



# Department of Justice

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STATEMENT OF  
MELANIE ANN PUSTAY  
DIRECTOR  
OFFICE OF INFORMATION POLICY

BEFORE THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

AT A HEARING ENTITLED  
“WE THE PEOPLE: FULFILLING THE PROMISE OF OPEN GOVERNMENT FIVE YEARS  
AFTER THE OPEN GOVERNMENT ACT”

PRESENTED  
MARCH 13, 2013

**Melanie Ann Pustay  
Director  
Office of Information Policy  
U.S. Department of Justice**

**Committee on the Judiciary  
United State Senate**

**“We the People: Fulfilling the Promise of Open Government Five Years After the OPEN  
Government Act”  
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Good morning Chairman Leahy, Ranking Member Grassley, and Members of the Committee. I am pleased to be here today during Sunshine Week to discuss the OPEN Government Act of 2007 and the Department of Justice’s continued efforts this past year to assist agencies in improving their FOIA administration and ensuring that President Obama’s Memorandum on the FOIA and Attorney General Holder’s FOIA Guidelines are fully implemented. As the lead agency responsible for implementing the FOIA across the government, the Department of Justice is strongly committed to encouraging compliance with the Act by all agencies and to promoting open government.

As you know, this Sunshine Week we celebrate the fourth anniversary of the Attorney General’s FOIA Guidelines. Issued during Sunshine Week on March 19, 2009, the Attorney General’s FOIA Guidelines address the presumption of openness that the President called for in his FOIA Memorandum, the necessity for agencies to create and maintain an effective system for responding to requests, and the need for agencies to proactively and promptly make information available to the public. Stressing the critical role played by agency Chief FOIA Officers in improving FOIA performance, the Attorney General called on all Chief FOIA Officers to review their agencies’ FOIA administration each year and to report to the Department of Justice on the steps taken to achieve improved transparency.

The Chief FOIA Officer Reports continue to serve as an invaluable tool for assessing agencies’ implementation of the FOIA Guidelines. The Reports provide a detailed description of each agency’s efforts throughout the year to address the five key aspects of the Attorney General’s Guidelines. I highly recommend that the Committee review these [reports](#) to see the broad array of activities that agencies have undertaken to improve their FOIA administration.

OIP is responsible for providing guidance and direction to agencies on the content of their Chief FOIA Officer Reports, and each year as agencies’ implementation of the Guidelines has matured, including their application of the foreseeable harm standard, we have modified the requirements of the reports to build on the successes of the previous years. For example, focusing on the Attorney General’s foreseeable harm standard, we began by asking agencies to

report whether they had made any discretionary releases of information that otherwise would have been protectable under the FOIA. When we saw the direct link between making such releases and having a system in place to identify them, we issued guidance to agencies encouraging adoption of such a system. By 2012, ninety-seven of the ninety-nine agencies subject to the FOIA reported that they had a system in place in their FOIA processing for considering discretionary releases. For the 2013 Chief FOIA Officer Reports we took this milestone even further by adding a new requirement that agencies provide narrative descriptions or examples of the types of information they released as a matter of discretion.

I am very pleased to report to you today that based on our initial review of both the 2013 Chief FOIA Officer Reports and agency Annual FOIA Reports for Fiscal Year 2012, agencies have continued to take concrete steps to improve their FOIA administration. Specifically, these reports illustrate how agencies continue to effectively apply the presumption of openness called for by the President and described in the Attorney General's Guidelines, and the steps they have taken to improve efficiency in their FOIA processes, reduce backlogs, expand their use of technology, and proactively make more information available online. While there are always areas in which any given agency can do more, for the fourth straight year, agencies have shown that they are improving their FOIA administration and increasing transparency.

During Fiscal Year 2012, agencies were once again faced with an increase in the number of incoming FOIA requests, which rose from more than 640,000 in Fiscal Year 2011 to over 650,000 in Fiscal Year 2012. Notably, since Fiscal Year 2009, the number of FOIA requests received by the government has increased each year. The 651,254 requests received this past fiscal year are nearly 17% more than the 557,825 requests received during Fiscal Year 2009. Nonetheless, in response to this ever-increasing demand, agency FOIA offices once again increased the number of requests they processed this past fiscal year. During Fiscal Year 2012, the government processed 665,924 requests, which is 14,670 more than were received this year, and 34,500 more than were processed in Fiscal Year 2011.

Agencies' sustained efforts to keep pace with the ever-increasing number of incoming requests clearly paid off this past fiscal year as I am proud to report that the government overall achieved a 14% reduction in its request backlog, moving from 83,490 backlogged requests in Fiscal Year 2011 to 71,790 in Fiscal Year 2012. Reducing agency backlogs to even lower levels is an ongoing goal, but the reduction this past year is a milestone, particularly given the increases in incoming requests. Moreover, it is even more significant when compared with the backlog from Fiscal Year 2008, which were 130,419 requests. The backlog reduction achieved this past fiscal year represents a nearly 45% reduction from Fiscal Year 2008, which is the year before President Obama and Attorney General Holder issued their FOIA Memoranda.

This remarkable achievement can be attributed to the concerted efforts of many agencies that worked to reduce their backlogs. For example, at the Department of Homeland Security (DHS), the U.S. Citizenship and Immigration Services (USCIS) took multiple approaches to improve efficiencies in their FOIA process, including hiring additional FOIA staff and completing a Six Sigma study that highlighted specific areas of improvement. USCIS's efforts

resulted in a remarkable 70% reduction in backlog, and directly contributed to DHS's overall backlog reduction of 32.7%. In a similar effort, the Department of Defense (DOD) realized a backlog reduction of 12.2%, which marks the fifth straight year in which DOD reduced its backlog. The Department of Veterans Affairs also achieved a significant 22.5% reduction in backlog, as did the Department of Treasury (15.3%) and the Department of Health and Human Services (12.1%).

In addition to reducing the overall number of requests pending in their backlogs, agencies have also continued to focus on reducing the age of their oldest requests. In 2007, OIP instituted a specific backlog reduction goal: for each agency to close its ten oldest pending perfected requests every year. This goal ensures that agencies are answering the President's and Attorney General's call to respond to requests promptly. As you know, Congress reinforced the importance of this effort through the passage of the OPEN Government Act by codifying the requirement that agencies report on their ten oldest requests in their Annual FOIA Reports. Over half of the agencies reported in 2013 that they either closed their ten oldest pending requests or had no such requests to close. Moreover, many of those agencies that were not able to close their ten oldest requests this past fiscal year did make progress in this area by closing some. Fully embracing the importance of closing its oldest requests, this past year the Department of Education created a new team responsible for closing all of the agencies pending requests between Fiscal Years 2009 and 2010 by the close of Fiscal Year 2012. The team was able to successfully close seventy of the eighty-nine cases that fit this criterion. Similarly, the National Aeronautics and Space Administration reported that for the first time it closed all of its pending requests from the prior fiscal year and had no requests that were older than Fiscal Year 2012.

The OPEN Government Act also highlights Congress's desire for agencies to respond more timely to those requests that do not present "unusual" or "exceptional" circumstances (as those terms are defined in the FOIA), by limiting the fees that can be charged for such requests if an agency's response is untimely. To further this goal, OIP has encouraged agencies to focus on processing their "simple track" requests within twenty working days. Agencies are responding to this challenge. During Fiscal Year 2012 over sixty agencies reported processing their "simple track" FOIA requests within an average of twenty days or less and the government's overall average time for processing these requests was reduced by almost a full day to 22.66 days. This represents a significant reduction of over 5.5 days from the average of 28.34 days reported in Fiscal Year 2010. Moreover, in addition to improving processing times for "simple track" requests, during Fiscal Year 2012 agencies on average also reduced the time it took to process complex requests by over twenty-one days. Moreover, as agencies work to reduce backlogs and process the record numbers of requests they receive more efficiently, they have also continued to maintain a high release rate. Indeed, during Fiscal Year 2012, the government released records in full or in part in response to 93.4% of requests where records were located and processed for disclosure, marking the fourth straight year in which such a high release rate has been achieved.

Fully implementing the President's directive to apply the FOIA with a presumption of openness, as well as the Attorney General's foreseeable harm standard, the majority of agencies in 2013 reported making discretionary releases of information. As mentioned above, for 2013

we asked agencies to provide examples of the types of records released as a matter of discretion. As detailed in their Chief FOIA Officer Reports, the Department of Agriculture (USDA) released a variety of material that could have been protected under Exemption 5 of the FOIA such as records concerning the Department's briefings, talking points, draft letters, and notes taken during enforcement proceedings. Similarly, DHS's Privacy Office released thousands of pages of records concerning the "Occupy Wall Street" movement. The Federal Emergency Management Agency released information pertaining to flood mapping documents, internal memoranda and reports on policy issues, and grant application evaluation sheets. In another example, the Department of Interior's (DOI) Bureau of Land and Management made discretionary releases of information concerning the North Steens 230-kV Transmission Line Project and items related to the Economic Analysis of Critical Habitat Designation for the Northern Spotted Owl. DOI's Fish and Wildlife Service released material on the impact of wind turbines on migratory birds, including information on bird and bat mortality. These are only a few of the examples provided in agencies' Chief FOIA Officer Reports and I would again urge the Committee to review each agencies' report for a more complete picture.

Agencies also continue to meet the demand for public information by proactively posting more material that is of interest to the public online. For example, at the Department of Commerce, the FOIA office for the National Oceanic and Atmospheric Administration (NOAA) partnered with NOAA's Central Library office, to post information on the Deepwater Horizon Oil Spill in its online Library catalog. At DOD, the Department of the Army posted an internal investigation on Agent Orange, an ecological report on the Missouri River Mainstream Reservoir, a Historical Review of Chemical/Biological Weapons, and a Fire Cause and Origin Report-Aberdeen Proving Ground. Among other things, the Department of the Navy posted the inspection report for the Naval Post Graduate School as well as Naval Research Laboratory video and photos. The National Security Agency (NSA) recently posted its 60th anniversary publication entitled "National Security Agency: 60 Years of Defending our Nation." The publication includes an interactive DVD with 250 declassified documents, seven audio recordings, two videos, and over 150 photographs. One hundred and ninety-six of the documents in the publication were released for the first time. Additionally, the Federal Communications Commission began modernizing its forty year-old public inspection file rules, which for the first time placed over 550,000 public disclosure documents associated with TV stations into one easy to use portal. Over 250,000 of these documents were previously not available anywhere online. Finally, as a major multi-year project, the U.S. Copyright Office is making historical copyright records created between 1870 and 1977 available online in a searchable form. The Copyright Office has already imaged nearly twenty-three million index cards for copyright registrations and assignments from 1955 to 1977, and has finished digitizing all 667 volumes of the Catalog of Copyright Entries from 1891 to 1978.

In addition to proactively posting new information online, agencies also continue to take steps to make the information on their websites more useful to the public. For example, USDA's National Agricultural Library launched the [Life Cycle Assessment \(LCA\) Digital Commons](#), an online resource that provides assessments of the potential impacts for a given agricultural product, process, or activity throughout its entire life span. The website offers the public fully

searchable access to a broad inventory of peer-reviewed, standard-formatted United States Life Cycle Assessment data.

Taking advantage of direct public feedback and usability testing, in October 2012 the Department of Transportation (DOT) redesigned its website to make it easier for the public to find information. The redesign makes it easier for users to view DOT's webpage on their mobile devices and DOT's new topic and audience pages are now among the most visited areas of its website. DOT also added a feedback button on every single page of its website encouraging visitors to provide suggestions for further improvement. The Social Security Administration, Federal Maritime Commission, Inter-American Foundation, National Labor Relations Board, and many other agencies have similarly taken steps to revamp their websites to make them more user-friendly and to improve searchability.

I am particularly pleased to report to you on the successes achieved by the Department of Justice this past year. During Fiscal Year 2012, the Department received a record high 69,456 FOIA requests, over 6,300 more than were received in Fiscal Year 2011. This also marks the fourth straight year in which the Department has received over 61,000 requests. In response to these historically high numbers of incoming requests, the Department's dedicated FOIA offices once again increased the number of requests they processed during the year. In Fiscal Year 2012, the Department processed over 4,500 more requests from 63,992 in Fiscal Year 2011 to 68,531. This increase in processing helped the Department meet the rising tide of incoming requests, so that while our backlog did go up, it increased by only 1,380, despite receipt of over 6,300 more requests.

This past fiscal year also marked the fourth straight year in which the Department maintained a high release rate of 94.3% for all requests where records were located and processed for disclosure. Perhaps even more significant, in response to 74.8% of these requests, the Department released records in full with no exemptions applied. We also closed our ten oldest pending requests from the prior fiscal year and improved the average processing times for both simple and complex FOIA requests. Notably, during Fiscal Year 2012, the Department processed all of its "simple track" requests within an average of 18.9 days.

Further, this past year the Department continued to lead by example in making proactive disclosures and using technology to disseminate information to the public. For example, the Department posted the most recent FOIA Logs for its senior management offices, including the Offices of the Attorney General, Deputy Attorney General and Associate Attorney General, in both a searchable pdf and open CSV format. By posting the FOIA Logs in an open format, members of the public can easily sort through and manipulate the data. The Bureau of Alcohol, Tobacco, Firearms and Explosives began posting the list of all active Federal Firearms Licensees (FFLs) on a monthly basis. Additionally, the Federal Bureau of Investigation continued to update its massive FOIA Library known as "The Vault." Launched in April 2011, The Vault initially posted records on 240 subjects and now has nearly 500. In addition to posting new information on their websites, many of the Department's components such as the Federal Bureau of Prisons and the Executive Office for Immigration Review either updated or redesigned their

websites to make them more user friendly. Finally, several of the Department's components maintain a very active social media presence, reaching new audiences in different ways.

My Office, the Office of Information Policy (OIP), carries out the Department's statutory responsibility to encourage compliance with the FOIA. We have been actively engaged over the years in a variety of initiatives to inform and educate agency personnel on the legal requirements of the FOIA, including all the provisions of the OPEN Government Act, as well the policy directives from the President and the Attorney General.

As you know, the OPEN Government Act amended several provisions of the FOIA. Among other things, the Act added additional reporting requirements for agencies' Annual FOIA Reports, required agencies to assign tracking numbers to certain requests and provide requesters with status updates, added new obligations to mark documents and to route misdirected requests, and provided standards and limitations on tolling FOIA response times and assessing certain fees.

Promptly after the passage of the OPEN Government Act, my Office issued guidance to agencies explaining each of the changes that were made to the statute. We then followed this up with a series of detailed guidance articles issued in 2008 that address each of the changes made to the statute in detail. To reinforce this guidance and ensure compliance with the OPEN Government Act provisions, OIP held three government-wide conferences specifically addressing various aspects of the FOIA amendments. The changes were also thoroughly discussed in our 2009 edition of the United States Department of Justice Guide to the FOIA. Since then, the changes made to the law by the OPEN Government Act have been fully integrated into all of our regular training and guidance to agency FOIA professionals.

Similarly, within two days of the issuance of President Obama's FOIA Memorandum, OIP sent initial guidance to agencies informing them of the significance of the President's directive and advising them to begin applying the presumption of disclosure immediately to all decisions involving the FOIA. Following the issuance of the Attorney General's FOIA Guidelines, OIP issued extensive written guidance which provided agencies with concrete steps to use and approaches to follow in applying the presumption of openness. Over the past four years, OIP has provided training to thousands of agency personnel. We have also issued guidance on steps to take in fulfilling the President's and Attorney General's transparency directives, as well as a range of other issues relating to the FOIA. Both the guidance my Office has issued and the training we provide has continuously been updated over the past four years to address the application of the Attorney General's Guidelines in light of agencies' maturation in implementing the policy as well as new developments in the law.

We continue to reach out to the public and the requester community. In 2009, OIP began holding roundtable meetings with interested members of the FOIA requester community to engage in a dialogue and share ideas for improving FOIA administration. In response to concerns raised by the FOIA requester community OIP has, on multiple occasions, issued policy guidance to all agencies to specifically address those concerns.

I have also continued to reach out to, and individually meet with, the Chief FOIA Officers of those agencies that receive and process the overwhelming share of the government's FOIA requests. Additionally, I regularly join the Acting Associate Attorney General, who is the highest-ranking Chief FOIA Officer in the government, in meeting with these Chief FOIA Officers to discuss the implementation of the Attorney General's FOIA Guidelines and other open government initiatives. These meetings have become an invaluable opportunity for the Chief FOIA Officers to hear directly from the Department of Justice as we promote the goals of the President's and the Attorney General's directives and reinforce our joint commitment to openness and transparency.

In an additional effort to assist agencies in improving the government's FOIA administration, OIP has developed, in collaboration with interested agency representatives, a list of [FOIA Best Practices](#) which in turn has been used as a basis for further training of agency personnel. Moreover, OIP continues to hold meetings of its FOIA Technology Working Group and has led the effort to maximize agencies' ability to utilize advanced technology to streamline the core tasks of processing requests. During these meetings, the Group has engaged in robust discussions about the tools and applications available to assist with FOIA processing, including technology to aid in the search and review of documents, shared platforms that allow for simultaneous review and comment on documents, and electronic capabilities that automatically identify duplicative material.

The advantages seen by automating these processes are clearly evident. Conducting an adequate search for responsive records often involves the review of both paper and electronic records originating with multiple employees throughout the agency. In turn, these searches can locate hundreds, if not thousands, of pages of material that need to be reviewed for both responsiveness and duplication before a FOIA disclosure analysis can be conducted. Employing electronic systems that can consolidate and perform some of these necessary administrative tasks allows the Department's FOIA staff to focus their efforts on reviewing responsive material and responding to requesters more promptly. This has great potential to improve timeliness in responses and reduce backlogs.

Recognizing the potential impact of leveraging this type of technology to streamline FOIA processing efforts, this past year OIP partnered with the Department's Civil Division to conduct a digital-FOIA pilot program. During the pilot, we compared status-quo processing techniques with digital processes to assess their impact and build the business case for their use. Just a few weeks ago, OIP hosted a seminar to present the results of this pilot to agency representatives with the aim of enhancing awareness of the possibilities these technologies hold for increased efficiencies across the government.

OIP is also engaged in efforts to make systemic improvements to the procedures used by agencies to become transparent, which will expand the public's access to information. Just this week, in keeping with the President's and Attorney General's emphasis on both proactive disclosures and greater use of technology, OIP issued new agency-wide guidance that lays the groundwork for enabling easy aggregation of FOIA data into a government-wide FOIA Library where all the records posted by agencies in FOIA Libraries across the government can be easily accessed in one place. This will be done through the use of a uniform metadata "FOIA tag"

assigned to all FOIA processed records that are posted online in agency FOIA Libraries. With the addition of a uniform metadata tag, records can reside on individual agency websites, where they most naturally would be maintained and, utilizing the uniform metadata tags, search engines can scroll across all government websites to identify all the records on a given topic that have been posted by an agency in its FOIA Library. Once implemented, this uniform metadata tagging will help make it easier for the public to readily access the information that agencies are posting online in their FOIA Libraries, including frequently requested records processed under the FOIA.

In addition to encouraging agency compliance with the FOIA statute and with the Attorney General's Guidelines through comprehensive guidance and training, OIP has also undertaken several initiatives to increase agency accountability. Just this year, OIP instituted a new quarterly reporting requirement for all agencies. Starting with this current fiscal year, agencies must report four key FOIA statistics each quarter, thereby allowing for a more real-time assessment of the flow of FOIA requests handled by the government throughout the year. The four key statistics are the numbers of requests received, processed, and in an agency's backlog for that quarter, as well as the status of the agency's ten oldest pending requests. This new reporting requirement will not only provide the public with more timely access to important FOIA data, but will also assist agencies and agency components in actively assessing the state of their FOIA caseloads in order to take the appropriate measures to reduce backlogs and improve timeliness.

In 2012, for the second straight year, OIP conducted a formal assessment of agencies' FOIA administration by scoring all ninety-nine 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 meeting the demands of their FOIA operations, OIP intentionally used a wide range of milestones to more completely capture every agency's efforts. We post the assessment each year, along with a summary of agency activity and guidance for further improvement.

Finally, FOIA.gov continues to revolutionize the way in which FOIA data is made available to the public. While it was initially a project undertaken by the Department in response to a strong interest by open government groups to have a "dashboard" that illustrates statistics collected from agencies' Annual FOIA Reports, the Department almost immediately began to expand its capabilities and we continue to add new features every year. With well over a million visitors since it was launched in March 2011, the website has become a valuable resource for both the requester community and agency FOIA personnel. The website takes the detailed statistics contained in agency Annual FOIA Reports and displays them graphically. FOIA.gov allows users to search and sort the data in any way they want, so that comparisons can be made between agencies and over time. This past year we continued our efforts to enhance FOIA.gov to provide additional resources and up-to-date information for the benefit of the public. Just this past January, the Department redesigned the "Reports" page of the website to feature Snapshot Reports of Annual FOIA Report data and the new Quarterly Report data that agencies are now required to provide. Additionally, we have added the data from agencies' Fiscal Year 2012

Annual FOIA Reports so that they too can now be sorted and compared by agency and over time. New charts and graphs show the evolution of key FOIA statistics over the past five fiscal years. FOIA.gov also continues to be updated with recent FOIA news and spotlights on the new releases agencies have made that are likely to be of interest to public.

FOIA.gov also serves as an educational resource for the public by providing useful information about how the FOIA works, where to make requests, and what to expect through the FOIA process. Explanatory videos are embedded into the site and there is a section addressing frequently asked questions and a glossary of FOIA terms. The website also serves as a central location for all the resources a requester needs to make a request to any agency subject to the FOIA. The website includes FOIA contact information for each agency, including their Chief FOIA Officer and all their FOIA Requester Service Centers and FOIA Public Liaisons. Additionally, hyperlinks to agency online request forms are provided so that requesters can begin making their requests right from FOIA.gov. As agencies look for ways to improve the FOIA process and to increase efficiency, many have developed the capability to accept FOIA requests online. Currently there are over 100 offices throughout the government that provide this capability and all of their online forms are available on FOIA.gov.

Last year the Department expanded the scope of services offered by FOIA.gov in yet another way by adding a search feature designed to help the public locate information that agencies have already posted online. FOIA.gov's "Find" feature allows users to enter search terms on any topic of interest, which FOIA.gov then searches for across all federal government websites. The "Find" feature captures not just those records posted in agency FOIA Libraries, but also records posted anywhere on an agency's website. Further, with our new guidance on the use of FOIA metadata tagging, the Department will be enhancing this search capability even further by allowing for a targeted search of documents located in FOIA Libraries. Through these features, FOIA.gov will continue to provide the public with an easy way to first see what information is already available on a topic and potentially preclude the need for a FOIA request to be made in the first place. These features also allow requesters the ability to make more targeted requests by reviewing the information that is already available on a topic.

Looking ahead, agencies submitted their Fiscal Year 2012 Annual FOIA Reports in February and have just completed their 2013 Chief FOIA Officer Reports. OIP has begun its reviews of both these reports, and we will assess where agencies stand in their ongoing efforts to continue improving the government's overall FOIA administration and sustaining the many achievements we have made thus far. We will also continue our outreach to both the requester community and agencies on the important goal of improving transparency. As I stated earlier, the Department is fully committed to achieving the new era of open government that the President envisions. We have accomplished a great deal these past four years, but OIP will continue to work diligently to help agencies achieve even greater transparency in the years ahead.

In closing, the Department of Justice looks forward to working together with the Committee on matters pertaining to the government-wide administration of the FOIA. I would

be pleased to address any question that you or any other Member of the Committee might have on this important subject.