U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

April 4, 2018

The Honorable Charles E. Grassley
Chairman

The Honorable Sheldon Whitehouse
Committee on the Judiciary
United States Senate

Subject: GAO Responses to Post-Hearing Questions on the Freedom of Information Act

Thank you for the opportunity to testify before the Senate Committee on the Judiciary on March 13, 2018, to discuss the Freedom of Information Act (FOIA). The attached enclosure provides GAO's responses to your questions for the record. If you have any questions, please contact me at (202) 512-9286 or pownerd@gao.gov.

Sincerely yours,

David A. Powner
Director
Information Technology Management Issues

Enclosure

Post-Hearing Questions for the Record
Submitted to David Powner
From Senator Charles Grassley

"The Freedom of Information Act: Examining the Administration's Progress on Reforms and Looking Ahead"
Committee on the Judiciary
March 13, 2018
Washington, D.C.

Questions for the Record

1. **When GAO conducted its recent FOIA audit, did you get the sense that the interoperability requirement for the FOIA Portal was a top priority in its development? What observations can you provide?**

   Our recent FOIA audit did not determine that interoperability requirements had been given top priority during development of the FOIA portal. The Office of Management and Budget (OMB) and the Department of Justice (Justice) worked to develop the national FOIA portal, which was launched on March 8, 2018. In doing so, OMB and Justice gave priority to delivering the basic functionality of the portal rather than to establishing requirements for its interoperability. Since the portal's launch, we have observed, for example, that the portal does not allow for interoperability between it and all agencies' FOIA systems for submitting a request. Specifically, 8 of the 18 agencies included in our FOIA compliance study FOIA's systems were not linked to the national FOIA portal for submitting FOIA requests.

2. **Was it surprising to find so many claimed (b)(3) exemptions that do not comply with the OPEN FOIA Act of 2009? Do you have any observations about the practical or legal consequences of this issue?**

   Our work identified a significant number of (b)(3) exemptions that did not comply with the OPEN FOIA Act. The 2009 amendments to FOIA required that statutes enacted after 2009 refer specifically to FOIA to qualify as a (b)(3) exemption. For the years reviewed (fiscal years 2010-2016), we identified 237 statutes used by federal agencies as the basis for withholding information when responding to FOIA requests. However, among these, we found that 86 statutes enacted after 2009 did not refer to FOIA, as required.

   Although we identified these statutes that did not refer to FOIA, we did not perform additional analysis regarding the practical or legal consequences of our finding. We observed in our work, that agencies are faced with a difficult decision when responding to FOIA requests. Specifically, agencies must decide either to withhold information as required by a particular statute or disclose the requested information if the statute does not cite to paragraph (b)(3), as required by the 2009 amendments to FOIA. Justice, in its oversight role, may be best positioned to assist agencies in making this decision.

3. **Do you have anything else to add on how we can improve FOIA across the government?**

My testimony discussed several recommendations, being made in our draft report out for agency comments, to selected agencies for improving their FOIA operations and ensuring that requirements are implemented. In particular, these recommendations relate to posting records online, designating chief FOIA officers, updating regulations consistent with requirements, and developing plans to reduce backlogs.

Further, FOIA oversight organizations, such as the Department of Justice's Office of Information Policy and the Chief FOIA Officers Council, established by FOIA, can play an important role in assisting agencies with effectively implementing FOIA requirements. As stated during my testimony, organizations such as the Chief Information Officers Council can contribute to agencies' success when addressing persistent agency challenges and weaknesses by, among other things, bolstering government-wide progress.

Post-Hearing Questions for the Record
Submitted to David Powner
From Senator Sheldon Whitehouse

"The Freedom of Information Act: Examining the Administration's Progress on Reforms and Looking Ahead"
Committee on the Judiciary
March 13, 2018
Washington, D.C.

Questions for the Record

1. **At last week's hearing, I brought up the trend of agencies either removing formerly public documents from their websites or failing to update publicly available documents, thereby making it necessary for the public to use the Freedom of Information Act (FOIA) to access such documents, adding to the FOIA backlogs.**
    a. **Has your office tracked the number of FOIA requests that have been filed for documents that were formerly available publicly? If so, what is that number? If not, why not?**

    To date, we have not conducted work that tracked the number of FOIA requests that have been filed for documents that were formerly available publicly. The requested reviews we have undertaken focused on agencies compliance with specific FOIA requirements, as represented in our written statement.

    b. **In your view, to avoid this problem, and in the interest of transparency and efficiency, would it be advisable to pass legislation mandating the proactive disclosure of certain ordinary-course executive branch documents? What would be the pros and cons of such legislation?**

    We have not conducted work that would allow us to take a position on this issue. It is important to note, however, that current FOIA legislation requires agencies to proactively disclose agency records. According to the Department of Justice's Office of Information Policy, agencies are to affirmatively and continuously disclose records proactively.

    Further, the Department of Justice *Guide to the Freedom of Information Act on Proactive Disclosures* states that agencies should make their records publicly available without waiting for specific requests from the public. The guidance also states that agencies should exercise their discretion to make a broader range of records available beyond the minimum required by the statute. In addition, Justice's guidance states that all proactively disclosed records should, to the extent practicable, be posted online on agency websites.

2. **Is redaction of a Department employee's official email address an appropriate use of FOIA Exemption 6? Why or why not? How would**

disclosure of an official government email address "constitute a clearly unwarranted invasion of personal privacy"? 5 U.S.C. 552(b)(6).

We have not conducted work that would enable us to assess whether or not the disclosure of a government employee's email address is an invasion of personal privacy. FOIA, using exemption 6, allows an agency to withhold agency records that are personnel and medical files, and similar files. In such a case, the agency would have to determine that the disclosure of these records would constitute a clearly unwarranted invasion of personal privacy. Our work examining FOIA compliance has not evaluated the appropriateness of agencies' uses of FOIA exemptions.

3. **Last year, a nonprofit organization filed suit against the Department of Health and Human Services (HHS) and the Office of Management and Budget (OMB) seeking the release of records of their communications with Congress regarding health care reform legislation. After a federal judge ordered the production of those records, the agencies produced heavily redacted versions of those communications with Congress, claiming deliberative process protection under FOIA Exemption 5, which exempts "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5).**
    a. **Was this an appropriate use of FOIA Exemption 5?**
    b. **Vis-à-vis HHS and OMB, is Congress an "agency" for purposes of FOIA Exemption 5, such that communications between Congress and HHS/OMB could constitute "inter-agency or intra-agency" communications? What legal basis is there for that position?**
    c. **If Congress is not an "agency," how can Exemption 5 apply to these requests?**
    d. **Has the Supreme Court ever recognized Congress as a "consultant" for the executive branch for purposes of FOIA's Exemption 5?**

Our recent FOIA work has not addressed the merits of dispositions of specific FOIA requests, so we cannot comment on this case. Also, because the matter is in litigation, we defer to the Department of Justice for any comments on this issue.

4. **As detailed in the Government Accountability Office's submitted report, agency compliance with various FOIA requirements is far from perfect, and some agencies flatly acknowledge their inability or unwillingness to comply with certain requirements. How can we better ensure agency compliance with FOIA requirements, for instance, the requirement that repeatedly requested information be publicly posted?**

My testimony discussed several actions that agencies can take to ensure better compliance with FOIA requirements. For example, oversight organizations, such as Justice's Office of Information Policy and the Chief FOIA Officers Council, established by FOIA, play an important role in assisting agencies with effectively implementing FOIA requirements. These organizations, as well as the National Archives and Records Administration's Office of Government Information

Services, can assist with ensuring agencies are compliant with FOIA requirements by, for example, periodically conducting FOIA compliance reviews.

In addition, our draft report pointed out that the majority of agencies we reviewed are posting records online as required by FOIA. However, three agencies—the Department of the Interior, the National Aeronautics and Space Administration, and the National Transportation Safety Board—had posted some, but not all of the required records online for the areas reviewed. As such, GAO made recommendations to these agencies to post records online in all required categories. We plan to continue to follow up on the agencies actions to implement our recommendations.

5. **In your view, would it be advisable to "limit the number of FOIA requests from any one group," as the Bureau of Land Management recently proposed? What interests would that serve?**

   Our current and past work on FOIA implementation has not examined the potential for, or impact of, limiting the number of FOIA requests that agencies receive. As such, we are not positioned to comment on whether it would be advisable to do so.

6. **When making determination about whether to withhold or redact materials sought pursuant to a FOIA request, what presumptions should apply regarding whether to produce versus withhold the information?**

   FOIA requires federal agencies to provide the public with access to government records and information based on the principles of openness and accountability in government. However, FOIA also authorizes agencies to utilize one of nine exemptions to withhold portions of records, or the entire record if it is determined that disclosure of the requested information would harm an interest related to certain protected areas. Further, regarding the presumption of openness, Justice's guidance states that, to the extent practicable, agencies should post records that may be of interest to the public on their websites before a FOIA request is made. By doing so, agencies may be better positioned to ensure efficient and ongoing compliance with FOIA's proactive disclosure provision.

7. **Last week, the Associated Press reported that the "federal government censored, withheld or said it couldn't find records sought by citizens, journalists and others more often last year than at any point in the past decade."**
   a. **What explains this recent drop-off in production of responsive materials?**

      Our reviews have not included an in-depth examination of the dispositions used when responding to FOIA requests. Thus, we are not positioned to explain the drop-off in production of responsive materials.

   b. **Given advances in technology, shouldn't it now be easier for agencies to locate responsive material, not harder?**

Given recent advances in technology, agencies should be better positioned to locate responsive materials. Agencies are required by the Office of Management and Budget and the National Archives and Records Administration *Managing Government Records Directive* to develop and begin to implement plans to manage all permanent electronic records in an electronic format. Agencies have until December 31, 2019 to meet this requirement. The directive states that agencies should consider the benefits of digitizing permanent records created in hard-copy format or other analog formats (e.g., microfiche, microfilm, analog video, and analog audio).

In our report, *Information Management: Additional Actions Are Needed to Meet Requirements of the Managing Government Records Directive*, we discussed agencies progress with managing all permanent electronic records in electronic format.[1] We noted that 23 of 24 selected federal agencies had taken steps to develop systems for managing permanent electronic records in electronic format. [2]

8. **The Associated Press also reported that "in more than one-in-three cases, the government reversed itself when challenged and acknowledged that it had improperly tried to withhold pages. But people filed such appeals only 14,713 times, or about 4.3 percent of cases in which the government said it found records but held back some or all of the material."**
    a. **Does this high reversal rate concern you? Does it suggest that agencies are presumptively withholding or redacting information when they should be presumptively disclosing it?**

    Our review did not examine the number of administrative appeals or the disposition of those appeals. As such, we are not positioned to comment on this matter.

    b. **What internal auditing processes exist to review agency FOIA determinations, absent the filing of an appeal?**

    Our review did not include an examination of any internal auditing processes that exist for reviewing agencies' FOIA determinations.

[1]GAO, *Information Management: Additional Actions Are Needed to Meet Requirements of the Managing Government Records Directive,* GAO-15-339 (Washington, D.C.: May 14, 2015).

[2]The 24 major federal agencies covered by the Chief Financial Officers Act of 1990 are the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, the Treasury, and Veterans Affairs; Environmental Protection Agency; General Services Administration; National Aeronautics and Space Administration; National Science Foundation; Nuclear Regulatory Commission; Office of Personnel Management; Small Business Administration; Social Security Administration; and U.S. Agency for International Development.