



**Responses to Questions for the Record –**  
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*Submitted by Senator Patrick Leahy - April 5, 2022*  
*(received by Director Semo on September 20, 2022;*  
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1. **You and other witnesses who appeared before the Judiciary Committee testified to the technological and staffing issues agencies are experiencing in processing FOIA requests and making proactive disclosures. In the Office of Government Information Services’ (OGIS) 2021 Report, “OGIS recommends that Congress ask GAO to conduct a study of the funding for agency FOIA programs to determine whether agencies have adequate funding to comply with FOIA and respond to requests in a timely manner, and what additional resources agencies need in order to improve the FOIA process overall.” This is a familiar trend because the FOIA Advisory Committee recommended Congress address funding for FOIA programs in the 2018-2020 term.**
  - a. **From your perspective, what are the most pressing technological and staffing issues facing FOIA programs?**

FOIA professionals across the government face a disconnect between what requesters expect of them and the staffing and technology resources their agencies make available for FOIA programs. We need to recognize that federal agencies believe that their primary mission is not to collect, process and respond to FOIA and Privacy Act requests. In fact, many agencies’ missions — and agency cultures — run directly counter to providing access to information — for example, the Intelligence Community (IC). The IC has traditionally been in the business of collecting information and sharing it in very limited and controlled ways, but not with the general public.<sup>1</sup> Against this backdrop, agencies unsurprisingly staff their mission-critical programs first; FOIA staffing typically comes last, sometimes as an afterthought, with whatever staffing is not otherwise diverted to the agency’s primary mission. That reality accounts for part of the reason why agency FOIA programs are typically understaffed. What needs to change? First and foremost, agency

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<sup>1</sup> The exception is our own home agency, the National Archives and Records Administration (NARA), whose very “[mission](#) is to provide public access to Federal Government records in our custody and control,” recognizing that “[p]ublic access to government records strengthens democracy by allowing Americans to claim their rights of citizenship, hold their government accountable, and understand their history so they can participate more effectively in their government.”

culture — a need to strike a more refined balance between agencies’ primary missions and the recognition that access to federal agency records is important as it ensures “an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>2</sup> Agencies may naturally revisit staffing priorities once they re-evaluate this balance. As we explained in our [2021 Annual Report](#),

OGIS “fully support[s] any efforts in Congress to increase funding for agency FOIA programs that demonstrate the need and can document how they will use increased funding to improve the FOIA process, including decreasing backlogs and increasing efficiency and effectiveness. We note, in particular, that the 2018–2020 term of the [FOIA Advisory] Committee recommended that agencies “conduct a comprehensive review of their technological and staffing capabilities within two years to identify the resources needed to respond to current and anticipated future FOIA demands.” (Recommendation No. 2020-13). Such a review, we believe, would put agency FOIA programs on a firm footing for asking their agency leadership and Congress for more resources.<sup>3</sup>

Increased staffing specifically targeted at agency FOIA programs will also help. Additional challenges include providing career paths for FOIA professionals to incentivize and ensure that there will be a “next generation” of FOIA employees; anticipating and adjusting for surges in the volume of FOIA requests; and recognizing and accounting for the significant drain on staffing as a result of increasingly complex federal court litigation.

One phenomenon experienced during the fourth term of the FOIA Advisory Committee (2020-2022), and in particular during the work of the Technology Subcommittee, was the knowledge gap between government and non-government Committee members. Non-government Committee members, representing the requester community, academia and historians, were surprised that there is no “one stop shopping” FOIA system that all 119 federal agency FOIA programs use—or even the possibility of such a system. Government subcommittee members, representing both Cabinet-level and independent agencies, patiently laid out the myriad of technology resources being deployed. The range is quite broad: a handful of agencies have developed sophisticated case management systems, either in-house or by working with an outside vendor, expending

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<sup>2</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

<sup>3</sup> [The Freedom of Information Act Ombudsman 2021 Report for Fiscal Year 2020](#), at 12.

significant financial resources in the process; other FOIA programs rely on e-discovery tools deployed by legal offices to respond for civil and criminal litigation discovery; licenses are limited — and expensive — and not always available to FOIA employees; and some FOIA programs rely on tools such as Adobe to process and redact documents, and Excel spreadsheets to keep track of requests.

In 2016, Congress amended FOIA to “ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records ... to any agency from a single website.” (5 U.S.C. § 552(m)). While the Department of Justice’s Office of Information Policy is making strides toward this on FOIA.gov, it is important to distinguish between a request portal and a cradle-to-grave processing system. FOIA.gov serves as an application programming interface (API) between a FOIA.gov visitor and a particular agency request portal. (Some agencies cannot yet receive requests through FOIA.gov.)

As the volume of records agencies produce increases, and as the entire federal government transitions from a paper-based to a digital environment, the challenge of searching for responsive records, de-duplicating them, processing them and producing them will undoubtedly be slowed by the fact that many agency FOIA programs are not allocated sufficient resources to purchase e-discovery/electronic record search tools and accompanying licenses, and case management systems. Another critical member of any successful FOIA program is an information technology professional who is fully devoted to serving the technology needs and challenges FOIA professionals face; relying on calls to the general “help desk” are insufficient and breed frustration and inefficiency for FOIA programs.

As of December 31, 2023, the Environmental Protection Agency (EPA) will be sunsetting the online platform of FOIAonline.gov. FOIAonline is a multi-agency web application that, in its prime, allowed 22 partner agencies to receive, manage, track and respond to FOIA requests, generate reports as mandated by the FOIA statute, and communicate with requesters. As of September 30, 2022, two of those 22 agencies (NARA and the Nuclear Regulatory Commission) are no longer using FOIAonline to manage any FOIA requests. In addition, Customs and Border Protection is no longer receiving new FOIA requests via FOIAonline, and we have learned anecdotally from some of our customers that they are unable to submit an appeal to CBP through FOIAonline even if they had just recently received a response via the platform. As the 2023 deadline looms, the remaining agencies are hard at work seeking to find an acceptable

technological replacement/solution. And technology companies are eager to fill the void as shown by the February 2022 [NexGen FOIA Tech Showcase](#), a collaboration between the Technology Committee of the Chief FOIA Officers Council, the Office of Government Information Services, and the Office of Information Policy. However, there is no one-size-fits-all solution that handles cradle-to-grave processing. Additionally, each agency's records and by extension their technology needs, differ greatly.

**b. Would increased funding decrease the backlogs of FOIA requests and increase the number of proactive disclosures agencies are capable of making?**

Over time, increased funding should logically translate into additional staff and technology improvements for FOIA programs, would likely help agencies reduce (although not eliminate) their backlogs and increase their capacity to make proactive disclosures. However, agencies still face challenges arising from the inherent conflict between FOIA's proactive disclosure requirements and the requirements of Section 508 of the Rehabilitation Act (see further discussion below in Question 2). Currently, we know of no software that can fully automate the process of making records 508-compliant.

**c. What issues do you think Congress should be made aware of regarding resource and funding needs?**

First, please see the answer to a., above. Second, the value in having GAO conduct the recommended study of the adequacy of agency FOIA program funding is that it will help inform Congress more precisely as to the issues agencies face and pinpoint specific pain points. Those issues are likely to be different at different agencies. An agency that receives over 10,000 FOIA requests annually may not have the same challenges that an agency receiving 50 or fewer requests annually has. There is no "one size fits all" when it comes to FOIA. GAO may also determine agencies would benefit from other resources we have not yet identified.

One other important factor to consider is the retrieval, review and processing of classified records. Agencies that generate or collect classified records as part of their primary mission require their FOIA programs to abide by the same protocols imposed on all federal employees who handle classified information. How does this translate to agency FOIA programs? FOIA professionals rely on separate, classified systems to do their FOIA work. These classified systems require additional layers

of protection and more sophisticated technology solutions compared to their unclassified counterparts.

Finally, as noted in [OGIS's 2021 Annual Report to Congress](#), OGIS observed how the pandemic created very different challenges for agencies as they processed a variety of records. For example, the processing of classified records, paper/born-analog records, and public health records during the pandemic created disparate challenges for agencies. Every agency's records are unique and FOIA programs must have the resource and funding needs to fulfill FOIA's mandate, particularly during unusual events such as a pandemic.

In addition, OGIS has noted anecdotally that many agencies' backlogs increased due to the COVID-19 pandemic. Agencies whose records required in-person access in order to process appear particularly hard hit.

2. **Section 508 of the Rehabilitation Act of 1973 requires, among other things, that all agency records posted to agency websites be accessible to people with disabilities, unless it would cause an "undue burden" on the agency. As you know, the last three terms of the FOIA Advisory Committee have identified the tension between agencies making proactive disclosures required under FOIA and the accessibility requirements under Section 508. In your testimony, you noted that many agencies are hamstrung with making proactive disclosures because of the technological limitations of FOIA processing technology and Section 508 compliance.**

- a. **What are the specific technology limitations that prevent agencies from making proactive disclosures while also complying with Section 508?**

As we noted in response to Question 1.b. above, we are not aware of any existing "one-stop-shopping" software that fully automates the process of making FOIA-redacted records 508 compliant. Currently, in order to make redacted records 508 compliant, agency personnel must *manually* prepare the records for posting after FOIA processing is complete.

Agency software used to redact FOIA-exempt information from records often converts the documents to flat images (such as some PDFs or TIFFs) thereby rendering the document's content inaccessible to Section 508-required assistive technology such as machine readers. In order to be Section 508-compliant, the text must be machine-readable and any charts, graphs, pictures, or tables in the document must be tagged and described in a way that enables the screen reader to accurately describe a document

to a reader with visual impairments. PDFs, TIFFs and other flat images strip any existing metadata and other features that make those records accessible and Section 508-compliant.

Another important consideration is that agencies often lack the staffing resources to remediate proactive disclosures in order to satisfy Section 508 requirements. A few agencies are able to rely on their information technology staff to ensure that documents are compliant with Section 508 prior to online posting. A number of other agencies leave that function in the hands of FOIA professionals, who are already busy trying to review and release records responsive to other requests. Faced with growing backlogs, agency FOIA programs are forced to choose: either process mounting FOIA requests or remediate proactive disclosures; it is not surprising that proactive disclosures take a back seat. Those agencies fortunate enough to have the resources to contract out these services can have the best of both worlds — continue to respond to FOIA requests and proactively disclose records.

Finally, one important technological challenge agencies face is the finite amount of money available for them to house proactive disclosures on their websites and electronic reading rooms. Cloud or server storage is not inexpensive. Some agencies face having to choose which documents to rotate off of their websites in order to make room for new documents. When agencies remove documents from their websites, the public suffers. The [2016-2018 FOIA Advisory Committee](#) recognized this issue, recommending that agencies “[a]void the removal of documents already posted on agency websites” and “[i]nstead remediate documents that are not currently Section 508 compliant.” As the Committee recognized, the benefits are the preservation of online access to information that is useful to the public, coupled with documents that are much easier for all individuals to search through and use by requiring that they have optical character recognition.

**b. Have any agencies successfully overcome these technological challenges? If so, are there lessons that can be applied to other agencies’ FOIA programs?**

We are not currently aware of any agencies that have successfully overcome the challenges associated with complying with both FOIA and the Rehabilitation Act. Many agencies are doing their best to comply, but complex documents, including charts, graphs, and images, and voluminous releases present additional challenges to proactive disclosures.

We are aware of at least one agency who received support from their legal staff to invoke the “undue burden” clause of Section 508 of the Rehabilitation Act. If any agency is considering invoking the undue burden exception, we recommend that they work closely with their Office of General Counsel and IT Accessibility/508 Program Manager to assess the legal requirements and agency resources.

As we noted in our December 2020 issue assessment, [Methods Agencies Use to Prepare Documents for Posting on Agency FOIA Websites](#), at the Department of Homeland Security (DHS), the Office of Accessible Systems and Technology in the Office of the Chief Information Officer determined that complying with 508 requirements would be an undue burden due to the extremely high volume of pages released with redactions each year, and the cost of making each page 508-compliant. DHS’s FOIA Library web page provides the following notice:

*“DHS strives to provide equal access to information and data to people with disabilities in accordance with Section 508 of the Rehabilitation Act of 1973. Not all of the documents on this page are fully Section 508 compliant.”*

DHS provides a telephone number for users who require assistance with the documents in the FOIA Library.

While this may allow for the posting of more documents, it is important to note that a document that does not comply with Section 508 may lack the critical metadata that allows the public to locate it. Underscoring that point is the [Department of State Virtual Reading Room search page](#) that provides a disclaimer describing that “the success of a document search is dependent upon the searchability of electronic text through OCR [optical character recognition].”

While there are currently no “lessons learned” that agencies can share, the Section 508 working group of the Chief FOIA Officers’ Council Technology Committee is examining all of these issues, with the goal of sharing their research, findings and possible solutions with agencies.