



441 G St. N.W.  
Washington, DC 20548

October 4, 2022

The Honorable Richard J. Durbin  
Chairman  
Committee on the Judiciary  
United States Senate

**Subject:** Response to Questions for the Record; Hearing Entitled “The Freedom of Information Act: Improving Transparency and the American Public’s Right to Know for the 21st Century”

Dear Mr. Chairman:

This letter responds to your September 20, 2022 request that I address eight questions for the record related to the Senate Committee on the Judiciary’s March 29, 2022, hearing on improving the federal government’s implementation of the Freedom of Information Act. My response to these questions, which is in the enclosure, is based on GAO’s previous work, ongoing work, and knowledge on the subject raised by the questions.

If you have any questions about the responses or need additional information, please contact me at 202-512-6806 or [McTigueJ@gao.gov](mailto:McTigueJ@gao.gov).

Sincerely yours,

A handwritten signature in black ink that reads "James R. McTigue, Jr." with a stylized flourish at the end.

James R. McTigue, Jr.  
Director, Tax Policy and Administration  
Strategic Issues Team

Enclosure

**Written Questions for the Record – Mr. James McTigue, Jr.  
Submitted by Senator Patrick Leahy  
April 5, 2022**

1. **During your testimony, you identified complex requests and the significant increase in FOIA litigation as two of the primary reasons why the government-wide FOIA backlog has increased nearly 79% since 2012. In addition, your written testimony indicated some agencies have been unable to address backlogs because of the loss of staff or due to the increasing workload agency FOIA personnel are experiencing.**

**a. What do you think is contributing to the increased number of complex requests agencies are processing?**

While our audit work did not explore the broader factors driving requesters to make certain types of FOIA requests, agency officials told us about several factors that contributed to the increased number of complex requests. These factors include:

- Increases in requests seeking access to large amounts of data or requiring additional communications between staff or coordination among multiple agency components.
- Increases in requests for duplicate or near-duplicate records, which increase the complexity of the review and length of time, needed to process the request.
- Increases in requests which require gathering documents from multiple locations or additional negotiations with requesters.
- Increases in multi-part requests or requests with national security sensitivities which require more review, coordination, and pre-release collaboration.

**b. You also mentioned in your testimony that most FOIA litigation is filed because of an agency's inability to meet the statutory timeline. What have you observed about the complex request processing time increases from 2019 to 2020?**

In our January 2022 report, we found that the processing time for complex requests government-wide increased from an average of 120 to 127 days, and an estimated median of 43 to 51 days from fiscal years 2019 to 2020.<sup>1</sup> However, both of these years showed a decrease from the higher numbers in fiscal years 2017 (average of 139 days, estimated median of 109 days) and 2018 (average of 143 days, estimated median of 103 days). We discuss factors contributing to the number of complex requests in our response to 1(a).

Among our selected agencies, complex request processing time changes varied from fiscal years 2019 to 2020, respectively.

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<sup>1</sup>GAO, *Freedom of Information Act: Selected Agencies Adapted to the COVID-19 Pandemic but Face Ongoing Challenges and Backlogs*, GAO-22-105040 (Washington, D.C.: January 26, 2022).

- At the Department of Agriculture, average days for complex requests rose to 168, while estimated median days fell from 45 to 40.
- At the Department of Homeland Security (DHS), average days for complex requests rose from 66 to 74, and estimated median days rose from 43 to 51.
- At Customs and Border Protection, average days for complex requests rose from 107 to 162, and estimated median days rose from 27 to 46.
- At the Department of Justice, average days for complex requests rose from 215 to 228, while estimated median days fell from 100 to 78.
- At the Federal Bureau of Investigation (FBI), average days for complex requests rose from 250 to 286, while estimated median days fell from 144 to 135.
- At the Department of Labor (DOL), average days for complex requests fell from 55 to 53, while estimated median days rose from 13 to 17.
- At the Environmental Protection Agency (EPA), average days for complex requests rose from 118 to 220, and estimated median days rose from 44 to 67.

**c. Which agencies has GAO surveyed that have made improvements in reducing their backlog? Are there lessons learned from these agencies that could be useful for other agencies who are struggling to meet their responsibilities under FOIA?**

Among our selected agencies, EPA has seen a consistent decline in its FOIA request backlog since peaking in 2018. We found that EPA’s backlog reduction planning efforts addressed all of GAO’s key practices for the use of performance information in addressing major management challenges, including establishing performance goals and indicators to measure progress, identifying planned actions and milestones to address the major management challenge, and naming a responsible agency official or office for resolving the challenge.<sup>2</sup> For example, EPA established a long-term performance goal and performance measures in its FY 2022-2026 Strategic Plan to eliminate its FOIA request backlog by September 30, 2026 and set monthly and quarterly milestones related to backlog reduction. EPA documented planned actions it would take to reduce its backlog and established a responsible office for addressing the backlog. Taking these or similar steps in alignment with GAO key practices for addressing major management challenges could potentially help other agencies struggling to meet their responsibilities under FOIA.

2. During the hearing, you noted that resources are “always an issue” and that investment in technology must be continuous. You also noted that you’ve heard from a number of agencies that investment in people is crucial to operate the systems and technology, such as training staff in complex information retrieval and data management systems.

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<sup>2</sup>GAO, *Managing for Results: Agencies Need to Fully Identify and Report Major Management Challenges and Actions to Resolve Them in Their Agency Performance Plans*, GAO-16-50 (Washington, D.C.: June 15, 2016).

- a. Are these challenges uniform across the government, or are they individualized to each agency and their own technological systems for data retrieval?**

Our review of FOIA operations at selected agencies found technology challenges were generally similar in nature, but these findings may not be generalizable to the rest of the federal government.<sup>3</sup> For example, selected agency officials with whom we spoke attributed some of the increase in FOIA-related costs to technology investments and software licenses. FBI and DHS officials identified outdated FOIA processing systems as a challenge to reducing their FOIA request backlogs. DOL had also identified a need to update its FOIA processing system, and began implementing a new system prior to the pandemic which launched between August and October 2020. Additionally, FBI faced a unique challenge given its dual law enforcement and intelligence mission, which requires staff to handle large volumes of sensitive and classified records that must be processed on site.

- b. Is there anything Congress can do to ensure that agency systems are updated to reflect the technological needs of today, particularly in the realm of training agency staff to process the increasingly complex requests?**

*In Freedom of Information Act: Selected Agencies Adapted to the COVID-19 Pandemic but Face Ongoing Challenges and Backlogs*, we noted that the FOIA Advisory Committee has identified technology as an ongoing challenge, and is considering potential solutions and best practices for processing FOIA requests and meeting the needs of FOIA requesters.<sup>4</sup> The Chief FOIA Officers Council has established a committee to study the utilization and deployment of technology in FOIA programs as well. However, we have not evaluated the recommendations or best practices made by these committees.

- c. Are there any agencies that have done a particularly good job in meeting these new challenges that might serve as a model for other agencies?**

We have not evaluated agencies for their effectiveness in using technology to enhance FOIA operations. As we stated in our response to 2(b), the FOIA Advisory Committee and Chief FOIA Officer Council are examining these issues.

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<sup>3</sup>GAO, *Freedom of Information Act: Selected Agencies Adapted to COVID-19 Challenges but Actions Needed to Reduce Backlogs*. GAO-22-105845. (Washington, D.C.: Mar. 29, 2022).

<sup>4</sup>GAO-22-105040

**Senate Judiciary Committee**  
**“The Freedom of Information Act: Improving Transparency and the  
American Public’s Right to Know for the 21st Century”**  
**Questions for the Record**  
**Senator Amy Klobuchar**

**For James McTigue, Director, Strategic Issues, Government Accountability Office**

**The CARES Act included a provision directing the Government Accountability Office to monitor and oversee the government’s response to the COVID-19 pandemic. You authored a report from January 2022 which stated that during the pandemic, although agencies received and processed fewer FOIA requests, backlogs continued to grow.**

- **Based on what you have learned, are there any systemic improvements which can be recommended to improve FOIA compliance across all agencies in the executive branch?**

Prior GAO work has found that agencies across the Executive Branch can improve Freedom of Information Act (FOIA) compliance by taking steps to 1) improve compliance with proactive disclosure requirements, 2) address gaps in backlog reduction plans, and 3) reassess reporting requirements to collect more information on current and emerging challenges around FOIA processing.<sup>5</sup>

In March 2021, we recommended that selected agencies fully update policies and processes to reflect current proactive disclosure requirements and report complete and accurate information on their proactive disclosures.<sup>6</sup> Taking these steps would help enhance government transparency and the efficient use of agency resources. As of September 2022, recommendations we made to the Department of Housing and Urban Development, the Federal Aviation Administration, and the Veterans Health Administration related to proactive disclosures remained open.

Regarding backlog reduction plans, we reported in 2018 and more recently in January 2022 that selected agencies varied in the extent to which their plans addressed best practices for backlog reduction and performance management.<sup>7</sup> FOIA request backlogs have been a long-standing issue in the Executive Branch, and requirements for developing backlog reduction plans date back to 2005. In 2018 we made eight backlog-related recommendations for selected agencies to address the need to develop and

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<sup>5</sup>For more information on prior GAO work in these areas, see *GAO, Freedom of Information Act: Actions Needed to Improve Agency Compliance with Proactive Disclosure Requirements, GAO-21-254 (Washington, D.C.: Mar. 10, 2021)*; *Freedom of Information Act: Agencies Are Implementing Requirements, but Additional Actions Are Needed, GAO-18-365 (Washington, D.C.: June 25, 2018)*; and *Freedom of Information Act: Selected Agencies Adapted to the COVID-19 Pandemic but Face Ongoing Challenges and Backlogs, GAO-22-105040 (Washington, D.C.: Jan. 26, 2022)*.

<sup>6</sup>GAO-21-254.

<sup>7</sup>GAO-18-365; GAO-22-105040.

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document a backlog reduction plan. In 2022, we made three additional recommendations that selected agencies take steps to improve backlog reduction efforts. As of September 2022 recommendations to the Departments of Agriculture, Labor, and Homeland Security remained open. All but one of the recommendations related to backlog reduction plans from our 2018 report has been addressed. Taking steps to develop and address gaps in backlog reduction plans can help agencies ensure sustained attention to and progress toward long-term reduction in their FOIA request backlogs.

Finally, we reported in January 2022 that selected agencies faced a number of challenges in reducing their request backlogs and responding to requester needs.<sup>8</sup> These challenges included increases in the number of complex requests, litigation, and staffing limitations. We recommended that OIP evaluate the usefulness and burden of the performance information it collects, and identify ways reporting can inform current and emerging FOIA challenges and risks. Doing so would help ensure that agencies have the information they need to effectively manage their FOIA programs and meet their responsibilities under FOIA.

- **Do you have any recommendations on how to ensure that the government is better prepared in the future to meet its FOIA obligations even during extraordinary events like the COVID-19 pandemic?**

In general, we found that while our selected agencies faced some operational challenges at the beginning of the pandemic, they were generally able to address them relatively early on to resume normal operations. Specifically, we identified a few common challenges that selected agencies faced, such as access to information technology equipment and networks and processing FOIA requests sent by mail. However, agencies addressed these issues by providing equipment to staff, deploying new software, and having limited staff on site to process paper requests. We found that agencies also made other technology and organizational changes to address longer-term, non-pandemic challenges to improve their FOIA operations. However, their experience was not necessarily representative of all agencies.

Additionally, on May 28, 2020, OIP issued COVID-19 guidance on ways for agencies to strategically manage their FOIA programs in light of COVID-19 and the range of impacts on various FOIA programs.<sup>9</sup> OIP recommended agencies engage in clear and effective communication with requesters, use multitrack processing and interim releases to maximize efficiency, consider additional proactive disclosures, and leverage technology. We found that selected agencies we reviewed took some or all of these steps to maintain operations during the pandemic.

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<sup>8</sup>GAO-22-105040.

<sup>9</sup>Department of Justice, Office of Information Policy, *Guidance for Agency FOIA Administration in Light of COVID-19 Impacts* (Washington D.C.: May 2020).

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While our selected agencies generally were effective in addressing pandemic-related challenges, agency officials identified a general increase in litigation as an emerging challenge that affected FOIA operations. For example, the Department of Justice reported a 117 percent increase in FOIA cases received from 2012 to 2020, as well as a 105 percent increase in cases decided over the same period. Selected agency officials stated that increased litigation affects the ability of agencies to process non-litigation FOIA requests in a timely manner. In addition, selected agencies cited other ongoing challenges related to reducing FOIA request backlogs. These challenges included increasing complexity of requests, issues related to information technology and FOIA systems, and staffing-related limitations.

In January 2022, we recommended that selected agencies take steps to improve their backlog reduction plans and that the Office of Information Policy evaluate information reporting requirements and identify ways that reporting can inform current and emerging FOIA challenges and risks.<sup>10</sup> By doing so, the Office could help ensure that agencies have the information they need to effectively manage their FOIA programs and meet their responsibilities under FOIA. As a result, agencies could be better able to respond to the needs of requesters and the public in the case of future extraordinary events such as the COVID-19 pandemic.

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<sup>10</sup>GAO-22-105040.