



Department of Justice

STATEMENT OF

**BOBAK TALEBIAN
DIRECTOR OF OFFICE OF INFORMATION POLICY
DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

FOR A HEARING ENTITLED

**“THE FREEDOM OF INFORMATION ACT: IMPROVING
TRANSPARENCY AND THE AMERICAN PUBLIC’S RIGHT TO KNOW
FOR THE 21ST CENTURY”**

PRESENTED ON

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Statement of
Bobak Talebian
Director of Office of Information Policy
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Before the
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For a Hearing Entitled

**“The Freedom of Information Act: Improving Transparency and the American Public’s
Right to Know for the 21st Century”**

March 29, 2022

I am pleased to be here today to discuss the Freedom of Information Act (FOIA) and the Department of Justice’s ongoing efforts to encourage agency compliance with the statute. As a child of immigrants who came to this country to pursue the American dream, it is my honor to be here today to discuss a topic that goes to the very core of our democracy and to which I am proud to dedicate my professional career. As the Attorney General declared in his first full week in office, “[t]he principles of open government and democratic accountability are at the heart of who we are as public servants and as Americans . . . [and] [w]ithout accountability, democracy is impossible. And democratic accountability requires the kind of transparency that the FOIA makes possible.” The Department has long recognized its special responsibility to encourage government-wide compliance with the FOIA with these principles in mind and under longstanding policies that embrace a presumption of openness.

Attorney General’s FOIA Guidelines

Earlier this month during Sunshine Week, the Attorney General issued new Department of Justice FOIA Guidelines (“Guidelines”) that underscore the federal government’s commitments to transparency in government operations and the fair and effective administration of the FOIA. The new Guidelines remind agencies to comply with both the words and the spirit of FOIA by applying a presumption of openness in administering the FOIA. The Justice Department will not defend nondisclosure decisions that are inconsistent with FOIA or with these Guidelines. Agencies are strongly encouraged to make discretionary disclosures of information where appropriate. As further reinforcement of the FOIA’s foreseeable harm standard, which codified longstanding Department policy, the Guidelines also ask agencies to confirm in response letters to FOIA requesters that they have considered the foreseeable harm standard when applying FOIA exemptions.

The Guidelines also emphasize that the proactive disclosure of information is fundamental to the faithful application of the FOIA. The Guidelines also encourage agencies to post records that fall within the FOIA’s proactive disclosure requirements as soon as feasible. Beyond these required proactive disclosures, agencies are further encouraged to maximize their

efforts to post more records online in advance of a FOIA request. In addition, the Guidelines explain that agency FOIA websites should be easily navigable, and records should be presented in the most useful, searchable, and open formats possible. Finally, the Guidelines highlight the Department's efforts to encourage proactive disclosures, including by providing more specific criteria regarding how relevant metrics should be reported in agency Annual FOIA Reports, as recommended by the Government Accountability Office (GAO).

The new Guidelines also direct agencies to continue efforts to remove barriers to requesting and accessing government records and to reduce FOIA processing backlogs. The Attorney General encouraged all agencies to examine whether they have categories of records that they could make more readily accessible without requiring individuals to file FOIA requests. The Attorney General's Guidelines also highlight the key role played by agency Chief FOIA Officers, who report each year to the Department of Justice on their progress in improving FOIA administration. The Guidelines also direct agencies to training and guidance documents issued by OIP that are designed to help ensure proper training and compliance with FOIA across the federal government.

Government-wide FOIA Administration and OIP's Role in Encouraging Compliance

I feel very fortunate to work alongside thousands of FOIA professionals across the government who have dedicated their careers to this profession because of our shared commitment to government transparency. There are certainly challenges in administering the FOIA as agencies continue to face high demands of increasingly complex and voluminous requests. Agencies report on these challenges as well as their many efforts to improve FOIA every year in their Chief FOIA Officer Reports to the Department. Recent events have created new challenges as agency FOIA offices moved on from a lengthy government shutdown in 2019 and into the pandemic. In the face of these challenges, agencies have continued to faithfully administer the FOIA. In Fiscal Year 2021, the government overall processed 838,688 requests, keeping pace with the 838,164 requests received. Overall, in the past three years, the government has received and processed over 2.4 million requests.

As part of the Department's responsibility to encourage agency compliance with the FOIA, my office has undertaken a range of initiatives designed to mitigate some of these challenges and assist agencies in improving their FOIA administration. Our most recent efforts are fully detailed in the Department's 2021 Litigation and Compliance Report posted [online](#) and provided to the committee on March 1st. I am pleased to highlight some of those efforts today.

OIP Guidance & Training

Two of the primary means by which my Office fulfills the Department's statutory responsibility of encouraging government-wide compliance with the FOIA is by issuing policy guidance and training government personnel. The Department firmly believes that quality guidance and training are fundamental to any successful FOIA program as they help ensure that the law is properly and consistently implemented across the government. Over the years, we have issued guidance to agencies on a range of topics involving nearly all aspects of FOIA administration.

For example, early in the pandemic, OIP issued [guidance](#) to agencies on FOIA administration in light of the pandemic. OIP's guidance stressed that, even though agencies are working under constraints imposed by the pandemic, agencies' legal obligations under the FOIA continue. In particular, OIP's guidance emphasized the importance of the FOIA in our democracy and advised agencies to: (1) focus on finding workable solutions to maximize the efficiency and effectiveness of their FOIA administration; (2) practice effective communication with requesters regarding impacts caused by the pandemic through general notices and direct engagement; (3) strategically manage requests through multitrack processing and interim releases; (4) consider additional proactive disclosures; (5) reexamine the use of technology in light of additional agency needs; (6) examine possibilities for advancing other areas of FOIA administration not limited by remote telework, such as providing training, conducting self-assessments, or handling other requests, particularly complex or older requests that are accessible remotely. The guidance was specifically designed to advise agencies on how to mitigate the various challenges caused by COVID-related workplace adjustments at each point in the FOIA process from conducting intake, to conducting searches and reviewing records, to issuing final responses, to making proactive disclosures. OIP encouraged agencies to continuously assess their FOIA programs as circumstances evolve with a focus on finding workable solutions to maximize the efficiency and effectiveness of their FOIA administration within the parameters of their agency's workplace policies.

OIP also issued [guidance](#) to agencies last year about the Supreme Court's decision in United States Fish & Wildlife Service v. Sierra Club, Inc., 141 S. Ct. 777 (2021). OIP's guidance explains that while the Supreme Court's decision does not modify existing standards for applying the deliberative process privilege, it does reemphasize and clarify important principles that agencies should consider when applying the deliberative process privilege under Exemption 5.

Additionally, every year as OIP reviews and assesses agency Annual FOIA Reports and Chief FOIA Officer Reports, we have issued guidance for agencies on efforts to make additional improvements. All of these guidance articles can be found on [OIP's website](#). Over the past few years, these guidance articles have addressed the importance of FOIA training, leveraging lessons learned from the pandemic, reducing backlogs and processing times, FOIA Standard Operating Procedures, agency FOIA regulations, expedited processing procedures, and the posting of raw Annual FOIA Report data.

OIP also provides comprehensive training on the FOIA that is available to all agency FOIA professionals. Over the past two years, OIP has expanded its training efforts to include virtual courses that occur more frequently and reach a wider audience than our in-person trainings previously did. Last year alone, over 5,750 attendants registered for our trainings. In addition to these regularly scheduled trainings, OIP provides tailored training to any agency upon request. To reach an even wider audience, this year OIP will be releasing new e-Learning training modules that provide FOIA training. These interactive FOIA training modules will provide three separate training resources designed specifically for senior executives, federal employees, and FOIA professionals. The senior executives course emphasizes the importance of

leadership support of the agency's FOIA program. The FOIA For Federal Employees course describes the obligations that all agency employees have under the FOIA. And finally, the FOIA for FOIA Professionals course provides an in-depth overview of the FOIA's legal and procedural requirements.

In addition to our training, OIP regularly holds [*Best Practices Workshops*](#). OIP launched the Best Practices Workshop Series in 2014 as a part of the Second United States Open Government National Action Plan's commitment to modernizing FOIA and improving internal agency FOIA processes. Each workshop focuses on a specific FOIA topic, with a panel of representatives sharing experiences, lessons learned, and strategies for success in these areas. Through these workshops, agencies can continue to learn from one another and leverage the successes of others in their own organizations for the overall benefit of FOIA administration across the government. In 2021, OIP hosted two Best Practices Workshops focused on FOIA administration during the pandemic for both Intelligence Community (IC) and non-IC community agencies. Key points from all workshops are posted on OIP's Best Practices Workshops webpage. This week OIP will be holding another workshop focused on technology for FOIA.

Promoting Agency Accountability

In addition to encouraging government-wide compliance with the FOIA through guidance and training, OIP engages in a number of efforts to keep agencies accountable and to help them move forward in their administration of the FOIA.

All agencies file two reports each year addressing their FOIA administration – an Annual FOIA Report and a Chief FOIA Officer Report. To assist agencies with their statutory reporting obligations, OIP updated its comprehensive Annual FOIA Report Handbook in October 2021. The Handbook includes all of the legal, procedural, and technical requirements concerning agency Annual FOIA Reports. Among other updates, OIP implemented GAO's recommendation to provide more detailed guidance to agencies on how they report proactive disclosures in the Annual FOIA Report.

Chief FOIA Officers are required to review their agency's FOIA administration annually and report to the Department of Justice on the steps taken to achieve improved transparency. Each year OIP provides guidance to agencies on the content of this report, which covers five key areas of FOIA administration: (1) applying a presumption of openness; (2) ensuring that there are effective and efficient systems in place to respond to requests; (3) increasing proactive disclosures; (4) utilizing technology; and (5) reducing backlogs and improving timeliness. Last year, OIP issued new guidance to agencies on the content of their 2021 Chief FOIA Officer Reports.

OIP adjusted the questions for the 2022 Chief FOIA Officer Report Guidelines based on agencies' success in meeting a number of milestones over the years, as well as to address newer challenges and to incorporate input from various stakeholders. Updating the questions each year allows OIP, as well as the agencies themselves, to identify best practices and common challenges as we continue to refine our FOIA processes. For 2022, OIP modified or added new questions to

all five sections of the Chief FOIA Officer Report. Specifically, OIP added new questions that asked agencies to indicate whether agency FOIA personnel attended training in federal records management; whether senior leaders at their agency received a briefing on the agency's FOIA resources, obligations, and expectations during the FOIA process; whether they maintained up-to-date internal Standard Operating Procedures (SOPs) for FOIA administration and, if not, to provide a timeline for developing or updating SOPs; whether they provided alternative means of access to first-party requested records outside of the FOIA process; whether and how they have conducted a self-assessment of their FOIA program; whether they have reviewed their FOIA-related staffing capabilities to identify resources needed to respond to current and anticipated FOIA demands; steps they have taken to identify, track, and post FOIA proactive disclosures; and whether they have reviewed FOIA-related technological capabilities to identify the resources needed to respond to current and anticipated FOIA demands..

As agencies submit their Annual and Chief FOIA Officer Reports to DOJ, OIP conducts a detailed review and assessment of agencies' progress in improving transparency. Agencies are scored on a variety of milestones providing a visual snapshot on progress being made and areas in need of improvement. As a result of this past year's review and assessment, on September 21, 2021, OIP issued [guidance](#) for all agencies to assist them in making additional improvements in the years ahead.

Additional Resources

OIP also provides agencies a number of key resources to aid in their administration of the FOIA. OIP regularly updates the [United States Department of Justice Guide to the Freedom of Information Act](#), which is a legal treatise on the FOIA widely relied upon by government personnel, the courts, and the public. The Guide contains an extensive discussion of the case law interpreting the FOIA's many procedural requirements, its exemptions, and other relevant topics such as litigation considerations and reverse FOIA actions. In 2021, OIP posted updated chapters concerning: Procedural Requirements, Exemption 1, Exemption 3, Exemption 4, Exemption 7(B), Exemption 7(F), and Exemption 9.

To ensure that all FOIA professionals have ready and current access to the most recently decided court opinions, OIP also publishes detailed summaries of every FOIA case decided in the United States, at both the district court and appellate levels. For every court decision in its summaries, OIP highlights each FOIA exemption and procedural or litigation-related issue that was discussed in the opinion. All of the summaries are compiled in one central location on the Court Decisions section of OIP's website where they can be searched by topic, chronologically, and through key words.

Exemption 3 of the FOIA provides for the withholding of records when disclosure is prohibited by another federal law. To assist agencies in their proper application of Exemption 3, OIP posts a chart of all the statutes that courts have found to qualify as Exemption 3 statutes under the FOIA on its website. To increase transparency about agencies' reliance on Exemption 3, OIP also makes available a separate chart reflecting all of the Exemption 3 statutes cited by agencies in their Annual FOIA Reports.

OIP also provides agencies a FOIA Self-Assessment Toolkit. OIP has encouraged agencies to conduct self-assessments to review and improve their FOIA program. By examining their procedures, practices, and results, agencies can improve their FOIA administration by, for instance, streamlining request processing, identifying new ways to use technology, and increasing proactive disclosures. The FOIA Self-Assessment Toolkit consists of 13 modules, each focusing on a distinct aspect of the FOIA process, such as Initial Mail Intake, Adjudicating Requests for Expedited Processing, Searching for Responsive Records, Requester Services, FOIA Reporting, and FOIA Websites. It uses an evidence-based approach to help agencies objectively and meaningfully evaluate their performance.

Finally, OIP also provides direct, one-on-one counseling for agency personnel. OIP's counseling activities are conducted by experienced OIP attorneys known to FOIA personnel throughout the Executive Branch as "FOIA Counselors." Through this FOIA Counselor Service, OIP provides confidential legal advice and policy guidance to FOIA personnel government-wide. This past year, OIP's FOIA Counselors responded to over 600 calls from agencies seeking guidance.

Chief FOIA Officers Council

As you know, the FOIA Improvement Act of 2016 established a Chief FOIA Officers Council (Council) as another means by which agencies can collaboratively improve FOIA administration. I co-chair the Council with the Director of the Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA). OIP and OGIS promptly convened the then new Chief FOIA Officers Council after the passage of the FOIA Improvement Act. Since then, the Council has served as a platform for agencies to understand common challenges, advance new FOIA initiatives, and identify and share best practices. The Council has stood up two committees that regularly meet on some of the biggest cross-cutting issues in FOIA. The Council's Technology Committee was established to study the use of technology in FOIA programs across agencies and to identify best practices and recommendations that can be implemented across agencies. The Council's Committee on Cross-Agency Collaboration and Innovation was established to research and propose cross-agency resource opportunities for agency FOIA administration, create federal career paths for FOIA professionals, and promote models to align agency resources with agency transparency.

The Chief FOIA Officers Council held two public meetings in 2021. On April 29, 2021, members of the Council heard updates from the Technology Committee, the Committee on Cross-Agency Collaboration and Innovation, and the Chief Data Officers Council. OIP's Director also participates on the Chief Data Officers Council as an ex officio member. Subsequently, on November 17, 2021, the Associate Attorney General of the United States provided remarks at the Chief FOIA Officers Council meeting emphasizing the importance of FOIA and the key role played by Chief FOIA Officers. Members of the Council also heard updates from the Committee on Cross-Agency Collaboration and Innovation and the Technology Committee.

The Technology Committee successfully held its two-day NexGen FOIA Tech Showcase event on February 9 and 10, 2022, which featured 18 different vendors. This was the first government-wide industry event to be held specifically for FOIA. Throughout the event, vendors shared their insights and potential solutions in the following areas:

- eDiscovery/electronic record search tools;
- case processing tools (including the collection of records to review for redaction and posting accessible 508-compliant releases);
- redaction tools (including tools that allow for automatic redaction of similar forms and record types including paper, digital content, videos, data, etc.);
- Artificial intelligence tools that may assist with FOIA case processing;
- the future of FOIA;
- improved public FOIA reading rooms/websites; and
- improving the FOIA customer experience.

OIP looks forward to hosting a Best Practices Workshop as a follow up to this event this week to provide agencies an opportunity to share their insights and experiences in using various types of technology for FOIA administration.

OIP makes all material related to the Chief FOIA Officer Council, including recordings of the meetings and minutes, available on its [website](#).

FOIA.gov and the National FOIA Portal

One of the major new provisions of the FOIA Improvement Act of 2016 was the requirement that OMB and the Department ensure the operation of a consolidated online request portal that allows members of the public to submit a request for records to any agency from a single website. The law also states that creation of this new portal should not alter the power of any other agency to create or maintain an independent request portal. The amendments directed OMB to establish standards for interoperability between the portal and agency FOIA case management systems, and the Department and OMB jointly issued such guidance in 2019.

In March 2018, we released the first iteration of the National FOIA Portal on FOIA.gov, the government's central FOIA website. Within the first year, nearly 9,000 requests were submitted to the site. That number has increased substantially over the years. In the past year alone, the public submitted over 22,000 requests through FOIA.gov as agencies continued to become fully interoperable. We have continued to enhance the site in light of public user and agency feedback and have actively sought public user participation as part of our development efforts.

By way of just a few examples, over the past few years we completely revamped the FOIA.gov data pages that contain detailed statistics about every agency's FOIA administration. Users can now more easily search, filter, compare, and download current and historical data from

agencies' [Annual](#) and [Quarterly](#) FOIA Reports. We also improved the submission, validation, and review process for the data displayed on FOIA.gov. Since 2019, agencies have submitted their Annual FOIA Report data to OIP directly through the site. This new reporting capability allows agencies to compile, validate, and submit their Annual FOIA Reports at a central location, streamlining the submission and review process. In 2021, we released an updated Quarterly Report tool that also simplifies agencies' submission of this data that provides key metrics about agency FOIA administration throughout the year.

We are pleased to be continuing an effort with the U.S. General Services Administration's (GSA) [10x team](#) to improve searchability of records across agency FOIA Libraries. Across the government, hundreds of online FOIA Libraries contain a wealth of information, yet these libraries are disconnected and lack an effective centralized search capability to allow the public to easily navigate the records. The 10x team is investigating the potential for a centralized search capability that would allow the public to search across all agency FOIA Libraries, enhancing the public's interaction with the government by facilitating the discovery of records already in the public domain, and creating efficiencies in agency FOIA operations by directing resources to processing FOIA requests for information not previously disclosed and available to the public.

Government Accountability Office (GAO) Engagements

Over the past few years OIP has worked with GAO on a few engagements aimed at better understanding and improving agencies' FOIA administration. We very much appreciate the work of GAO and our collaborative efforts to improve FOIA.

On March 10, 2021, GAO issued a report on proactive disclosures under Subsection (a)(2) of the FOIA. OIP has implemented both of GAO's recommendations from this report. Subsection (a)(2) of the FOIA requires agencies to post on their websites:

1. Final agency opinions and orders rendered in the adjudication of cases;
2. Specific policy statements that are not published in the Federal Register;
3. Administrative staff manuals and instructions to staff that affect a member of the public; and
4. Records that have become or are likely to become the subject of subsequent requests or those records that have been requested three or more times – commonly referred to as “frequently requested records.”

In response to GAO's recommendation, OIP has established an additional step in its Annual FOIA Report review process to obtain more information about why an agency may be reporting zero proactive disclosures and to help ensure the agency's compliance with the requirements of Subsection (a)(2) of the FOIA. As described in OIP's Summary of Annual FOIA Reports for Fiscal Year 2020, twenty-six (26) agencies reported zero proactive disclosures in their Annual FOIA Reports last year. OIP followed-up with each agency to confirm that the reporting was accurate. These agencies explained to OIP that they did not have any (a)(2)

disclosures because, for example, they process primarily first-party requests which are not appropriate for general public disclosure; they did not have frequently requested records during the reporting period; or they did not have any updates to policies or other documents required to be disclosed pursuant to Subsection (a)(2). As to GAO's second recommendation, OIP has updated its guidance with additional explanation of how agencies should count their (a)(2) proactive disclosures to promote greater consistency in these metrics across agencies' Annual FOIA Reports. This guidance can be found in the [Department of Justice Annual FOIA Report Handbook](#) and is covered as part of our proactive disclosure training and yearly Annual FOIA Report training.

On March 18, 2021, GAO issued a report on agencies' use of Exemption 3 of the FOIA. As noted above, Exemption 3 provides for the withholding of records when disclosure is prohibited by another federal law. Agencies are required to apply Exemption 3 when information satisfies this exemption, and they generally do not have the discretion to release such material. However, as noted above, OIP provides several [resources](#) to agencies to ensure this exemption is properly applied. OIP also reviews the statutes cited in agencies' Annual FOIA Reports to ensure they are proper Exemption 3 statutes. Further, OIP provides [individual counseling services](#) for agencies that have questions about the application of this exemption.

Finally, on January 26, 2022, GAO completed its review of the impact of the pandemic on select agencies' FOIA administration. In its report, GAO recommended that OIP identify new ways that reporting requirements can inform current and emerging FOIA challenges and risks. As noted in the Attorney General's FOIA Guidelines, this coming year OIP will issue new reporting Guidelines that, as GAO recommended, will inform current and emerging FOIA challenges and risks, including the number of requests for which unusual circumstances apply and the effect of litigation on overall FOIA request processing and backlogs.

Looking Ahead

In light of the high volume of incoming requests, particularly complex requests, requiring multiple searches, consultations, or the review of large numbers of records, the challenges facing many agencies implementing the FOIA are at times substantial. These challenges were compounded in recent years by events occurring outside the control of agency FOIA offices. Nevertheless, agencies, as with the rest of the country, have persevered to find solutions and ways to improve the best we can. OIP is fully committed to its responsibility of encouraging government-wide compliance with the FOIA both in terms of exploring new ways to meet these current challenges and in helping to ensure that agencies have a proper understanding of FOIA law and policy. As the Attorney General declared earlier this month through his Guidelines, "[t]he Department stands ready to work constructively with [] agencies, with Congress, and with the FOIA requester community, to improve processing capacities, reduce backlogs, and make government more transparent, responsive, and accountable."

In closing, I want to thank you for the opportunity to be here today to discuss OIP's work in encouraging agencies' compliance with the FOIA. I would be pleased to address any questions that you or any other Member of the Committee might have on this important subject.