html>.

**Question 1: Why has OIP not updated its FOIA regulations since 2003?**

Our FOIA regulations were designed to provide a general framework for implementing the FOIA at the Department. Given the time and resources necessary to promulgate regulations, they are not intended to be frequently modified. We have determined that, due to the passage of time, it would be beneficial to revise the Department's FOIA regulations, and we expect to publish the final version later this year.

**Question 2: Has OIP issued any instructions to other agencies to update their regulations? If not, why not? If so, which agencies did OIP instruct, and did the agencies comply?**

- **Please provide copies of any recommendations OIP has made from 2007 to present.**
- **Please provide copies of all memoranda issued by DOJ concerning FOIA regulations from 2007 to present.**

The OPEN Government Act amendments to the FOIA did not require implementing regulations to be effective, and accordingly, OIP did not issue any such instructions or issue any memoranda regarding FOIA regulations. After passage of the OPEN Government Act, OIP's focus, as with any change in FOIA law or policy, was to ensure that all agencies fully understood their FOIA obligations and promptly changed their *practices* as needed. Accordingly, OIP issued detailed guidance explaining the Act's changes to the FOIA. Similarly, after the Attorney General's FOIA Guidelines were issued, OIP issued guidance on their implementation as well. Below is a list of our guidance on the OPEN Government Act:

- "Congress Passes Amendments to the FOIA," *available at* <http://www.justice.gov/oip/foiapost/2008foiapost9.htm>. This guidance advised agencies on compliance with the provision defining "representative of the news media."

- “Segregating and Marking Documents for Release in Accordance with the OPEN Government Act,” *available at* <http://www.justice.gov/oip/foiapost/2008foiapost26.htm>;
- “Assigning Tracking Numbers and Providing Status Information for Requests,” *available at* <http://www.justice.gov/oip/foiapost/2008foiapost30.htm>;
- “New Limitations On Tolling the FOIA’s Response Time,” *available at* <http://www.justice.gov/oip/foiapost/2008foiapost29.htm>;
- “New Limitations on Assessing Fees,” *available at* <http://www.justice.gov/oip/foiapost/2008foiapost28.htm>;
- “New Requirement to Route Misdirected FOIA Requests,” *available at* <http://www.justice.gov/oip/foiapost/2008foiapost31.htm>;
- “2008 Guidelines for Agency Preparation of Annual FOIA Reports,” *available at* <http://www.justice.gov/oip/foiapost/guidance-annualreport-052008.pdf>.
- “Question and Answer: Annual FOIA Report (Expedited Processing and Fee Waiver Requests),” *available at* <http://www.justice.gov/oip/foiapost/2008-annual-foia-report-qa.htm>.
- “Question and Answer: Annual FOIA Report (Consultations, Response Time and Remands), *available at* <http://www.justice.gov/oip/foiapost/2009foiapost1.htm>

Moreover, in 2009 OIP revised the *Department of Justice Guide to the Freedom of Information Act* (henceforth *DOJ Guide*), an 880-page treatise widely relied upon by agencies in administering the FOIA, to reflect (among other things) President Obama’s FOIA Memorandum, Attorney General Holder’s FOIA Guidelines, and the OPEN Government Act, including the Act’s requirements to route misdirected requests, assign request tracking numbers, and provide status information to requesters, as well as the additional limitations on tolling FOIA response times and assessing certain fees. *See* [http://www.justice.gov/oip/foia\\_guide09.htm](http://www.justice.gov/oip/foia_guide09.htm).

Additionally, as part of its ongoing efforts to ensure that agencies understand both the FOIA’s legal requirements and the policy directives of the President and Attorney General, OIP provides extensive, hands-on training to thousands of agency FOIA professionals across the government each year. Following passage of the OPEN Government Act and issuance of the President’s and Attorney General’s FOIA Memoranda, OIP conducted a number of specialized training courses on these topics, including government-wide conferences specifically addressing various aspects of the Act and the Memoranda. The Act and Memoranda are now fully integrated into OIP’s trainings.

**Question 3: Has OIP assessed how requesters may have been negatively impacted by agency regulations that do not reflect current law?**

OIP has been very clear in conveying to agencies their obligations under the OPEN Government Act and the Attorney General Guidelines, neither of which are affected by the age of their regulations. Because of this, we do not have reason to believe that requesters could be “negatively impacted by agency regulations that do not reflect current law.” To the extent a regulation was inconsistent with any provision of the FOIA statute, the statute would supersede it.

**Question 4: What does OIP plan to do to ensure agency regulations are updated to conform to the current statute?**

As noted above, OIP believes that what matters is that agencies comply with the statute, and that compliance is not necessarily dependent on whether regulations have been recently revised. That said, OIP certainly encourages agencies to have up-to-date regulations and as mentioned, DOJ is in the final stages of updating its own regulations. In the interim, OIP has been reviewing and offering comments and suggestions to other agencies that are drafting revised regulations.

**FOIA Fees**

As an initial matter, we respectfully note that it is not technically correct that, as your letter suggests, the OPEN Government Act “broadens the type of requesters who may qualify for a fee waiver under the FOIA.” Rather, the OPEN Government Act codified the definition of “representative of the news media,” which is a *fee category*. In doing so, Congress borrowed existing definitions from the Office of Management and Budget (OMB) and from *Nat’l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989), authorities that agencies had been relying upon for many years. The OPEN Government Act also imposed limitations on agencies’ abilities to assess fees in certain instances.

**Question 5: What is OIP doing to ensure agencies are complying with the OPEN Government Act provisions concerning FOIA when assessing fees and determining eligibility for fee waivers?**

OIP has undertaken a range of activities to promote agency compliance with all of the FOIA’s fee provisions, including the changes made by the OPEN Government Act. As indicated above, shortly after passage of the Act, OIP issued a series of guidance articles to agencies explaining the new FOIA provisions. The first guidance, issued in January 2008, alerted agencies to each of the changes made by the Act, including codification of the definition for “representatives of the news media” in Section (a)(4)(A)(ii) and the limitations on assessing certain fees. See <http://www.justice.gov/oip/foiapost/2008foiapost9.htm>. A subsequent guidance article in November 2008 specifically addressed the new fee limitations applicable to agencies that do not timely respond. See

<http://www.justice.gov/oip/foiapost/2008foiapost28.htm>. In addition, an entire chapter of the *DOJ Guide* is devoted to the proper application of the FOIA's fee and fee waiver provisions.

OIP reinforces the abovementioned written guidance via extensive training to thousands of agency personnel across the government. A comprehensive two-day training course conducted three to four times per year by OIP provides instruction from expert attorneys and FOIA professionals on a wide range of issues and includes a plenary session on the FOIA's fee and fee waiver provisions. OIP also provides training on fees and fee waivers as part of its introductory-level course on the FOIA so that even novice FOIA professionals and employees with only tangential involvement in the FOIA are instructed on the FOIA's fee requirements. Lastly, OIP addresses fees and fee waivers at its advanced-level training course designed for seasoned FOIA professionals, where an in-depth discussion of fee issues is included in the curriculum.

In May 2011, OIP conducted the first ever FOIA Fee Summit, in which OIP experts provided in-depth instruction to agency personnel on the FOIA's fees and fee waiver provisions, with particular emphasis on the OPEN Government Act fee provisions. A copy of OIP's training slides for instructing FOIA personnel on fees and fee waivers, as well as the slides that were used at the FOIA Fee Summit (which will be repeated this year), are available at <http://www.justice.gov/oip/training-materials.html>.

Finally, OIP also provides direct, one-on-one counseling for agency personnel through its FOIA Counselor Service, a hotline operated by experienced OIP attorneys and accessible each workday to all agency personnel. OIP believes that these consultations have proven to be an effective resource in answering FOIA professionals' questions, including those related to the fees and the fee waiver provisions.

**Question 6: What is the most current guidance OIP has issued to agencies concerning assessment of fees and determining eligibility for fee waivers?**

- **Please provide a copy of OIP's latest guidance on fee waivers.**
- **Please provide copies of all memoranda and official guidance issued by DOJ to agencies concerning FOIA fees from 2007 to present.**

The most current guidance issued on FOIA fees and fee waivers is referenced and summarized in the Fees and Fee Waivers chapter of the *DOJ Guide* ([http://www.justice.gov/oip/foia\\_guide09/fee-waivers.pdf](http://www.justice.gov/oip/foia_guide09/fee-waivers.pdf)), and in the training slides used to instruct agencies on the FOIA's fee provisions (<http://www.justice.gov/oip/docs/fees-fee-waivers.pdf>). The slides used for the in-depth Fee Summit presentation are available at <http://www.justice.gov/oip/docs/fee-summit.pdf>.

Additionally, as noted above, subsequent to the passage of the OPEN Government Act, OIP issued written guidance to agencies. The Act's impact on the fee provisions is addressed in two guidance articles available at <http://www.justice.gov/oip/foiapost/2008foiapost9.htm> and <http://www.justice.gov/oip/foiapost/2008foiapost28.htm>. OIP also issued guidance on applying



the FOIA's fee waiver provision after this section of the Act was last amended. This guidance remains in effect and is available 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).

**Question 7: What steps has OIP taken to address the two incidents described above, as well as other reports of agencies violating FOIA's requirements for determining fees and eligibility for fee waivers?**

Your letter references a pending lawsuit against the Central Intelligence Agency (CIA) and allegations against the Department of Homeland Security (DHS). In accordance with Department policy, we cannot comment on the pending lawsuit against the CIA mentioned in your letter. With regard to the general question of the propriety of charging fees for the declassification of records, we note that the Information Security Oversight Office at the National Archives and Records Administration (NARA) has specifically provided for the charging of fees in the course of conducting declassification reviews. *See* 32 C.F.R. § 2001.33(e). Questions concerning such fees are more appropriately addressed to NARA. As to DHS, OIP has provided specialized training to DHS staff on proper application of the FOIA's fee and fee waiver provisions. During 2012, OIP conducted two such training sessions for DHS headquarters staff and one for field staff. Our engagement with DHS on that issue is ongoing and OIP will provide additional training as appropriate.

As indicated above, OIP provides extensive training, guidance, and counseling to all agencies to assist them in properly applying the FOIA's fee and fee waiver provisions. In addition, if a requester raises a concern with OIP regarding the assessment of fees, or any other FOIA-related issue, OIP will look into the matter and, if necessary, provide direction to the agency to ensure that the FOIA's provisions are properly applied.

Finally, OIP certainly strongly agrees that agencies should never use fees for the purpose of dissuading requesters from making requests. Such actions would be contrary to the Attorney General's Guidelines directing agencies to work with requesters in the spirit of cooperation and to avoid unnecessary bureaucratic hurdles.

**Question 8: Does OIP have any recommendations for improving agency compliance with FOIA's fee structure requirements?**

OIP believes that continued training of agency personnel who make fee determinations is key to ensuring agency compliance on this issue. OIP will continue to provide comprehensive training on the FOIA's fee provisions, and will hold a second FOIA Fee Summit this year.

In addition, OIP is currently examining whether further steps can be taken to simplify application of the FOIA's fee provisions for the benefit of agencies and requesters alike.

## FOIA Backlogs

### **Question 9: What steps has OIP taken to help agencies reduce their FOIA backlogs?**

The reduction and management of backlogs has long been a key focus at OIP.

First, OIP enhanced agency accountability on this issue by establishing the requirement that agencies publicly report backlog data in their Annual FOIA Reports. In creating this requirement OIP expanded on the reporting obligations set out in the OPEN Government Act, which did not include backlog. OIP has also emphasized that reduction of backlogs includes two distinct elements—reduction in the *numbers* of pending requests and reduction in the *age* of the oldest of those requests. Indeed, the closing of agencies' oldest pending requests is a distinct backlog reduction goal, which was reiterated in April 2012 guidance to all agencies. And in June 2012, Acting Associate Attorney General Tony West and White House Counsel Kathryn Ruemmler issued a memorandum to all agency Chief FOIA Officers and General Counsels requesting that they review their oldest pending FOIA requests and take affirmative steps to resolve them. Per a new OIP reporting requirement, agencies must report on a quarterly basis the size of their backlogs and the status of their ten oldest pending requests.

Second, OIP has encouraged agencies to improve communication with FOIA requesters as a means of freeing up resources to reduce backlogs. For example, guidance issued in March 2010 emphasized the benefits of negotiating the scope of certain requests and providing interim responses to large requests. See <http://www.justice.gov/oip/foiapost/2010foiapost5.htm>. These practices assist agencies in efficiently processing the more complicated requests that tend to clog their backlogs. By negotiating the scope of a large request, agencies are often able to provide requesters with the precise type of information requested in prompt fashion, thereby freeing up resources to devote to backlog reduction. And when requesters receive interim releases in response to requests for large volumes of records, some will determine that they have received what they were looking for and will terminate their request. This too frees up resources for backlog reduction.

Third, OIP has held agencies accountable for their efforts to reduce backlogs and improve timeliness through both Annual FOIA Reports and Chief FOIA Officer Reports. Since 2010, OIP has instructed agencies to include in their Chief FOIA Officer Report details on whether they have reduced their backlog and closed their ten oldest pending requests and appeals. Agencies that were unable to do so must provide an explanation. In turn, OIP's FOIA assessments, which are publicly posted, score agencies on their backlog reduction efforts, including progress in closing their oldest requests.

**Question 10: Has OIP reviewed DHS's backlog? If so, please produce all documents related to that review.**

**Question 11: What are the causes of the significant increase in the request backlog at USCIS?**

**Question 12: Has OIP provided any guidance to DHS or USCIS to resolve the backlog? If so, what guidance did OIP provide and is it being followed?**

- **Please provide any guidance issued, and all related correspondence.**

**Question 13: If no guidance has been provided, does OIP plan to consult or offer guidance to DHS on its backlog?**

The OIP Director has discussed DHS's backlog with DHS's Chief FOIA Officer. As recently reported in its Annual FOIA Report, DHS reduced its backlog by 32.7% in Fiscal Year 2012, despite receiving nearly 15,000 more requests than the previous year. *See* <http://www.dhs.gov/sites/default/files/publications/foia/privacy-foia-annual-report-fy-2012-dhs.pdf>.

DHS has explained to OIP that a continuing rise in the number of incoming requests had been responsible for an increase in its backlog—which, as noted above, has now decreased significantly. The decrease is due to increased focus on backlog reduction, including an increase in workforce support to components with the largest backlogs. Most notably, as of February 2013, the backlog at the U.S. Citizenship and Immigration Services—which, as you note, totaled 35,780 at the end of Fiscal Year 2011—had been reduced to 1,262. According to DHS, the most significant factor in reducing USCIS's backlog was increased staffing levels.

### **The Use of Exemptions and President Obama's Presumption of Openness**

As an initial matter, we respectfully disagree with your letter's characterization of agencies' use of FOIA exemptions as "excessive." Over the past four years, the government has released records in full or in part in response to over 92% of requests where records were processed for disclosure. In Fiscal Year 2012, this high release rate meant that records were provided in response to more than 434,000 requests, and in more than 50% of those cases, totaling more than 234,000, all responsive records were released in full, with no exemptions applied. While your letter notes that in Fiscal Year 2011, more than 30,000 requests resulted in full denials, that number accounted for less than 7% of the requests processed for exemption applicability. In Fiscal Year 2012, full denials once again accounted for less than 7% of the requests reviewed for disclosure.

As to the exemptions that were used by agencies, the two most cited FOIA exemptions during the past four years have been Exemptions 6 and 7(C), both of which protect individuals' personal privacy. For Fiscal Year 2012, this meant that the privacy exemptions constituted over 52% of all exemptions cited.

We also disagree with your letter's apparent assumption that a higher use of exemptions correlates with fewer discretionary releases. Often an agency will determine that portions of a record are appropriate for discretionary release, while still having to invoke one or more exemptions to protect other portions because it foresees that harm could ensue if the document were released in its entirety. In these instances, exemptions are used *precisely because* the agency has made a discretionary release.



**Question 14: In your view, have agencies sufficiently complied with the President's and Attorney General memorandums on FOIA?**

Based on interactions with agency FOIA offices and its review of the Annual FOIA Reports and Chief FOIA Officer Reports, OIP believes that agencies have taken concrete steps to improve their FOIA administration and achieved significant accomplishments in complying with the President's and Attorney General's FOIA Memoranda. This is illustrated in agencies' Chief FOIA Officer Reports, available at <http://www.justice.gov/oip/reports.html>, and OIP's summary of these reports and assessment of agency progress in implementing the President's and Attorney General's FOIA Memoranda, which can be found at <http://www.justice.gov/oip/docs/sum-2012-chief-foia-officer-rpt.pdf>.

OIP's 2012 assessment scored all 99 agencies subject to the FOIA on seventeen milestones tied to each of the five key areas addressed in the Attorney General's Guidelines. Because each agency inevitably faces different challenges in its FOIA administration, OIP intentionally used a wide range of milestones to capture a more complete picture of agencies' efforts. Although the 2012 assessment highlights areas where some agencies need to improve, it is clear that, overall, agencies have implemented the Attorney General's Guidelines in their FOIA practices and are making substantial efforts to improve their performance.

With regard to the application of President Obama's presumption of openness, 97 of the 99 agencies reported that they had a system in place to determine whether a discretionary release is possible when processing requests, up from 52 in 2010. OIP's review of the 2010 Chief FOIA Officer Reports found a strong correlation between agencies that made discretionary releases and those that had added a step to their administrative process to affirmatively evaluate whether a discretionary release is possible. Further, 85 agencies reported making discretionary releases of records during the reporting period.

OIP's 2012 assessment also showed that the majority of agencies are achieving a high release rate, which is calculated as the percentage of requests where some records are released either in full or in part out of the universe of requests processed for a disclosure determination. As shown in the 2012 assessment, during Fiscal Year 2011, out of the 99 agencies subject to the FOIA, 24 had a release rate of 100% and 74 agencies had a release rate of 90% or higher.

With regard to the President's and Attorney General's emphasis on increasing proactive disclosures, 95 of the 99 agencies reported that they had increased the amount of material they make available proactively on their website, and 90 agencies reported that they had taken steps to make the information on their websites more useful to the public.

In response to the President's directive that agencies utilize technology to inform citizens about their government, 92 of the 99 agencies reported offering the ability for requesters to make requests electronically. Several agencies reported using, and many other agencies reported that they are considering using, software that conducts document de-duplication and sorting as well

as other tasks that make the processing of large volume requests more efficient. OIP and several other Department components have also begun to utilize similar technology.

Finally, with regard to improving timeliness and reducing agency FOIA backlogs, OIP's 2012 assessment found that 60 of the 99 agencies processed their simple requests in fewer than twenty working days on average. Further, 68 agencies were either able to close their ten oldest requests or had no such pending requests to close. Additionally, 66 agencies either decreased their overall backlog of FOIA requests or had no backlog at the end of Fiscal Year 2011.

These are only some of the efforts agencies have undertaken in implementing the President's and Attorney General's FOIA Memoranda. As noted above, OIP is currently in the process of reviewing agencies' Fiscal Year 2012 Annual FOIA Reports and 2013 Chief FOIA Officer Reports. Upon completing this review, OIP will once again issue an assessment of agencies' progress based on milestones that build on past successes.

To be sure, OIP believes that further improvements are possible. Each year, OIP modifies the reporting requirements for agencies as their implementation of the Attorney General's Guidelines has matured. By doing so, OIP seeks to continually challenge agencies to take further steps to improve their FOIA administration. OIP will also continue to work with agencies in making improvements by issuing pertinent guidance, providing training, and exploring new ways to increase efficiencies in agencies' FOIA administration.

**Question 15: Has OIP ever assisted DOJ in questioning an agency's decision to withhold information? If so, under what circumstance?**

- **Please provide all memorandums and official guidance prepared by OIP concerning any instance where OIP has questioned an agency's decision to withhold a record from 2009 to present.**

Through its FOIA Counselor service, OIP regularly provides verbal advice to agencies on the proper application of the FOIA's exemptions. These discussions assist agencies in determining in the first instance whether a contemplated withholding falls within the legal parameters of an exemption. Additionally, Department litigators occasionally solicit OIP's views concerning the propriety of an agency's withholding that has become the subject of litigation. Finally, as part of a service provided to requesters who have concerns about the way in which their request has been handled, OIP may conduct what it calls a "FOIA compliance inquiry" to review the actions taken on the request. If necessary, OIP would then provide appropriate guidance to agencies concerning their handling of the request. Since 2009, however, OIP has not received a compliance inquiry where it determined that a withholding was improper due to use of an exemption. Thus, OIP has not prepared any memoranda or official guidance that questioned an agency's decision to withhold a record.

**Question 16: Has OIP taken any actions to limit the use of FOIA exemptions, and specifically Exemption 3?**

- **Please provide any guidance or correspondence with agencies concerning limiting FOIA exemptions from 2009 to present.**

**Question 18: What steps has OIP taken to ensure agencies use exemptions only when necessary, and in compliance with the Attorney General's guidelines?**

As discussed above, OIP has undertaken a wide range of activities to guide agencies in implementing the Attorney General's FOIA Guidelines, including the emphasis on making discretionary releases of information—which by definition involves refraining from using a FOIA exemption even though an exemption could validly be used. OIP's written guidance on the Guidelines discusses in detail how to implement the foreseeable harm standard instituted by Attorney General Holder. See <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>. The guidance fully explains the concept of discretionary disclosures and the factors agencies should consider in making such releases even though an exemption could be applied.

The revised *DOJ Guide* devotes an entire chapter to discretionary disclosures. See [http://www.justice.gov/oip/foia\\_guide09/disclosure-waiver.pdf](http://www.justice.gov/oip/foia_guide09/disclosure-waiver.pdf). Moreover, OIP has issued guidance and suggested best practices for improving transparency based on the five key areas addressed in the Attorney General's Guidelines. See <http://www.justice.gov/oip/docs/best-practices-guidance-sept-2010.pdf>. As part of this guidance, OIP advised agencies to "institute a system, or add a step in their processing procedures, to affirmatively consider whether more information can be released as a matter of discretion." Further, the guidance instructed Chief FOIA Officers, as well as other agency FOIA professionals, to consider regularly tracking the number of full and partial releases that are made throughout the year to ensure that sufficient attention is being paid to releasing more information.

To reinforce this guidance OIP provides training specifically on the implementation of President Obama's and Attorney General Holder's FOIA Memoranda. OIP also provides instruction on the Attorney General's foreseeable harm standard in each of its training courses on FOIA exemptions. Finally, whether through OIP's FOIA Counselor Service or upon special request, OIP's attorneys and FOIA professionals are always available to consult with agencies that have questions on whether a FOIA exemption properly applies or if certain information is appropriate for discretionary release.

With regard to your specific concerns about Exemption 3, the *DOJ Guide* provides guidance on its proper use. See [http://www.justice.gov/oip/foia\\_guide09/exemption3.pdf](http://www.justice.gov/oip/foia_guide09/exemption3.pdf). Exemption 3 incorporates into the FOIA the nondisclosure provisions of other statutes passed by Congress. Accordingly, as OIP advised in its guidance on the President's and Attorney General's FOIA Memoranda, these statutes generally do not afford agencies any opportunity to make discretionary releases, because Congress has prohibited disclosure of the covered information. See <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>.

In order to bring more transparency to Exemption 3 and to help agencies properly apply the exemption, OIP has published a list of all Exemption 3 statutes cited in agency Annual FOIA Reports in Fiscal Years 2010 and 2011, as well as a list of the statutes that have been found by courts to meet the requirements of Exemption 3. See <http://www.justice.gov/oip/foia-resources.html#s3>. Additionally, one OIP attorney is designated as an Exemption 3 expert to assist agencies in determining whether information falls within the scope of a statute or if a statute meets the requirements of Exemption 3 in the first place.

**Question 17: Does OIP ever review agency proposals for new exemptions under Exemption 3?**

- **Please provide a copy of any review OIP has conducted of Exemption 3 proposals.**

OIP does review and comment to the Office of Management and Budget (OMB) on legislative proposals for new Exemption 3 statutes to ensure that they satisfy the threshold requirements of Exemption 3 and comply with the OPEN FOIA Act of 2009. These comments are provided to OMB as part of the inter-agency clearance process. The Executive Branch has significant confidentiality interests in internal deliberations regarding the legislative process and, consequently, we are not in a position to disclose copies of our comments.

**The E-FOIA Requirements to Post Frequently Requested Records Online**

**Question 19: What steps has OIP taken to ensure that all agencies fully comply with the E-FOIA's requirement to post frequently requested records online?**

OIP has provided extensive guidance and training to agencies on proactive disclosures, including the requirement to post frequently requested records. Since the enactment of the Electronic Freedom of Information Act, OIP has issued several articles of guidance on proactive disclosures and the posting of frequently requested records, all of which are available on its website.

In June 2008, OIP issued guidance to agency Chief FOIA Officers on the requirement that they certify to the Department and OMB that their agency FOIA Libraries (formerly called Reading Rooms) were in compliance with the law. See <http://www.justice.gov/oip/foiapost/2008foiapost21.htm>. This guidance described each of the required categories of records that agencies must include in their FOIA Libraries, including frequently requested records, and required Agency Chief FOIA Officers to certify compliance.

In the wake of President's and Attorney General's FOIA memoranda, OIP issued guidance that placed an even greater emphasis on proactive disclosures. See <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>. Moving beyond the legal requirements to post frequently requested records, this guidance emphasized that increasing proactive disclosures is "a key area where agencies should strive for significant improvement." The guidance also stressed that proactively posting information on government websites can reduce the number of incoming FOIA requests, and that "proactively disclosing information about the

operations and activities of their agency is an integral part of achieving transparency.” In addition, the 2009 edition of the *DOJ Guide* contains a chapter on proactive disclosures, including the requirement to post frequently requested records online. See [http://www.justice.gov/oip/foia\\_guide09/proactive-disclosures.pdf](http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf).

OIP reinforces this guidance through training, including a new segment that specifically addresses the FOIA’s requirements for posting frequently requested records as well as the President’s and Attorney General’s call for agencies to make records available proactively. See <http://www.justice.gov/oip/proactive-disclosures.pdf>.

**Question 20: Does OIP evaluate agency compliance with the requirement to post frequently requested records online? If so, please provide a copy of OIP’s criteria used to measure compliance.**

OIP has taken steps to keep agencies accountable for posting not only frequently requested records, but any records likely to be of interest to the public. As mentioned above, in 2008 OIP required agency Chief FOIA Officers to certify that their FOIA Libraries were in compliance with the law. OIP also holds agencies accountable for increasing proactive disclosures in general through the submission of their Chief FOIA Officer Reports, which are required to address this topic. For example, in 2012 agencies were scored on whether they had added new material to their websites and whether they had taken steps to make their websites more useful to the public. Given the importance of proactive disclosures and the benefits for both requesters and agencies when frequently requested records are posted, OIP is currently exploring how it can further increase accountability in this area.

**Question 21: Please provide a copy of the most recent OIP-issued guidance on the requirement to post frequently requested records.**

As discussed in the response to Question 19, OIP has issued a number of guidance articles on the requirement that agencies post frequently requested records. The most recent guidance can be found in the Proactive Disclosures chapter of the *DOJ Guide* ([http://www.justice.gov/oip/foia\\_guide09/proactive-disclosures.pdf](http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf)) and in the training OIP conducts on proactive disclosures (<http://www.justice.gov/oip/proactive-disclosures.pdf>).

### **Dispute Resolution Services**

**Question 22: What has OIP done to encourage agencies to engage in dispute resolutions services and/or seek out the assistance of OGIS?**

- **Please provide all communications between OIP and agencies regarding the benefits of OGIS’s dispute resolution services.**
- **Please provide all communications from OIP to an agency recommending the agency engage in dispute resolution or to seek assistance from OGIS.**



Since the inception of the Office of Government Information Services (OGIS), OIP has worked to support the office and publicize the mediation services that Congress authorized OGIS to provide. In July 2010, OIP issued guidance to agencies highlighting OGIS's mediation services and encouraging agencies to notify requester of these services at the conclusion of the administrative process. See <http://www.justice.gov/oip/foiapost/2010foiapost21.htm>.

In OIP's own FOIA administrative appeal determinations concerning Department records, OIP provides individualized notification to each requester that mediation is available at OGIS as a non-exclusive alternative to litigation. OIP includes detailed contact information for OGIS. Each year since OGIS became operational, the Department has advised thousands of FOIA requesters of OGIS's mediation services.

Additionally, OIP has assisted OGIS in its work by facilitating its ability to obtain pertinent FOIA request files directly from DOJ without first having to obtain a privacy waiver from each requester, as would otherwise have been required by the Privacy Act of 1974. To do this, DOJ amended its Privacy Act System of Records Notice (SORN) to specifically authorize disclosure of information connected with the handling of a FOIA matter to OGIS as a "routine use" under the Privacy Act. This revision to the Department's SORN makes it easier for OGIS to work with DOJ components on dispute resolution matters. OIP collaborated with OGIS and OMB in drafting the language of the Department's SORN so that it could serve as a model for other agencies in updating their own SORNs. This will facilitate the use of OGIS's mediation services by other agencies as well.

In addition, OIP has teamed with OGIS to hold training sessions on dispute resolution and customer service skills for FOIA Public Liaisons and other FOIA professionals. These trainings emphasize the value of effective communication with requesters and give an overview of the communications techniques utilized by dispute resolution specialists. OIP has also added to its two-day FOIA training program a session co-taught with OGIS that focuses on the importance of good communication in resolving disputes. OIP and OGIS also co-teach a specialized training program for FOIA Public Liaisons that addresses their statutory duties, discusses concerns commonly raised by the requester community, and provides suggestions for how FOIA Public Liaisons can assist in making the FOIA process more understandable to requesters. The slides for this training session are available at <http://www.justice.gov/oip/public-liaison-training.pdf>.

**Question 23: Do you believe more could be done to avoid FOIA lawsuits? If so, what recommendations do you have for reducing the number of FOIA lawsuits?**

We believe that all agencies share the goal of avoiding FOIA lawsuits whenever possible. One effective tool for reducing such lawsuits is a meaningful administrative appeals process, during which agencies can reevaluate their searches, take a fresh look at records, address requesters' specific concerns, and provide further explanation of the agency's action on the request. Greater use of the administrative appeal process by requesters also has the potential to avoid lawsuits.

Some lawsuits may result from simple miscommunications between agency and requester. The OPEN Government Act codified the role of agency FOIA Public Liaisons who are responsible for “increasing transparency” and “resolving disputes.” Greater use of FOIA Public Liaisons, both by requesters and agencies, could facilitate dialogue between the parties, explain the agency’s handling of the request, and address any particular concerns of the requester, in some cases averting potential lawsuits.

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance on this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter J. Kadzik". The signature is fluid and cursive, with the first name "Peter" and last name "Kadzik" clearly legible.

Peter J. Kadzik  
Principal Deputy Assistant Attorney General