



March 28, 2022

The Honorable Dick Durbin
United States Senate
711 Hart Senate Building
Washington, DC 20510

Dear Senator Durbin,

American Oversight is a section 501(c)(3) nonpartisan organization that specializes in using Freedom of Information Act (FOIA) requests to promote government transparency and to hold government officials accountable. In our experience—working with agencies across the federal government over two administrations—there are multiple, common agency practices and legislative barriers that impair FOIA’s ability to serve its central purpose of making government records promptly available to the public. We also frequently work with requesters across the country, including advocacy organizations, journalists, and individuals, who encounter impediments to the timely disclosure of records as required by law under FOIA. Reform of a few aspects of FOIA will prevent agencies from delaying and otherwise obstructing access to public records, while still protecting important governmental interests.

The Freedom of Information Act was enacted in 1966 to provide the American public access to federal agency records, thereby affording Americans a window into the government so that they might better understand how and for whom it works.¹ In the decades since FOIA was enacted, it has opened up countless records to vital public scrutiny, providing citizens, journalists, and others the ability to shine a much-needed light on the inner-workings of the federal government. The statute embodies the fundamental principle that the government works for the people and is a critical component of our democracy.

Unfortunately, FOIA’s efficacy as a tool for transparency has waned considerably in the years since its passage. Under-resourced FOIA processing units, excessive delays, liberal use of exemptions and redactions, unclear guidance, and limited responsiveness by certain federal agencies have collectively undermined FOIA’s promise of the timely access to government records necessary to ensure an informed citizenry. The FOIA Improvement Act of 2016 addressed several of these challenges, including by establishing a presumption of disclosure.² Six years after the law’s passage, however, the need for additional reform remains clear.

As Congress re-examines FOIA and considers amending the law to ensure that the American people are able to gain access to the records to which they are entitled, we offer our experience and expertise in furthering the goals of the act.

¹ Freedom of Information Act (FOIA), 5 U.S.C. § 552.

² S.337 - FOIA Improvement Act of 2016, 114th Congress (2015-2016).



From our experience requesting records under FOIA, American Oversight has identified multiple areas where Congress could consider acting to ensure complete and timely access to agency records and thus increased transparency regarding government operations:

1. Require adequate resources for responding to FOIA requests.

Many of the problems with modern FOIA backlogs are a question of supply and demand: There are too many requests for agencies to satisfy with too few resources. Across the federal government, agency responses to FOIA requests are routinely delayed because agencies are neglecting to allocate sufficient agency resources to FOIA processing to meet existing or predictable FOIA demand. This systemic neglect has resulted in growing backlogs and increasingly delayed responses to FOIA requests. Delays prevent timely disclosure of records regarding agency operations and thereby frustrate FOIA’s purpose of providing accountability for government actions and facilitating democratic participation by ensuring an informed citizenry.

The statute requires that agencies respond to requests within 20 working days, but in practice, the deadline is meaningless.³ Agencies rarely come close to meeting the statutorily mandated deadline, and many do not produce the requested documents for years—often only after being sued to comply—preventing the American people from getting information about matters of public concern in a timely manner.

Agency budgets reflect their priorities; FOIA has not been one of them. Accordingly, Congress may wish to consider requiring agencies to substantially increase the portion of their budgets allocated to processing FOIA requests whenever they process fewer requests in a fiscal year than they received. If an adequate proportion of agency spending, or agencies’ full-time equivalent employees, are not committed to meeting their obligation to provide timely access to records under FOIA, budgetary consequences may improve compliance.

Congress may wish to consider including mandatory spending triggers when an agency’s backlog of unprocessed requests exceeds the number of requests it receives in a typical fiscal year, because such a situation indicates systematic processing delays that would prevent the agency from releasing documents in a reasonably timely manner.

2. Prevent indefinite delays caused by so-called “consults.”

Agency FOIA regulations often provide that before producing records in response to a request, an agency or component will “consult” with other components or agencies that may have equities in the documents.

³ Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(6)(A)(i): “Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall [. . .] determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person[.]”

There is no statutory time limit for the length of these consultations, leading frequently to extended delays that often push the production of records past the timeframe in which they are relevant and raising concerns that such delays could be used to strategically conceal sensitive but nonexempt records.

Likewise, the practice of referring FOIA requests or documents to other agencies after months or even years of processing by the original agency serves as a loophole for compliance that is difficult for requesters to combat in court or through direct advocacy. When agencies can point fingers at each other to avoid complying with FOIA requests in a timely manner, agencies escape accountability. In light of the FOIA’s statutory deadlines, the black hole of interagency consultation—which is generally not covered by those deadlines—is a significant source of delay that is squarely at odds with the purpose of FOIA.

Because such consultations occur only *after* the agency that received the request has done its search, has identified the record as responsive, and has completed its own processing, there is no justification for other components or agencies to require an extended period of time to respond.

Congress may wish to consider providing by statute that any agency or component that fails to respond to a request for consultation within 20 working days is presumed to consent to release of the records. Congress could consider granting agency heads authority to extend that review period for an additional 90 calendar days, under appropriate circumstances as identified by the statutes.

3. Explicitly broaden the requirement that requests be “reasonably described” to align with the legislative purpose of FOIA.

Agencies routinely abuse the requirement under FOIA that requests be “reasonably described.”⁴ Some agencies marshal this provision to reject FOIA requests seeking readily identifiable records, such as emails between two individuals over a specified date range, when the requested records are not further limited to a specific topic or by specific key words. Neither the FOIA statute, its implementing regulations, nor case law require requests to be so limited. Instead, agencies are obligated to process FOIA requests so long as a professional employee of the agency can understand what records are sought and can locate them with a reasonable amount of effort. This is the case with requests for email that can be readily identified using basic search criteria in any modern email program. When agencies demand specificity beyond what the law actually requires, it frustrates transparency and violates FOIA.

Accordingly, Congress may wish to consider amending Section 552(a)(3) to make express that a record is “reasonably described,” when a professional employee of the agency can understand what record is sought and can locate the record, and specifying explicitly that for a request to be “reasonably described,” a requester need not limit their request to specific subject matters, topics, key terms, or specific custodians.

⁴ Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(3)(A).

4. Ensure systematic preservation and searches of text messages and other fleeting communications systems.

Recent years have provided clear indications that agency officials, including very senior officials, are using text messages and similar communication applications as a substitute for email. In response to FOIA requests, American Oversight has received emails that reference related text messages—text messages that were not produced. In other cases, agencies have released text messages that show the type of formal communication that would be expected over email, sometimes with attached documents. Some agencies have responded that they are unable to search texts because they do not have access to the relevant device or because the relevant custodians have left the agency. Others have disclaimed any obligation to search for these records altogether.

Most agencies do not have efficient or systematic methods of preserving or searching these records. Some officials may even be communicating via these methods in order to avoid creating records readily identified in response to FOIA or congressional requests. Congress may wish to consider, at least for the records of senior officials, requiring agencies to create and maintain electronically searchable systems for uploading or automatically capturing and preserving text messages and similar records on applications such as Signal, Slack, WhatsApp, Lync, or other text or instant-message platforms, so that these forms of communication cannot be used as a loophole to avoid transparency.

We believe it would be useful for any new information technology in this space to offer searchability by date range, key term, and sender/recipient, to allow for records officers to respond to FOIA requests effectively and efficiently.

5. Restore the competitive harm standard for Exemption 4 commercial information.

For many decades, federal courts required that for commercial information to be considered “confidential” and shielded from disclosure under Exemption 4, that disclosure must cause “substantial competitive harm.” But in 2019, the Supreme Court struck down this decades-old standard, and did not erect a firm rule in its place. As a result, some agencies quickly began to redact and withhold significantly more information under this exemption, and the exemption may now be so wide it could include lobbying and influence-seeking communications of public import, rather than the type of proprietary, commercial and financial information it was intended to protect. Congress may wish to consider amending FOIA to clearly reinstate the “substantial competitive harm” standard for withholding information under Exemption 4. This reform already has bipartisan support in the Senate.

6. Ensure responsive records are preserved.

As it currently stands, FOIA itself does not create a clear, independent obligation for an agency to preserve the records potentially responsive to requests it receives. The Federal Records Act is a distinct statutory scheme that requires agencies to create plans to preserve specific types of records, but not all agency records that might be responsive to FOIA requests have to be preserved under the FRA.

And in practice, it is very difficult for a FOIA requester to sue an agency to rectify an FRA violation. In our experience, the lack of clear preservation requirements under FOIA can create challenges in connection with everyday, routine FOIA processing—and those challenges only increase at times of transition, such as when an agency head leaves the government or during the transition process after a presidential election.

Congress may wish to consider amending FOIA to require agencies to take reasonable steps to ensure such records are preserved until a response is issued, such as by suspending the deletion of such records and sending preservation notices to easily identifiable custodians of the records. Some agencies (such as the State Department) already take such steps, demonstrating that these requirements are feasible and not overly burdensome.

7. Subject government contractors' records to FOIA when they carry out important public functions.

The records of government contractors carrying out public functions are generally not considered agency records subject to FOIA. This creates a harmful lack of transparency on certain vital matters, particularly by preventing the disclosure of records from privately run immigration detention centers. The companies that run detention centers have enormous power over their detainees and have, in recent years, been consistently accused of abuse and inhumane conditions. Numerous individuals have died in these companies' custody, but their records are still shielded from public scrutiny. Congress may wish to consider taking steps to ensure that the records of these detention centers, and other similarly empowered contractors, are subject to release under FOIA.

8. Require agencies to post information about FOIA processing to facilitate requests.

Ironically, despite FOIA's core purpose of ensuring increased government transparency, agencies' processes for responding to requests is often a black box. Providing the public with better information about how their requests will be processed will not only enable them to make better requests in the first place, but it will also increase trust and encourage cooperation between agencies and requesters.

Congress may therefore consider requiring agencies to publicly disclose information regarding FOIA processing to help improve requesters' ability to seek records, including:

- a. Complexity tracking. If the agency has a tracking system based on complexity or other factors, it would aid requesters if such a system were clearly articulated and publicly available.
- b. Software/platforms. It would aid requesters for agencies to disclose what types of software or platforms they (or their contractors) use to process FOIA requests.
- c. Search term capacity. It would aid requesters for agencies to describe the kinds of searches they are capable of running, including keywords, Boolean operators, proximity searches, ability to exclude terms, etc.



These changes would go far in improving the ability of requesters to effectively receive documents, would clarify the requirements for agency FOIA personnel, and would ultimately result in greater transparency for all. We would be happy to discuss any of these suggestions with your staff, and look forward to working together to ensure that the next 50 years of FOIA will be as robust and transparent as possible.

Sincerely,

A handwritten signature in black ink that reads "Alissa Ellis". The signature is fluid and cursive, with the first name "Alissa" and last name "Ellis" clearly distinguishable.

Alissa Ellis
Strategic Partnerships Director
American Oversight



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Sincerely,

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Alissa Ellis
Strategic Partnerships Director
American Oversight