CIVIL LIBERTIES DEFENSE CENTER: FREEDOM OF INFORMATION WORKSHOP

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5 U.S.C.A. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

Effective: June 30, 2016
Currentness

<Notes of Decisions for 5 USCA § 552 are displayed in two separate documents. Notes of Decisions for subdivisions I and II are contained in this document. For Notes of Decisions for subdivisions III to end, see second document for 5 USCA § 552.>

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format--

(i) that have been released to any person under paragraph (3); and

(ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term “search” means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii)(I) Except as provided in subclause (II), an agency shall not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) under this subparagraph if the agency has failed to comply with any time limit under paragraph (6).

(II)(aa) If an agency has determined that unusual circumstances apply (as the term is defined in paragraph (6)(B)) and the agency provided a timely written notice to the requester in accordance with paragraph (6)(B), a failure described in subclause (I) is excused for an additional 10 days. If the agency fails to comply with the extended time limit, the agency may not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees).

(bb) If an agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, an agency may charge search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) if the agency has provided a timely written notice to the requester in accordance with paragraph (6)(B) and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with paragraph (6)(B)(ii).

(cc) If a court has determined that exceptional circumstances exist (as that term is defined in paragraph (6)(C)), a failure described in subclause (I) shall be excused for the length of time provided by the court order.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[**(D)** Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of--

(I) such determination and the reasons therefor;

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an adverse determination--

(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, “unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term “compelling need” means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(8)(A) An agency shall--

(i) withhold information under this section only if--

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) 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, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States and to the Director of the Office of Government Information Services a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests;

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests;

(P) the number of times the agency denied a request for records under subsection (c); and

(Q) the number of records that were made available for public inspection in an electronic format under subsection (a)(2).

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available for public inspection in an electronic format. In addition, each agency shall make the raw statistical data used in each report available in a timely manner for public inspection in an electronic format, which shall be made available--

(A) without charge, license, or registration requirement;

(B) in an aggregated, searchable format; and

(C) in a format that may be downloaded in bulk.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Oversight and Government Reform of the House of Representatives and the Chairman and ranking minority member of the Committees on Homeland Security and Governmental Affairs and the Judiciary of the Senate, no later than March 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6)(A) The Attorney General of the United States shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President a report on or before March 1 of each calendar year, which shall include for the prior calendar year--

(i) a listing of the number of cases arising under this section;

(ii) a listing of--

(I) each subsection, and any exemption, if applicable, involved in each case arising under this section;

(II) the disposition of each case arising under this section; and

(III) the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4); and

(iii) a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(B) The Attorney General of the United States shall make--

(i) each report submitted under subparagraph (A) available for public inspection in an electronic format; and

(ii) the raw statistical data used in each report submitted under subparagraph (A) available for public inspection in an electronic format, which shall be made available--

(I) without charge, license, or registration requirement;

(II) in an aggregated, searchable format; and

(III) in a format that may be downloaded in bulk.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes--

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make available for public inspection in an electronic format, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration. The head of the Office shall be the Director of the Office of Government Information Services.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) identify procedures and methods for improving compliance under this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a nonexclusive alternative to litigation and may issue advisory opinions at the discretion of the Office or upon request of any party to a dispute.

(4)(A) Not less frequently than annually, the Director of the Office of Government Information Services shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President--

(i) a report on the findings of the information reviewed and identified under paragraph (2);

(ii) a summary of the activities of the Office of Government Information Services under paragraph (3), including--

(I) any advisory opinions issued; and

(II) the number of times each agency engaged in dispute resolution with the assistance of the Office of Government Information Services or the FOIA Public Liaison; and

(iii) legislative and regulatory recommendations, if any, to improve the administration of this section.

(B) The Director of the Office of Government Information Services shall make each report submitted under subparagraph (A) available for public inspection in an electronic format.

(C) The Director of the Office of Government Information Services shall not be required to obtain the prior approval, comment, or review of any officer or agency of the United States, including the Department of Justice, the Archivist of the United States, or the Office of Management and Budget before submitting to Congress, or any committee or subcommittee thereof, any reports, recommendations, testimony, or comments, if such submissions include a statement indicating that the views expressed therein are those of the Director and do not necessarily represent the views of the President.

(5) The Director of the Office of Government Information Services may directly submit additional information to Congress and the President as the Director determines to be appropriate.

(6) Not less frequently than annually, the Office of Government Information Services shall conduct a meeting that is open to the public on the review and reports by the Office and shall allow interested persons to appear and present oral or written statements at the meeting.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j)(1) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(2) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency--

(A) have agency-wide responsibility for efficient and appropriate compliance with this section;

(B) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(C) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(D) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(E) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply;

(F) offer training to agency staff regarding their responsibilities under this section;

(G) serve as the primary agency liaison with the Office of Government Information Services and the Office of Information Policy; and

(H) designate 1 or more FOIA Public Liaisons.

(3) The Chief FOIA Officer of each agency shall review, not less frequently than annually, all aspects of the administration of this section by the agency to ensure compliance with the requirements of this section, including--

(A) agency regulations;

(B) disclosure of records required under paragraphs (2) and (8) of subsection (a);

(C) assessment of fees and determination of eligibility for fee waivers;

(D) the timely processing of requests for information under this section;

(E) the use of exemptions under subsection (b); and

(F) dispute resolution services with the assistance of the Office of Government Information Services or the FOIA Public Liaison.

(k)(1) There is established in the executive branch the Chief FOIA Officers Council (referred to in this subsection as the "Council").

(2) The Council shall be comprised of the following members:

(A) The Deputy Director for Management of the Office of Management and Budget.

(B) The Director of the Office of Information Policy at the Department of Justice.

(C) The Director of the Office of Government Information Services.

(D) The Chief FOIA Officer of each agency.

(E) Any other officer or employee of the United States as designated by the Co-Chairs.

(3) The Director of the Office of Information Policy at the Department of Justice and the Director of the Office of Government Information Services shall be the Co-Chairs of the Council.

(4) The Administrator of General Services shall provide administrative and other support for the Council.

(5)(A) The duties of the Council shall include the following:

(i) Develop recommendations for increasing compliance and efficiency under this section.

(ii) Disseminate information about agency experiences, ideas, best practices, and innovative approaches related to this section.

(iii) Identify, develop, and coordinate initiatives to increase transparency and compliance with this section.

(iv) Promote the development and use of common performance measures for agency compliance with this section.

(B) In performing the duties described in subparagraph (A), the Council shall consult on a regular basis with members of the public who make requests under this section.

(6)(A) The Council shall meet regularly and such meetings shall be open to the public unless the Council determines to close the meeting for reasons of national security or to discuss information exempt under subsection (b).

(B) Not less frequently than annually, the Council shall hold a meeting that shall be open to the public and permit interested persons to appear and present oral and written statements to the Council.

(C) Not later than 10 business days before a meeting of the Council, notice of such meeting shall be published in the Federal Register.

(D) Except as provided in subsection (b), the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents that were made available to or prepared for or by the Council shall be made publicly available.

(E) Detailed minutes of each meeting of the Council shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Council. The minutes shall be redacted as necessary and made publicly available.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(m)(1) The Director of the Office of Management and Budget, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records under subsection (a) to any agency from a single website. The portal may include any additional tools the Director of the Office of Management and Budget finds will improve the implementation of this section.

(2) This subsection shall not be construed to alter the power of any other agency to create or maintain an independent online portal for the submission of a request for records under this section. The Director of the Office of Management and Budget shall establish standards for interoperability between the portal required under paragraph (1) and other request processing software used by agencies subject to this section.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54; Pub.L. 93-502, §§ 1 to 3, Nov. 21, 1974, 88 Stat. 1561 to 1564; Pub.L. 94-409, § 5(b), Sept. 13, 1976, 90 Stat. 1247; Pub.L. 95-454, Title IX, § 906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357; Pub.L. 99-570, Title I, §§ 1802, 1803, Oct. 27, 1986, 100 Stat. 3207-48, 3207-49; Pub.L. 104-231, §§ 3 to 11, Oct. 2, 1996, 110 Stat. 3049 to 3054; Pub.L. 107-306, Title III, § 312, Nov. 27, 2002, 116 Stat. 2390; Pub.L. 110-175, §§ 3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8 to 10(a), 12, Dec. 31, 2007, 121 Stat. 2525 to 2530; Pub.L. 111-83, Title V, § 564(b), Oct. 28, 2009, 123 Stat. 2184; Pub.L. 114-185, § 2, June 30, 2016, 130 Stat. 538.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 12174

Ex. Ord. No. 12174, Nov. 30, 1979, 44 F.R. 69609, which related to minimizing Federal paperwork, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

EXECUTIVE ORDER NO. 12600

<June 23, 1987, 52 F.R. 23781>

Predisclosure Notification Procedures for Confidential Commercial Information

By the authority vested in me as President by the Constitution and statutes of the United States of America, and in order to provide predisclosure notification procedures under the Freedom of Information Act [this section] concerning confidential commercial information, and to make existing agency notification provisions more uniform, it is hereby ordered as follows:

Section 1. The head of each Executive department and agency subject to the Freedom of Information Act [5 U.S.C.A. § 552] shall, to the extent permitted by law, establish procedures to notify submitters of records containing confidential commercial information as described in section 3 of this Order, when those records are requested under the Freedom of Information Act [FOIA], 5 U.S.C. 552, as amended, if after reviewing the request, the responsive records, and any appeal by the requester, the department or agency determines that it may be required to disclose the records. Such notice requires that an agency use good-faith efforts to advise submitters of confidential commercial information of the procedures established under this Order. Further, where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

Sec. 2. For purposes of this Order, the following definitions apply:

(a) "Confidential commercial information" means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4) [subsec. (b)(4) of this section], because disclosure could reasonably be expected to cause substantial competitive harm.

(b) "Submitter" means any person or entity who provides confidential commercial information to the government. The term "submitter" includes, but is not limited to, corporations, state governments, and foreign governments.

Sec. 3. (a) For confidential commercial information submitted prior to January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, provide a submitter with notice pursuant to section 1 whenever:

(i) the records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or

(ii) the department or agency has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(b) For confidential commercial information submitted on or after January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, establish procedures to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. Such agency procedures may provide for the expiration, after a specified period of time or changes in circumstances, of designations of competitive harm made by submitters. Additionally, such procedures may permit the agency to designate specific classes of information that will be treated by the agency as if the information had been so designated by the submitter. The head of each Executive department or agency shall, to the extent permitted by law, provide the submitter notice in accordance with section 1 of this Order whenever the department or agency determines that it may be required to disclose records:

(i) designated pursuant to this subsection; or

(ii) the disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm.

Sec. 4. When notification is made pursuant to section 1, each agency's procedures shall, to the extent permitted by law, afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure of any specified portion of the information and to state all grounds upon which disclosure is opposed.

Sec. 5. Each agency shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue. In all instances when the agency determines to disclose the requested records, its procedures shall provide that the agency give the submitter a written statement briefly explaining why the submitter's objections are not sustained. Such statement shall, to the extent permitted by law, be provided a reasonable number of days prior to a specified disclosure date.

Sec. 6. Whenever a FOIA requester brings suit seeking to compel disclosure of confidential commercial information, each agency's procedures shall require that the submitter be promptly notified.

Sec. 7. The designation and notification procedures required by this Order shall be established by regulations, after notice and public comment. If similar procedures or regulations already exist, they should be reviewed for conformity and revised where necessary. Existing procedures or regulations need not be modified if they are in compliance with this Order.

Sec. 8. The notice requirements of this Order need not be followed if:

(a) The agency determines that the information should not be disclosed;

(b) The information has been published or has been officially made available to the public;

(c) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(d) The disclosure is required by an agency rule that (1) was adopted pursuant to notice and public comment, (2) specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act [5 U.S.C.A. § 552], and (3) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(e) The information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to section 7, when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(f) The designation made by the submitter in accordance with agency regulations promulgated pursuant to section 7 appears obviously frivolous; except that, in such case, the agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

Sec. 9. Whenever an agency notifies a submitter that it may be required to disclose information pursuant to section 1 of this Order, the agency shall also notify the requester that notice and an opportunity to comment are being provided the submitter. Whenever an agency notifies a submitter of a final decision pursuant to section 5 of this Order, the agency shall also notify the requester.

Sec. 10. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN

EXECUTIVE ORDER NO. 13110

<Jan. 11, 1999, 64 F.R. 2419>

Nazi War Criminal Records Interagency Working Group

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Nazi War Crimes Disclosure Act (Public Law 105-246) (the “Act”) [set out as a note under this section], it is hereby ordered as follows:

Section 1. Establishment of Working Group. There is hereby established the Nazi War Criminal Records Interagency Working Group (Working Group). The function of the Group shall be to locate, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration all classified Nazi war criminal records of the United

States, subject to certain designated exceptions as provided in the Act. The Working Group shall coordinate with agencies and take such actions as necessary to expedite the release of such records to the public.

Sec. 2. Schedule. The Working Group should complete its work to the greatest extent possible and report to the Congress within 1 year.

Sec. 3. Membership. (a) The Working Group shall be composed of the following members:

(1) Archivist of the United States (who shall serve as Chair of the Working Group);

(2) Secretary of Defense;

(3) Attorney General;

(4) Director of Central Intelligence;

(5) Director of the Federal Bureau of Investigation;

(6) Director of the United States Holocaust Memorial Museum;

(7) Historian of the Department of State; and

(8) Three other persons appointed by the President.

(b) The Senior Director for Records and Access Management of the National Security Council will serve as the liaison to and attend the meetings of the Working Group. Members of the Working Group who are full-time Federal officials may serve on the Working Group through designees.

Sec. 4. Administration.(a) To the extent permitted by law and subject to the availability of appropriations, the National Archives and Records Administration shall provide the Working Group with funding, administrative services, facilities, staff, and other support services necessary for the performance of the functions of the Working Group.

(b) The Working Group shall terminate 3 years from the date of this Executive order.

WILLIAM J. CLINTON

EXECUTIVE ORDER NO. 13392

<Dec. 14, 2005, 70 F.R. 75373>

Improving Agency Disclosure of Information

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to ensure appropriate agency disclosure of information, and consistent with the goals of section 552 of title 5, United States Code, it is hereby ordered as follows:

Section 1. Policy.

(a) The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed. For nearly four decades, the Freedom of Information Act (FOIA) [The Freedom of Information Act, is 5 U.S.C.A. § 552] has provided an important means through which the public can obtain information regarding the activities of Federal agencies. Under the FOIA, the public can obtain records from any Federal agency, subject to the exemptions enacted by the Congress to protect information that must be held in confidence for the Government to function effectively or for other purposes.

(b) FOIA requesters are seeking a service from the Federal Government and should be treated as such. Accordingly, in responding to a FOIA request, agencies shall respond courteously and appropriately. Moreover, agencies shall provide FOIA requesters, and the public in general, with citizen-centered ways to learn about the FOIA process, about agency records that are publicly available (e.g., on the agency's website), and about the status of a person's FOIA request and appropriate information about the agency's response.

(c) Agency FOIA operations shall be both results-oriented and produce results. Accordingly, agencies shall process requests under the FOIA in an efficient and appropriate manner and achieve tangible, measurable improvements in FOIA processing. When an agency's FOIA program does not produce such results, it should be reformed, consistent with available resources appropriated by the Congress and applicable law, to increase efficiency and better reflect the policy goals and objectives of this order.

(d) A citizen-centered and results-oriented approach will improve service and performance, thereby strengthening compliance with the FOIA, and will help avoid disputes and related litigation.

Sec. 2. Agency Chief FOIA Officers.

(a) Designation. The head of each agency shall designate within 30 days of the date of this order a senior official of such agency (at the Assistant Secretary or equivalent level), to serve as the Chief FOIA Officer of that agency. The head of the agency shall promptly notify the Director of the Office of Management and Budget (OMB Director) and the Attorney General of such designation and of any changes thereafter in such designation.

(b) General Duties. The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency:

(i) have agency-wide responsibility for efficient and appropriate compliance with the FOIA;

(ii) monitor FOIA implementation throughout the agency, including through the use of meetings with the public to the extent deemed appropriate by the agency's Chief FOIA Officer, and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing the FOIA, including the extent to which the agency meets the milestones in the agency's plan under section 3(b) of this order and training and reporting standards established consistent with applicable law and this order;

(iii) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to carry out the policy set forth in section 1 of this order;

(iv) review and report, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing the FOIA; and

(v) facilitate public understanding of the purposes of the FOIA's statutory exemptions by including concise descriptions of the exemptions in both the agency's FOIA handbook issued under section 552(g) of title 5, United States Code, and the agency's annual FOIA report, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply.

(c) FOIA Requester Service Center and FOIA Public Liaisons. In order to ensure appropriate communication with FOIA requesters:

(i) Each agency shall establish one or more FOIA Requester Service Centers (Center), as appropriate, which shall serve as the first place that a FOIA requester can contact to seek information concerning the status of the person's FOIA request and appropriate information about the agency's FOIA response. The Center shall include appropriate staff to receive and respond to inquiries from FOIA requesters;

(ii) The agency Chief FOIA Officer shall designate one or more agency officials, as appropriate, as FOIA Public Liaisons, who may serve in the Center or who may serve in a separate office. FOIA Public Liaisons shall serve as supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the Center, following an initial response from the Center staff. FOIA Public Liaisons shall seek to ensure a service-oriented response to FOIA requests and FOIA-related inquiries. For example, the FOIA Public Liaison shall assist, as appropriate, in reducing delays, increasing transparency and understanding of the status of requests, and resolving disputes. FOIA Public Liaisons shall report to the agency Chief FOIA Officer on their activities and shall perform their duties consistent with applicable law and agency regulations;

(iii) In addition to the services to FOIA requesters provided by the Center and FOIA Public Liaisons, the agency Chief FOIA Officer shall also consider what other FOIA-related assistance to the public should appropriately be provided by the agency;

(iv) In establishing the Centers and designating FOIA Public Liaisons, the agency shall use, as appropriate, existing agency staff and resources. A Center shall have appropriate staff to receive and respond to inquiries from FOIA requesters;

(v) As determined by the agency Chief FOIA Officer, in consultation with the FOIA Public Liaisons, each agency shall post appropriate information about its Center or Centers on the agency's website, including contact information for its FOIA Public Liaisons. In the case of an agency without a website, the agency shall publish the information on the Firstgov.gov website or, in the case of any agency with neither a website nor the capability to post on the Firstgov.gov website, in the Federal Register; and

(vi) The agency Chief FOIA Officer shall ensure that the agency has in place a method (or methods), including through the use of the Center, to receive and respond promptly and appropriately to inquiries from FOIA requesters about the status of their requests. The Chief FOIA Officer shall also consider, in consultation with the FOIA Public Liaisons, as appropriate, whether the agency's implementation of other means (such as tracking numbers for requests, or an agency telephone or Internet hotline) would be appropriate for responding to status inquiries.

Sec. 3. Review, Plan, and Report.

(a) Review. Each agency's Chief FOIA Officer shall conduct a review of the agency's FOIA operations to determine whether agency practices are consistent with the policies set forth in section 1 of this order. In conducting this review, the Chief FOIA Officer shall:

(i) evaluate, with reference to numerical and statistical benchmarks where appropriate, the agency's administration of the FOIA, including the agency's expenditure of resources on FOIA compliance and the extent to which, if any, requests for records have not been responded to within the statutory time limit (backlog);

(ii) review the processes and practices by which the agency assists and informs the public regarding the FOIA process;

(iii) examine the agency's:

(A) use of information technology in responding to FOIA requests, including without limitation the tracking of FOIA requests and communication with requesters;

(B) practices with respect to requests for expedited processing; and

(C) implementation of multi-track processing if used by such agency;

(iv) review the agency's policies and practices relating to the availability of public information through websites and other means, including the use of websites to make available the records described in section 552(a)(2) of title 5, United States Code; and

(v) identify ways to eliminate or reduce its FOIA backlog, consistent with available resources and taking into consideration the volume and complexity of the FOIA requests pending with the agency.

(b) Plan.

(i) Each agency's Chief FOIA Officer shall develop, in consultation as appropriate with the staff of the agency (including the FOIA Public Liaisons), the Attorney General, and the OMB Director, an agency-specific plan to ensure that the agency's administration of the FOIA is in accordance with applicable law and the policies set forth in section 1 of this order. The plan, which shall be submitted to the head of the agency for approval, shall address the agency's implementation of the FOIA during fiscal years 2006 and 2007.

(ii) The plan shall include specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog, including (as applicable) changes that will make the processing of FOIA requests more streamlined and effective, as well as increased reliance on the dissemination of records that can be made available to the public through a website or other means that do not require the public to make a request for the records under the FOIA.

(iii) The plan shall also include activities to increase public awareness of FOIA processing, including as appropriate, expanded use of the agency's Center and its FOIA Public Liaisons.

(iv) The plan shall also include, taking appropriate account of the resources available to the agency and the mission of the agency, concrete milestones, with specific timetables and outcomes to be achieved, by which the head of the agency, after consultation with the OMB Director, shall measure and evaluate the agency's success in the implementation of the plan.

(c) Agency Reports to the Attorney General and OMB Director.

(i) The head of each agency shall submit a report, no later than 6 months from the date of this order, to the Attorney General and the OMB Director that summarizes the results of the review under section 3(a) of this order and encloses a copy of the agency's plan under section 3(b) of this order. The agency shall publish a copy of the agency's report on the agency's website or, in the case of an agency without a website, on the Firstgov.gov website, or, in the case of any agency with neither a website nor the capability to publish on the Firstgov.gov website, in the Federal Register.

(ii) The head of each agency shall include in the agency's annual FOIA reports for fiscal years 2006 and 2007 a report on the agency's development and implementation of its plan under section 3(b) of this order and on the agency's performance in meeting the milestones set forth in that plan, consistent with any related guidelines the Attorney General may issue under section 552(e) of title 5, United States Code.

(iii) If the agency does not meet a milestone in its plan, the head of the agency shall:

(A) identify this deficiency in the annual FOIA report to the Attorney General;

(B) explain in the annual report the reasons for the agency's failure to meet the milestone;

(C) outline in the annual report the steps that the agency has already taken, and will be taking, to address the deficiency; and

(D) report this deficiency to the President's Management Council.

Sec. 4. Attorney General.

(a) Report. The Attorney General, using the reports submitted by the agencies under subsection 3(c)(i) of this order and the information submitted by agencies in their annual FOIA reports for fiscal year 2005, shall submit to the President, no later than 10 months from the date of this order [Dec. 14, 2005], a report on agency FOIA implementation. The Attorney General shall consult the OMB Director in the preparation of the report and shall include in the report appropriate recommendations on administrative or other agency actions for continued agency dissemination and release of public information. The Attorney General shall thereafter submit two further annual reports, by June 1, 2007, and June 1, 2008, that provide the President with an update on the agencies' implementation of the FOIA and of their plans under section 3(b) of this order.

(b) Guidance. The Attorney General shall issue such instructions and guidance to the heads of departments and agencies as may be appropriate to implement sections 3(b) and 3(c) of this order.

Sec. 5. OMB Director. The OMB Director may issue such instructions to the heads of agencies as are necessary to implement this order, other than sections 3(b) and 3(c) of this order.

Sec. 6. Definitions. As used in this order:

(a) the term “agency” has the same meaning as the term “agency” under section 552(f)(1) of title 5, United States Code; and

(b) the term “record” has the same meaning as the term “record” under section 552(f)(2) of title 5, United States Code.

Sec. 7. General Provisions.

(a) The agency reviews under section 3(a) of this order and agency plans under section 3(b) of this order shall be conducted and developed in accordance with applicable law and applicable guidance issued by the President, the Attorney General, and the OMB Director, including the laws and guidance regarding information technology and the dissemination of information.

(b) This order:

(i) shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations;

(ii) shall not be construed to impair or otherwise affect the functions of the OMB Director relating to budget, legislative, or administrative proposals; and

(iii) is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

GEORGE W. BUSH

EXECUTIVE ORDER NO. 13642

<May 9, 2013, 78 F.R. 28111>

Making Open and Machine Readable the New Default for Government Information

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. General Principles. Openness in government strengthens our democracy, promotes the delivery of efficient and effective services to the public, and contributes to economic growth. As one vital benefit of open government, making information resources easy to find, accessible, and usable can fuel entrepreneurship, innovation, and scientific discovery that improves Americans' lives and contributes significantly to job creation.

Decades ago, the U.S. Government made both weather data and the Global Positioning System freely available. Since that time, American entrepreneurs and innovators have utilized these resources to create navigation systems, weather newscasts and warning systems, location-based applications, precision farming tools, and much more, improving Americans' lives in countless ways and leading to economic growth and job creation. In recent years, thousands of Government data resources across fields such as health and medicine, education, energy, public safety, global development, and finance have been posted in machine-readable form for free public use on Data.gov. Entrepreneurs and innovators have continued to develop a vast range of useful new products and businesses using these public information resources, creating good jobs in the process.

To promote continued job growth, Government efficiency, and the social good that can be gained from opening Government data to the public, the default state of new and modernized Government information resources shall be open and machine readable. Government information shall be managed as an asset throughout its life cycle to promote interoperability and openness, and, wherever possible and legally permissible, to ensure that data are released to the public in ways that make the data easy to find, accessible, and usable. In making this the new default state, executive departments and agencies (agencies) shall ensure that they safeguard individual privacy, confidentiality, and national security.

Sec. 2. Open Data Policy. (a) The Director of the Office of Management and Budget (OMB), in consultation with the Chief Information Officer (CIO), Chief Technology Officer (CTO), and Administrator of the Office of Information and Regulatory Affairs (OIRA), shall issue an Open Data Policy to advance the management of Government information as an asset, consistent with my memorandum of January 21, 2009 (Transparency and Open Government), OMB Memorandum M-10-06 (Open Government Directive), OMB and National Archives and Records Administration Memorandum M-12-18 (Managing Government Records Directive), the Office of Science and Technology Policy Memorandum of February 22, 2013 (Increasing Access to the Results of Federally Funded Scientific Research), and the CIO's strategy entitled “Digital Government: Building a 21st Century Platform to Better Serve the American People.” The Open Data Policy shall be updated as needed.

(b) Agencies shall implement the requirements of the Open Data Policy and shall adhere to the deadlines for specific actions specified therein. When implementing the Open Data Policy, agencies shall incorporate a full analysis of privacy, confidentiality, and security risks into each stage of the information lifecycle to identify information that should not be released. These review processes should be overseen by the senior agency official for privacy. It is vital that agencies not release information if doing so would violate any law or policy, or jeopardize privacy, confidentiality, or national security.

Sec. 3. Implementation of the Open Data Policy. To facilitate effective Government-wide implementation of the Open Data Policy, I direct the following:

(a) Within 30 days of the issuance of the Open Data Policy, the CIO and CTO shall publish an open online repository of tools and best practices to assist agencies in integrating the Open Data Policy into their operations in furtherance of their missions. The CIO and CTO shall regularly update this online repository as needed to ensure it remains a resource to facilitate the adoption of open data practices.

(b) Within 90 days of the issuance of the Open Data Policy, the Administrator for Federal Procurement Policy, Controller of the Office of Federal Financial Management, CIO, and Administrator of OIRA shall work with the Chief Acquisition Officers Council, Chief Financial Officers Council, Chief Information Officers Council, and Federal Records Council to identify and initiate implementation of measures to support the integration of the Open Data Policy requirements into Federal acquisition and grant-making processes. Such efforts may include developing sample requirements language, grant and contract language, and workforce tools for agency acquisition, grant, and information management and technology professionals.

(c) Within 90 days of the date of this order, the Chief Performance Officer (CPO) shall work with the President's Management Council to establish a Cross-Agency Priority (CAP) Goal to track implementation of the Open Data Policy. The CPO shall work with agencies to set incremental performance goals, ensuring they have metrics and milestones in place to monitor advancement toward the CAP Goal. Progress on these goals shall be analyzed and reviewed by agency leadership, pursuant to the GPRA Modernization Act of 2010 (Public Law 111-352).

(d) Within 180 days of the date of this order, agencies shall report progress on the implementation of the CAP Goal to the CPO. Thereafter, agencies shall report progress quarterly, and as appropriate.

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Nothing in this order shall compel or authorize the disclosure of privileged information, law enforcement information, national security information, personal information, or information the disclosure of which is prohibited by law.

(e) Independent agencies are requested to adhere to this order.

BARACK OBAMA

MEMORANDA OF PRESIDENT

PRESIDENTIAL MEMORANDUM

<Jan. 21, 2009, 74 F.R. 4683>

Freedom of Information Act

Memorandum for the Heads of Executive Departments and Agencies

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, “sunlight is said to be the best of disinfectants.” In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the Federal Register. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the Federal Register.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA

PRESIDENTIAL MEMORANDUM

<Jan. 21, 2009, 74 F.R. 4685>

Transparency and Open Government

Memorandum for the Heads of Executive Departments and Agencies

My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.

Government should be transparent. Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use. Executive departments and agencies should harness new technologies to put information about their operations and

decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public.

Government should be participatory. Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.

Government should be collaborative. Collaboration actively engages Americans in the work of their Government. Executive departments and agencies should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector. Executive departments and agencies should solicit public feedback to assess and improve their level of collaboration and to identify new opportunities for cooperation.

I direct the Chief Technology Officer, in coordination with the Director of the Office of Management and Budget (OMB) and the Administrator of General Services, to coordinate the development by appropriate executive departments and agencies, within 120 days, of recommendations for an Open Government Directive, to be issued by the Director of OMB, that instructs executive departments and agencies to take specific actions implementing the principles set forth in this memorandum. The independent agencies should comply with the Open Government Directive.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

This memorandum shall be published in the Federal Register.

BARACK OBAMA

Notes of Decisions (4189)

5 U.S.C.A. § 552, 5 USCA § 552
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)

5 U.S.C.A. § 552a

§ 552a. Records maintained on individuals

Effective: December 19, 2014
Currentness

(a) Definitions.--For purposes of this section--

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term "matching program"--

(A) means any computerized comparison of--

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include--

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches--

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986;

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));

(ix) matches performed by the Secretary of Health and Human Services or the Inspector General of the Department of Health and Human Services with respect to potential fraud, waste, and abuse, including matches of a system of records with non-Federal records; or

(x) matches performed pursuant to section 3(d)(4) of the Achieving a Better Life Experience Act of 2014 [1] ;

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals [2] entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) Accounting of certain disclosures.--Each agency, with respect to each system of records under its control, shall--

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of--

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records.--Each agency that maintains a system of records shall--

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and--

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either--

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements.--Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include--

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) Agency rules.--In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall--

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil remedies.--Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians.--For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal penalties.--Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General exemptions.--The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions.--The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)(1) Archival records.--Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m)(1) Government contractors.--When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing lists.--An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Matching agreements.--(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying--

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to--

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel,

that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2)(A) A copy of each agreement entered into pursuant to paragraph (1) shall--

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if--

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) Verification and opportunity to contest findings.--(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until--

(A)(i) the agency has independently verified the information; or

(ii) the Data Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that--

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C)(i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of--

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) Sanctions.--(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless--

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) Report on new systems and matching programs.--Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) Biennial report.--The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report--

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(t)(1) Effect of other laws.--No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(u) Data Integrity Boards.--(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board--

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including--

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4)(A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective. [3]

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5)(A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that--

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) In the reports required by paragraph (3)(D), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) Office of Management and Budget responsibilities.--The Director of the Office of Management and Budget shall--

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

(w) Applicability to Bureau of Consumer Financial Protection.--Except as provided in the Consumer Financial Protection Act of 2010, this section shall apply with respect to the Bureau of Consumer Financial Protection.

CREDIT(S)

(Added Pub.L. 93-579, § 3, Dec. 31, 1974, 88 Stat. 1897; amended Pub.L. 94-183, § 2(2), Dec. 31, 1975, 89 Stat. 1057; Pub.L. 97-365, § 2, Oct. 25, 1982, 96 Stat. 1749; Pub.L. 97-375, Title II, § 201(a), (b), Dec. 21, 1982, 96 Stat. 1821; Pub.L. 97-452, § 2(a)(1), Jan. 12, 1983, 96 Stat. 2478; Pub.L. 98-477, § 2(c), Oct. 15, 1984, 98 Stat. 2211; Pub.L. 98-497, Title I, § 107(g), Oct. 19, 1984, 98 Stat. 2292; Pub.L. 100-503, §§ 2 to 6(a), 7, 8, Oct. 18, 1988, 102 Stat. 2507 to 2514; Pub.L. 101-508, Title VII, § 7201(b)(1), Nov. 5, 1990, 104 Stat. 1388-334; Pub.L. 103-66, Title XIII, § 13581(c), Aug. 10, 1993, 107 Stat. 611; Pub.L. 104-193, Title I, § 110(w), Aug. 22, 1996, 110 Stat. 2175; Pub.L. 104-226, § 1(b)(3), Oct. 2, 1996, 110 Stat. 3033; Pub.L. 104-316, Title I, § 115(g)(2)(B), Oct. 19, 1996, 110 Stat. 3835; Pub.L. 105-34, Title X, § 1026(b)(2), Aug. 5, 1997, 111 Stat. 925; Pub.L. 105-362, Title XIII, § 1301(d), Nov. 10, 1998, 112 Stat. 3293; Pub.L. 106-170, Title IV, § 402(a)(2), Dec. 17, 1999, 113 Stat. 1908; Pub.L. 108-271, § 8(b), July 7, 2004, 118 Stat. 814; Pub.L. 111-148, Title VI, § 6402(b)(2), Mar. 23, 2010, 124 Stat. 756; Pub.L. 111-203, Title X, § 1082, July 21, 2010, 124 Stat. 2080; Pub.L. 113-295, Div. B, Title I, § 102(d), Dec. 19, 2014, 128 Stat. 4062.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 9397

<Nov. 22, 1943, 8 F.R. 16095, as amended Ex. Ord. No. 13478, Nov. 18, 2008, 73 F.R. 70239>

Numbering System for Federal Accounts Relating to Individual Persons

WHEREAS certain Federal agencies from time to time require in the administration of their activities a system of numerical identification of accounts of individual persons; and

WHEREAS some seventy million persons have heretofore been assigned account numbers pursuant to the Social Security Act; and

WHEREAS a large percentage of Federal employees have already been assigned account numbers pursuant to the Social Security Act; and

WHEREAS it is desirable in the interest of economy and orderly administration that the Federal Government move towards the use of a single, unduplicated numerical identification system of accounts and avoid the unnecessary establishment of additional systems:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

1. Hereafter any Federal department, establishment, or agency may, whenever the head thereof finds it advisable to establish a new system of permanent account numbers pertaining to individual persons, utilize the Social Security Act account numbers assigned pursuant to Title 20, section 422.103 of the Code of Federal Regulations and pursuant to paragraph 2 of this order.

2. The Social Security Administration shall provide for the assignment of an account number to each person who is required by any Federal agency to have such a number but who has not previously been assigned such number by the Administration. The Administration may accomplish this purpose by (a) assigning such numbers to individual persons, (b) assigning blocks of numbers to Federal agencies for reassignment to individual persons, or (c) making such other arrangements for the assignment as it may deem appropriate.

3. The Social Security Administration shall furnish, upon request of any Federal agency utilizing the numerical identification system of accounts provided for in this order, the account number pertaining to any person with whom such agency has an account or the name and other identifying data pertaining to any account number of any such person.

4. The Social Security Administration and each Federal agency shall maintain the confidential character of information relating to individual persons obtained pursuant to the provisions of this order.

5. There shall be transferred to the Social Security Administration, from time to time, such amounts as the Director of the Office of Management and Budget shall determine to be required for reimbursement by any Federal agency for the services rendered by the Administration pursuant to the provisions of this order.

6. This order shall be implemented in accordance with applicable law and subject to the availability of appropriations.

7. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.

8. This order shall be published in the FEDERAL REGISTER.

FRANKLIN D. ROOSEVELT

Notes of Decisions (1451)

Footnotes

1 So in original. The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014, which is Division B of Pub.L. 113-295, did not include a section 3.

2 So in original. Probably should be “and individuals”.

3 So in original. Probably should be “cost-effective”.

5 U.S.C.A. § 552a, 5 USCA § 552a

Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

FOIA Requests

Agency	Contact	Mail	Email	Electronic	Fax
Antitrust Division	FOIA Requester Service Center 202-514-2692	Kenneth Hendricks, Chief Freedom of Information Act U.S. Department of Justice, Antitrust Division Liberty Square Building, Suite 1000 450 Fifth Street, NW, Washington, DC 20530-0001	antitrust.foia@usdoj.gov	Through FOIA.gov- https://www.foia.gov/request/agency-component/063ec4f1-cebb-4fc1-8396-4a8b8308e1f4/	202-616-4529
Bureau of Alcohol, Tobacco, Firearms, and Explosives	Darryl Webb and Johnny Rosner, FOIA Public Liaison 202-648-7390	Bureau of Alcohol, Tobacco, Firearms and Explosives ATTN: Disclosure Division, Room 4E.301 99 New York Avenue, NE Washington, DC 20226	foiamail@atf.gov	Through FOIA.gov- https://www.foia.gov/request/agency-component/25d63aa1-021a-4ff1-8ece-43fdea022601/	202-648-9619
Bureau of Land Management	FOIA Requester Service Center 202-912-7650	Bureau of Land Management Attn: FOIA Office (WO-640) 1849 C St. N.W. Washington, DC 20240	blm_wo_foia@blm.gov	Through FOIA.gov- https://www.foia.gov/request/agency-component/d42a8692-bf5a-4d97-aeee-1389a96a9fba/	202-245-0050 (Call to confirm receipt.)
Central Intelligence Agency	FOIA Requester Service Center 703-613-1287	Information and Privacy Coordinator Central Intelligence Agency Washington, D.C. 20505		https://www.cia.gov/library/readingroom/node/256459	703-613-3007
Civil Rights Division	April Freeman, FOIA Public Liaison FOIA Requester Service Center 202-514-4210	Acting Chief, FOIA Branch Civil Rights Division BICN, Room 3234 950 Pennsylvania Ave, N.W. Washington, DC 20530	CRT.FOIArequests@usdoj.gov	Through FOIA.gov- https://www.foia.gov/request/agency-component/00b8441d-5cb6-418b-90b8-496cb70c390d/	
Cybersecurity and Information Security Agency	Angela Washington, Acting FOIA Office 703-235-2211	FOIA Officer, Directorate for National Protection and Programs U.S. Department of Homeland Security Washington, DC 20528	NPPD.FOIA@dhs.gov	https://www.dhs.gov/dhs-foia-privacy-act-request-submission-form	
Department Logistics Agency	FOIA Requester Service Center 571-767-6183	Information Governance & Compliance/Attn: FOIA/Privacy 8725 John J. Kingman Road, Suite 1326 Fort Belvoir, VA 22060-6221		https://foiaonline.gov/foiaonline/action/public/request	
Department of Education	Denise Carter, Chief FOIA Officer 202-401-8365 Robert Wehausen, FOIA Public Liaison 202-205-0733	U.S. Department of Education Office of Management Office of the Chief Privacy Officer 400 Maryland Avenue, SW, LBJ 7W104 Washington, DC 20202-4536 ATTN: FOIA Public Liaison	EDFOIAManager@ed.gov	Through FOIA.gov- https://www.foia.gov/request/agency-component/062dcf21-0ca7-4dee-8ea9-feb2de0d12ca/	202-401-0920
Department of Energy	FOIA Requester Service Center 202-586-5955	Alexander Morris, FOIA Officer, 1000 Independence Avenue, SW Mail Stop MA-46 Washington, DC 20585		Through FOIA.gov- https://www.foia.gov/request/agency-component/da51148e-4f28-4b95-9a75-cbd50e6ad2bf/	
Department of Housing and Urban Development HQ	Sandra J. Wright, FOIA Supervisor Deborah Snowden, Deputy Chief FOIA Officer 202-708-3866	U.S. Department of Housing and Urban Development Freedom of Information Act Office 451 7th Street, SW Room 10139 Washington, DC 20410-3000			202 619-8365

Environment and Natural Resources Division	FOIA Requester Service Center 202-514-0424	Charles Smiroldo, FOIA Coordinator Environment and Natural Resources Division Law and Policy Section P.O. Box 7415, Ben Franklin Station Washington, DC 20044-7415	FOIARouting.enrd@usdoj.gov	Through FOIA.gov-https://www.foia.gov/request/agency-component/d044bfa5-1d30-4588-b7a2-df680170435f/	
Environmental Protection Agency	FOIA Requester Service Center 202-566-1667	National Freedom of Information Officer 1200 Pennsylvania Avenue, NW Suite WJCN 5315, Mail Code 2310A Washington, DC 20460	hq.foia@epa.gov	https://foiaonline.gov/foiaonline/action/public/request	
Executive Office for U.S. Attorneys	Donna Preston, FOIA Public Liaison FOIA Requester Service Center 202-252-6020	FOIA/Privacy Unit 175 N Street, NE, Suite 5.400 Washington, DC 20530-0001		https://foiaonline.gov/foiaonline/action/public/request	
Federal Bureau of Investigation	FOIA Requester Service Center 540-868-1535	Federal Bureau of Investigation Attn: FOI/PA Request Record/Information Dissemination Section 170 Marcel Drive Winchester, VA 22602-4843		https://efoia.fbi.gov/#term	540-868-4391/4997
Federal Bureau of Prisons	C. Darnell Stroble, FOIA Public Liaison FOIA Requester Service Center 202-616-7750	FOIA Section Office of General Counsel, Federal Bureau of Prisons 320 First Street, N.W. Room 924 Washington, DC 20534	ogc_efoia@bop.gov	https://www.bop.gov/foia/index.jsp#tabs-0	
Federal Communications Commission	FOIA Requester Service Center 202-418-0440	Acting Associate Managing Director, 445 12th Street, SW Room 1-A838 Washington, DC 20554		Through FOIA.gov-https://www.foia.gov/request/agency-component/ee57c611-328a-4178-9f1c-441fe0f93141/	
Federal Labor Relations Authority	FOIA Requester Service Center 202-218-7770	Office of the Solicitor Federal Labor Relations Authority 1400 K Street, NW Washington, DC 20424	solmail@flra.gov	https://foiaonline.gov/foiaonline/action/public/request	202-343-1007
Food and Drug Administration	Sarah Kotler, FOIA Officer FOIA Requester Service Center 301-796-3900	Food and Drug Administration Division of Freedom of Information Office of the Executive Secretariat, OC 5630 Fishers Lane, Room1035 Rockville, MD 20857		https://www.accessdata.fda.gov/scripts/foi/FOIRequest/requestinfo.cfm	301-827-9267
Office of Information Policy	Douglas Hibbard, FOIA Public Liaison FOIA Requester Service Center 202-514-3642	Initial Request Staff 1425 New York Ave, NW, Suite 11050 Washington, DC 20530		Through FOIA.gov-https://www.foia.gov/request/agency-component/8216158f-8089-431d-b866-dc334e8d4758/	
Office of Inspector General	Mark Dorgan, FOIA Public Liaison 703-604-9785 FOIA Officer 866-993-7005	DoDIG FOIA 4800 Mark Center Drive, Suite 10B24 Alexandria, VA 22350-1500	foiarequests@dodig.mil	https://foiaonline.gov/foiaonline/action/public/request	
Small Business Administration	FOIA Requester Service Center 202-401-8203	Chief, Freedom of Information Office U.S. Small Business Administration 409 Third St. SW, 8th floor Washington, DC 20416	foia@sba.gov	https://www.foiaonline.gov/foiaonline/action/public/home	202-205-7059
Social Security Administration		Social Security Administration Office of Privacy and Disclosure G-401 WHR	foia.public.liaison@ssa.gov	https://foiaonline.gov/foiaonline/action/public/request	

		6401 Security Boulevard Baltimore, Maryland 21235			
U.S. Agency for Global Media	David Kligerman, Chief FOIA Officer 202-203-4550	USAGM FOIA Office ATTN: FOIA/PRivacy Act Officer 330 Independence Ave. SW Room 3349 Washington, D.C. 20237	foia@usagm.gov	Through FOIA.gov- https://www.foia.gov/request/agency-component/8eaa4672-113c-4f7e-a087-f25bb2bb0384/	202 203-4585
U.S. Customs and Border Protection	Sabrina Burroughs, FOIA Officer FOIA Requester Service Center 202-325-0150	U.S. Customs & Border Protection FOIA Officer 90 K Street, NW, 9th Floor, Mail Stop 1181 Washington, DC 20229-1181		https://foiaonline.gov/foiaonline/action/public/request	
U.S. Department of Agriculture		Departmental FOIA Officer 1400 Independence Avenue, SW South Building Room 4104 Washington, DC 20250-0706	USDAFOIA@ocio.usda.gov		
U.S. Department of State	FOIA Requester Service Center 202-261-8484	Director, Office of Information Programs and Services Building SA-2 515 22nd Street, NW Washington, DC 20522-8100	foiarequest@state.gov	https://foia.state.gov/Request/Submit.aspx	202-261-8579
U.S. General Services Administration	FOIA Requester Service Center 855-675-3642	U.S. General Services Administration FOIA Requester Service Center (H1C), 1800 F. Street, NW, 7308 Washington, DC 20405-0001	GSA.foia@gsa.gov	https://foiaonline.gov/foiaonline/action/public/request	202-501-2727
U.S. Immigration & Customs Enforcement	Catrina Pavlick-Keenan, FOIA Officer 202-732-4265	United States Immigration & Customs Enforcement, FOIA Office 500 12th Street, SW, Stop 5009 Washington, DC 20536-5009	ice-foia@dhs.gov	https://www.dhs.gov/dhs-foia-privacy-act-request-submission-form	

1. Alabama: 2006 Alabama Code – Section 36-12-40

2.Alaska: AS § 40.25.110 ET seq.

3. Arizona: A.R.S. §§ 39-101 to -161

3. Arkansas: Ark. Code Ann. § § 25- 19- 101 to 25-19-109

4. California: Cal. Govt Code, Chapter 3.5 Inspection of Public Records

5. Colorado: C.R.S 24- 72- 201 et seq

6. Connecticut: Conn.Gen.Stat.§1-200 et seq7.

7. Delaware: 29 Del. C. § 10001 et seq.

8. Florida: Florida Statutes, Title X, Chapter 119

9. Georgia: Georgia Law § 50-18-70

10. Guam: 5 GCA Chapter 10

11. Hawaii: Chapter 92F,Hawaii Revised Statutes

12. Idaho: Idaho Code §§ 74-101

13.Illinois: 5 ILCS 140

14. Indiana: Ind.Code Ann. 5-14-3-1 to 10

15. Iowa: Iowa Code Ann. 22.1 to .14

16. Kansas: Kan.Stat.Ann 45-215 to 225

17. Kentucky: Ky.Rev.Stat.Ann. 61.870 to 884

18. Louisiana: Louisiana Revised Statutes Title 44

19. Maine: 1 M.R.S §400

20 Maryland: Md.Ann.Code art. GP, § 4-101

21. Massachusetts: Massachusetts General Laws, Part 1, Title X, Chapter 66

22. Michigan: MCL 15.231 et. Seq.

23. Minnesota: Minn. Stat. Ann. 13.03

24. Mississippi: Miss. Code Ann. 25-61-1 et seq

25. Missouri: Chapter 610 of the Revised Statutes of Missouri

26. Montana: Mont.Code. Ann. 2-6-1

27. Nebraska: Neb. Rev. Stat. §§ 84-712 – 84-712.09

28. Nevada: N.R.S. 239.010

29. New Hampshire: New Hampshire RSA Ch. 91-A

30. New Jersey: NJSA 47; 1A-1 et seq.

31, New Mexico: 14-2-1 NMSA 1978 et seq.

32 New York: N.Y. Pub. Off. Law Ch. 47 Art. 6 § 84

33. North Carolina: G.S. §132-1

34. North Dakota: N.D.C.C § 44-04- 18 et seq, North Dakota Constitution. Article XI, Section 6

35. Ohio: Ohio Rev. Code sec. 149.43 et seq.

36. Oklahoma: OK Title 51, Sections 24A.1-30

37. Oregon: Or. Rev. Stat. Ann. 192.410 to 505

38. Pennsylvania: Pa.Cons.Stat.Ann. Tit. 65, 66..1 to .4

39. Rhode Island: R.I. Gen. Laws 38-2-1 to -14

40. South Carolina: S.C. Code Ann. 30-4-10

41. South Dakota: S.D. Codified Laws Ann. 1-25-1 to -19

42. Tennessee: Tenn. Code Ann. § 10-7-501 et seq.

43. Texas: Texas Government Code, Title 5, Subtitle A, Chapter 552, Subchapter A

44. Utah: Utah Government Records Access and Management Act 63G-2-201

45. Vermont: 1.V.S.A. Sec. 315-320

46. Virginia: § 2.2-3700

47. Virgin Islands: Public Records Act, 3 VIC § 881-884. Title 3, chapter 33

48. Washington: Wash. Rev. Code Ann. 42.56.001 to .904

49. West Virginia: W.Va. Code§ 6-9A-1

50. Wisconsin: Wis. Stat. Ann. 19.31 to .39

51. Wyoming: W.S. §16-4-201 through 16-4-205

JOHN MOSS AND THE ROOTS OF THE FREEDOM OF INFORMATION ACT: WORLDWIDE IMPLICATIONS[†]

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INTRODUCTION

John Moss was an obscure Congressman from a newly created district in northern California when he arrived in Washington D.C. in 1953.[1] He had survived a razor-thin general election victory (by about 700 votes), which included unfounded charges of being a communist, or a communist sympathizer.[2] Those charges became an important force behind Moss's long battle to enact the Freedom of Information Act.

Except for an 18th century Swedish law and a similar information law in Finland in 1951, the U.S. Freedom of Information Act ("FOIA") was the first open government law in the world.[3] During the twelve years it took John Moss to win enough Congressional votes to pass the bill, he endured intense political opposition, faced a veto threat from a president of his own party, and overcame fierce opposition from executive branch agencies.[4]

When President Lyndon Johnson signed the Freedom of Information Act into law on July 4, 1966, Moss did not receive a pen from the president, nor was there any signing ceremony.[5]

Since 1966, more than 117 nations have passed government information laws.[6] Congress has amended and refined significant sections of the U.S. law several times, generally improving access in areas where Moss had to compromise in order to win its original passage.

I. MOSS AND THE CONGRESS

When Moss first arrived in Washington, D.C. there was a poisonous political atmosphere in the city.[7] Senator Joseph McCarthy was riding anti-communist fears that he helped arouse and that propelled

1. Interview by Donald B. Seney with John E. Moss, Congressman, U.S. House of Representatives, in Sacramento, Cal., 15 (Oct. 3, 1989) [hereinafter Interview by Seney with Moss], http://archives.cdn.sos.ca.gov/oral-history/pdf/oh-moss-john.pdf.

2. *Id.* at 19.

3. *Fast Facts: Freedom of Information Laws Around the World*, RAPPLER (July 23, 2014, 9:15 AM), https://www.rappler.com/newsbreak/iq/63867-fast-facts-access-to-information-laws-world.

4. C.J. Ciaramella, *The Freedom of Information Act—and the Hero Who Pioneered It*, PACIFIC STANDARD (June 29, 2016), https://psmag.com/news/the-freedom-of-information-act-and-the-hero-who-pioneered-it.

5. *Id.*

6. *See Chronological and Alphabetical Lists of Countries with FOI Regimes*, FREEDOMINFO.ORG (Sept. 28, 2017) [hereinafter *List of Countries with FOI Regimes*], http://www.freedominfo.org/?p=18223.

7. MICHAEL J. HOGAN, A CROSS OF IRON 315 (1998).

him to great influence in the U.S. Senate and in the nation.[8] The House Un-American Activities Committee was making headlines, with its endless investigations of security risks, Russian spies, and alleged disloyalty in dozens of government agencies and American industries.[9]

President Harry Truman issued an Executive Order establishing an administration Loyalty Program.[10] It directed Truman's attorney general to compile a list of communist organizations and "front" organizations and to investigate the loyalty of federal government employees.[11] Based on the results of these investigations, the targets could be fired from their government jobs, prosecuted, and made virtually unemployable.[12] They faced public condemnation and personal humiliation in the process. People investigated under the Loyalty Program were not allowed to confront their accusers or see the charges against them, often based on hearsay evidence that was held in secret files compiled by the Federal Bureau of Investigation.[13]

United States Court of Appeals Judge Henry Edgerton wrote an opinion concerning the firing of one such government employee: "Without trial by jury, without evidence, and without even being allowed to confront her accusers or to know their identity, a citizen of the United States has been found disloyal to the government of the United States."[14]

Edgerton found the discharge proceedings to have been unconstitutional.[15] "Whatever her actual thoughts may have been," he wrote, "to oust her as disloyal without trial is to pay too much for protection against any harm that could possibly be done."[16] Edgerton was the lone dissenter on the federal Court of Appeals. The court affirmed the employee's firing from government service.[17] The United States Supreme Court divided evenly in reviewing the case, four to four, thus upholding the legality of the Truman Loyalty Program and its attendant government secrecy.[18]

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8. *Id.*
9. *$4 Million For Probes,* 9 CONG. Q. ALMANAC 69 (1953).
10. *See* HOGAN, *supra* note 7, at 254 (citing Exec. Order No. 9,835, 3 C.F.R. Supp. 2 (1947)).
11. *See* Exec. Order No. 9,835, 3 C.F.R. Supp. 2 (1947); HOGAN, *supra* note 7, at 254.
12. *See* Exec. Order No. 9,835, 3 C.F.R. Supp. 2 (1947); HOGAN, *supra* note 7, at 254.
13. *See* HOGAN, *supra* note 7, at 255.
14. Bailey v. Richardson, 182 F.2d 46, 66 (D.C. Cir. 1950) (Edgerton, J., dissenting).
15. *Id.* at 74.
16. *Id.*
17. *Id.* at 65-66.
18. Bailey v. Richardson, 341 U.S. 918, 918 (1951).

Moss knew about the McCarthy approach, having been a target of similar charges in his California campaigns for both the state assembly in 1949 and, in 1953, for Congress.[19] He survived the attacks. He did not forget them. His long campaign to secure freedom of information was grounded, in part, on his anger at being faced with such potentially devastating charges based on unsubstantiated claims against him.

Moss's information battle was also based, coincidently, on his assignment to a very obscure congressional committee that had legislative responsibility only for federal civil service and post office employees.[20]

When he took his seat in Congress in January 1953 representing California's new Third Congressional District, there was no evidence that limiting government secrecy and providing the public and the press with access to government records would be causes he would champion for twelve long years—and in fact, for the rest of his life.[21] Perhaps because of Moss's independent views on several such issues, he later said, "By all that was holy, I was destined to be a one-termer."[22]

But Moss and his new congressional district in Sacramento bonded almost instantly. The strong connection had started with his election to the California Assembly in 1949 in a portion of the Third district.[23] Moss had a clear record. He favored lower utility rates for consumers, strengthening public power to compete with the giant Pacific Gas and Electric Company, increased wages for government workers, and better working conditions for railroad employees.[24] His stances on the issues were a natural fit for Sacramento's voters, who appeared to like his combative style and his populist position on pocketbook issues. Moss was repeatedly returned to office in Sacramento for thirty years.[25]

The young congressman knew about everyday problems from his own experience—particularly the sudden death of his mother when he was a small boy—and his subsequent abandonment by his father. Liv-

19. *See* Interview by Seney with Moss, *supra* note 1, at 19.

20. *See* MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW 39 (2015).

21. *See* MICHAEL R. LEMOV, PEOPLE'S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS 43 (2011). *See generally* Interview by Seney with Congressman Moss, *supra* note 1.

22. LEMOV, *supra* note 21(citing author's 1996 interview with John E. Moss).

23. *See* Interview by Seney with Moss, *supra* note 1, at iii.

24. *See id.* at 62-63.

25. *See id.* at iii.

ing in an attic with his older brother, he struggled financially to go to high school and never finished college.[26] He later said, "[I] gained all of my bits and pieces of knowledge and understanding the more difficult way . . . but at the same time, it made me appreciate them more, and I probably dug deeper to get some of the facts."[27]

In the nation's capital in 1953, Moss was an unknown. He tried for an appointment to the powerful House Commerce Committee, or to the Government Operations Committee.[28] He was assigned instead to the Post Office-Civil Service and House Administration Committees.[29] These were not exactly major appointments, but freshmen are typically placed on such minor committees.[30] So he waited and did his best to make something of his position, serving out his "sentence" stoically and as it turned out, productively. He offered and pushed through amendments that gave post office workers the right to arbitration of disputes and a pay raise.[31]

II. The Speaker of the House

At the end of Moss's second term in 1956, the House Leadership promoted him to membership on the more powerful Government Operations Committee, which had jurisdiction over government information practices.[32] He would serve on Government Operations for twenty-two years.[33]

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26. *See id.* at 10.

27. *See* Lemov, *supra* note 21, at 44 (citing author's 1996 interview with John E. Moss).

28. *Id.*

29. *See* Schudson, *supra* note 20.

30. *See* Kathy Gill, *What is the Seniority System? How Power is Amassed in Congress*, ThoughtCo., https://www.thoughtco.com/what-is-the-seniority-system-3368073 (last updated Dec. 26, 2016).

31. *See Postal Rates, Postal Pay Hikes*, Cong. Q. Almanac 1954, 10th ed., 1955, goo.gl/Vc9XQZ (follow "Postal Rates, Postal Pay Hikes - CQ Almanac Online Edition" hyperlink) (indicating that, in 1954, Congressman Moss supported HR 9836 and HR 6052, which sought to, respectively, increase mail rates and increase the pay of postal employees).

32. *See* H.R. Journal, 82nd Cong., 2d Sess. 720-21 (1951-52) (indicating a change in the name of the "Committee on Expenditures in the Executive Departments" to the "Committee on Government Operations" on July 3, 1952 via unanimous consent following House Resolution 647); H.R. Journal, 90th Cong., 2d Sess. 1315 (1968) (outlining the powers and duties of the Committee on Government Operations, which include, among others, "receiving and examining reports of the Comptroller General of the United States [i.e. the director of the Government Accountability Office] and of submitting such recommendations to the House as it deems necessary or desirable in connection with the subject matter of such reports; . . . studying the operation of Government activities at all levels with a view to determining its economy and efficiency . . . .").

33. *See* 2 Garrison Nelson et al., Committees in the U.S. Congress 1947-1992, at 643 (1994).

But Moss wanted even more—a seat on another and perhaps more influential committee.[34] Moss let the California delegation know he was interested in membership on the Interstate and Foreign Commerce Committee as well as Government Operations.[35] He wanted Commerce because it had jurisdiction over major parts of business and industry in the United States and trade with foreign nations.[36] Before running for Congress, Moss had been in the appliance and real estate businesses in Sacramento.[37] He thought he knew something about commerce.[38] So the committee's jurisdiction over transportation, communications, securities markets, consumer protection, energy, the environment, and health care appealed to him.

Moss was disappointed when the selections of the Democratic caucus were announced.[39] Sam Rayburn, the all-powerful Texas Congressman who was Speaker of the House, "always liked to pick Texans for key committees[,] . . . he didn't particularly look to California."[40] So Moss tried again, this time directly with Speaker Rayburn.

He walked from the House office building across the street to the Capitol to talk to the Speaker.[41] From the way Moss described it later, he did not press Rayburn but Moss reminded him that there was no Californian on the Interstate and Foreign Commerce Committee; that he was from the growing northern part of the state; and that he probably would have the nomination of both parties in the next election—something he did not actually get until 1958.[42] Moss assured Rayburn he knew about business issues; that he could handle the job; and that he really wanted it.[43] And, oh yes, putting a Californian on Commerce might be good for the Democratic Party. Rayburn was nobody's pushover. Moss found him friendly, but noncommittal.

A day or two later, Moss got a telephone call from the chairman of the California delegation: "You're on the Commerce Committee, John. What the hell did you say to Rayburn?"[44]

It had not hurt Moss to go to the Speaker to make his case. The meeting began a strong relationship between the young Moss and the

34. *See* LEMOV, *supra* note 21, at 45-46.
35. *See id.* at 46.
36. *See id.*
37. *See* Interview by Seney with Moss, *supra* note 1, at iii.
38. *See* LEMOV, *supra* note 21, at 46.
39. *Id.*
40. *Id.*
41. *Id.*
42. *See* Interview by Seney with Moss, supra note 1, at iii, 139.
43. *See* LEMOV, *supra* note 21, at 46.
44. Interview by Seney with Moss, *supra* note 1, at 149.

older, more powerful Rayburn.[45] Rayburn placed Moss on the leadership track, eventually landing him as deputy whip.[46] Rayburn also oversaw the appointment of Moss as chairman of the newly established Special Subcommittee on Government Information, which was established as a part of the Government Operations Committee.[47] And it was Rayburn who, directly or indirectly, supported Moss's long freedom of information battle.[48]

III. Growth of Government Secrecy

World War II witnessed an immense growth of the federal government coupled with the wartime need for a high degree of secrecy—at least as to military-security information. Winning the war took precedence over everything. In the years immediately following World War II, the military's need to guard and control information declined, but secrecy and censorship limiting the flow of government information to the public continued.[49] During the Cold War and the anti-communist hysteria that followed, both the Truman and Eisenhower Administrations responded with many information and security restrictions, the Truman Loyalty Program among them.[50] Some restrictions became what appeared to be a permanent apparatus for state secrecy.

Due to government and public reaction to the uncertainties of the Cold War, thousands of documents were classified as secret. The pre-

45. *See* Berry Jones, Dictionary of World Biography 710 (4th ed. 2017) (indicating that Rayburn was a U.S. Congressman from 1913 until 1961); Schudson, *supra* note 20, at 147 (indicating that in the 1940s and 1950s Congressman and then Speaker Rayburn was a powerful figure); Deward C. Brown, *The Same Rayburn Papers: A Preliminary Investigation*, 35 The Am. Archivist 331, 331 (1972) (indicating that Rayburn became Speaker in 1940 and acted as the Chairman of the Democratic National Convention in 1948, 1952, and 1956); Interview by Seney with Moss, *supra* note 1, at iii (indicating that Moss was born in 1913, the same year Rayburn was first elected, and that Moss was elected to Congress as a Representative of the Third District in 1952).

46. *See* Interview by Philip M. Stern with John Moss, U.S. House of Representatives, in Wash. D.C. (Apr. 13, 1965). Moss did not seek to continue as deputy floor whip after his confrontation with the White House and the House leadership over the Freedom of Information Act in the early 1960s. He said he wanted to pursue his own agenda and that he was not forced to resign.

47. *See* Schudson, *supra* note 20, at 40.

48. Lemov, *supra* note 21, at 46.

49. *See* Schudson, *supra* note 20, at 46; Harold C. Relyea, *Freedom of Information, Privacy, and Official Secrecy: The Evolution of Federal Government Information Policy Concepts*, 7 Soc. Indicators Res. 137, 138-39 (1980).

50. Schudson, *supra* note 20, at 42. *See generally* Exec. Order No. 9,835, 3 C.F.R. Supp. 2 (1947) (the executive order that began the "Loyalty Program"); Deward, *supra* note 45, at 336 (pointing out the anti-communist hysteria that existed during the 1950s).

vailing attitude towards government records was "when in doubt, classify."[51] Secrecy labels were slapped on seemingly innocent bits of data. For example, the amount of peanut butter consumed by the armed forces was classified as secret (the government feared this information might enable an enemy to determine our military preparedness). A twenty-year-old report describing shark attacks on shipwrecked sailors was classified as secret, as was a description of modern adaptations of the bow and arrow.[52]

In the midst of this wave of Cold War secrecy, Moss confronted executive branch secrecy for the first time.[53] During his first term in Congress, while on the House Post Office and Civil Service Committee, Moss became concerned with the discharge of some 2,800 federal employees for alleged "security reasons."[54] Moss felt that the dismissals ought to be explained more thoroughly by the Civil Service Commission.[55] The firings had a devastating effect on employees and reflected poorly on the civil service in general. Besides, Moss believed the majority of the people dismissed had probably not been let go because they lacked patriotism, but for other minor incidents or because of disagreements with their superiors. An instinctive civil libertarian, Moss was sensitive to questionable charges of disloyalty. So the young congressman, as a member of the committee with jurisdiction, formally requested that the Civil Service Commission produce the records relating to the discharge of all 2,800 employees.[56] His request was flatly denied by the Civil Service Commission.[57] It seemed as though that would be the end of it. With the Republicans in control of both the Executive Branch and Congress, he was stymied.[58] But Moss did not forget the issue, or the affront.

IV. ROLE OF THE PRESS

The Cold War, the "red scare" and similar concerns continued to broaden government control over information. Kent Cooper, the executive director of the Associated Press, popularized the phrase "right

51. BRUCE LADD, CRISIS IN CREDIBILITY 188 (1968).

52. *Id.* at 188-89; Bruce Ladd, *50 Years After FOI Act, Celebrating Government Transparency*, THE NEWS & OBSERVER (July 3, 2016), http://www.newsobserver.com/opinion/op-ed/article87239527.html.

53. *See* SCHUDSON, *supra* note 20, at 45-46.

54. LADD, *supra* note 51, at 189.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 189-90.

to know" in his 1956 book by the same name.[59] He wrote: "American newspapers do have the constitutional right to print . . . but they cannot properly serve the people if governments suppress the news."[60] Cooper cited a 1945 *New York Times* editorial that had referred to the "right to know" as a "good new phrase for an old freedom."[61]

The American Society of Newspaper Editors (ASNE) organized a freedom of information committee in the late 1940s.[62] The committee pressed to obtain access to government records but the levels of secrecy and the complexity of attempting to get facts from the now-bloated federal government caused one of its chairmen to say that the situation "frightened [him] very, very much, because, for the first time, [he] really realized the perils that we face in this country."[63] Editors became so concerned about the denial of information to the press and the public that they commissioned Harold Cross, a leading newspaper lawyer and counsel to the *New York Herald Tribune*, to prepare a report on federal, state, and local information rights. Cross's report was published in 1953 under the title, "The People's Right to Know."[64] It was funded by ASNE.[65]

The Cross report confirmed press fears over the systematic denial of government information and asserted that the press and the public have an enforceable legal right to inspect government records for a lawful or proper purpose.[66] In ringing terms, Cross spelled out a new constitutional and legal principle: "Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that, the citizens of a democracy have but changed their kings."[67]

The Cross report looked mainly at the state of the law as reflected in court decisions either granting or denying the right to access.[68] It also focused primarily on state and local law because under existing federal law, "in the absence of a general or specific act of Congress," there was absolutely no enforceable right of the public or

59. HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW 15 (1999).

60. KENT COOPER, THE RIGHT TO KNOW xii (1956).

61. *Id.* at xiii.

62. SCHUDSON, *supra* note 20, at 42.

63. FOERSTEL, *supra* note 59, at 16.

64. *Id.* at 17.

65. *Id.* at 17.

66. *See* HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW xiii, 49-50 (1953).

67. *Id.* at xiii.

68. *See id.* at 48, 58.

the press to access government documents.[69] The federal government was, in fact, subject to a series of statutes and regulations essentially making federal records and information the private property of each federal agency and ultimately of the White House.[70]

Thus, Cross's book, which became the Bible of the press and ultimately a guide to the Congress regarding freedom of information, opened the way toward a more open government—but only in general terms.[71] Cross said the First Amendment "points the way[;] [t]he function of the press is to carry the torch."[72] Where to carry the torch and how to secure such a public right to government information remained unclear.

Just after the publication of Cross's book, the Eisenhower Administration precipitated an incident that gave the issue of control of government information and public access to such information more national prominence and a new leader.[73]

In 1954, the voters returned a Democratic Congress to Washington.[74] Around the same time, President Eisenhower created the Office of Strategic Information (OSI).[75] The OSI was officially established in the Department of Commerce at the request of the National Security Council.[76] It quickly became controversial.

The idea was to ask industry and the press to "voluntarily" refrain from disclosing any strategic information that might assist enemies of the United States.[77] At that time, the primary enemy was, of course, the Soviet Union. The chill of the Cold War dominated the American consciousness. OSI's new director was R. Karl Honaman, who later moved to the Department of Defense under Secretary of Defense Charles Wilson.[78]

On March 29, 1955, Defense Secretary Wilson issued a directive to all government officials and defense contractors stating that, in order for an item to be cleared for publication or released to the public, it not only had to meet security requirements, but also had to make a

69. *Id.* at 197.

70. *See id.* at 23, 198-99.

71. SCHUDSON, *supra* note 20, at 42.

72. CROSS, *supra* note 66, at 132.

73. *See* Albert G. Pickerell, *Secrecy and the Access to Administrative Records*, 44 CAL. L. REV. 305, 306-08 (1956).

74. SCHUDSON, *supra* note 20, at 40.

75. FOERSTEL, *supra* note 59, at 18-19.

76. *Id.* at 19.

77. *See* Wallace Parks, *Secrecy and the Public Interest*, 26 GEO. WASH. L. REV. 23, 44-45, 62-64 (1957).

78. FOERSTEL, *supra* note 59, at 19-20.

"constructive contribution" to defense and national security.[79] Under this standard, the government would have had almost total control over all information released and, at the time, there was no possibility of court review of such decisions.[80]

This new barrier of government secrecy infuriated editors, reporters, and the press generally.[81] Editorials were published opposing the Eisenhower Administration's information policy.[82] *Time* magazine commented that "such a policy is just the thing for government officials who want to cover up their own mistakes by withholding non-constructive news."[83]

J.R. Wiggins of the *Washington Post* and chairman of the ASNE government information committee, said "newspapers will not join in the conspiracy with this or any other administration to withhold from the American people non-classified information."[84] The public battle between the Eisenhower Administration and the press could not help but come to the attention of the newly-elected Democratic Congress—and to interested members like Moss.[85]

One historian later noted that the battle may have precipitated the most important event on the path to the Freedom of Information Act; that event was the creation of a Special Subcommittee on Government Information in 1955, thereafter known as the "Moss Subcommittee."[86]

Some evidence suggests that Moss became interested in the denial of information to the press and public in 1955 when he met with press lawyer and author Harold Cross.[87] It was perhaps Moss's own experience with the Civil Service Commission's roadblock to his information requests and Cross's eloquence that merged the strands of the issue for Moss. The controversy also came up at a moment in time when the political climate was ripe for at least an inquiry into the problem of access to government information.

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79. *Id.* at 19-20.
80. *See* Pickerell, *supra* note 73, at 306-10.
81. FOERSTEL, *supra* note 59, at 20.
82. *Id.*
83. *Id.*
84. *Id.*
85. *See id*. at 21.
86. *Id.*
87. *See id.* at 22.

V. Creation of the Special Subcommittee on Government Information

From his new position as a junior member of the Government Operations Committee, Moss saw a chance to deal with an issue that he cared about a lot and that affected many.[88] A short time after his appointment, Moss talked with William Dawson, the chairman of the Government Operations Committee, and suggested that the committee authorize a "study" to determine the extent of information withheld by the Executive Branch.[89]

Moss's sense of the right of the public, as well as the prerogatives of the Congress, undoubtedly fueled his interest in freedom of information. His meetings with editors, reporters, and author Harold Cross increased his interest.[90] And he read the newspapers, as did the leadership.[91] They thought that secrecy in government could be a potentially powerful political issue.[92] Moss directed Dr. Wallace Parks, a committee counsel, to undertake a preliminary inquiry.[93] Parks, who later became counsel to Moss's Government Information Subcommittee, wrote a memorandum—undoubtedly with Moss's supervision—to committee chairman Dawson, indicating that there was indeed a trend toward suppression and denial of access to government information, that it was growing, and that it affected areas of government untouched by security considerations.[94] What happened next can only have been authorized by Speaker Rayburn.

In an effort to solicit support for a new subcommittee on government information and withholding, Moss and Parks, armed with their memorandum, approached House leadership through Majority Leader John McCormick of Massachusetts.[95] According to a committee staff member at the time, McCormick, Rayburn, and others in the leadership were "pushed out of shape because the Administration was withholding information from Congress. [They] wanted to get the press aroused over the issue so [that the Administration would be pressured on behalf of Congress] . . . ."[96] Moss, with his progressive

88. *See* Ladd, *supra* note 51, at 191.
89. *Id.* at 190.
90. *See* Foerstel, *supra* note 59, at 22.
91. *See id.*; Ladd, *supra* note 51, at 191.
92. *See* Ladd, *supra* note 51, at 190.
93. *See id.*
94. *Id.*
95. *See* Foerstel, *supra* note 59, at 21.
96. *Id.* at 21-22.

attitudes and willingness to tackle big interests, clearly thought more broadly than access solely by the Congress.[97]

With the support of McCormick and Rayburn, a new Special Subcommittee on Government Information was established on June 9, 1955.[98] A memorandum from Chairman Dawson—again written by Parks under Moss's direction—noted that, "An informed public makes the difference between mob rule and democratic government. . . . I am asking your Subcommittee to make such an investigation as will verify or refute these charges."[99]

The chairman of the new and potentially powerful Special Subcommittee on Government Information might have been any one of several senior members of the House. It was, instead, the very junior representative from California, John Moss.[100]

Why would the Democratic leadership of the new Congress place responsibility for the chairmanship of such a potentially powerful subcommittee in the hands of a second-term congressman? Only Rayburn, McCormick, and Moss know the answer to that question and they are long gone. But Moss's early willingness to tackle big problems, demonstrated both in the California legislature and on the Post Office and Civil Service Committee, may have played a role. Leadership might have noted Moss's intense interest in the subject and his personal drive. Otherwise, perhaps, Rayburn just liked the young congressman.

Moss's sudden rise to a key House position may have simply been a case of the right leader appearing at the right time. One thing is certain, Moss thought there was a job to be done and he wanted the job "desperately."[101] Whatever the reason, when he assumed the chairmanship of the new Special Subcommittee on Government Information, Moss could not have known the true extent of the struggle that he had embarked upon, nor how long, and how difficult that battle would be.

VI. Substantive and Political Opposition to FOIA

Ten years after being named chairman of the Special Subcommittee on Government Information in 1955, and eleven years after confronting the federal government's wall of secrecy over alleged

97. *See* Ladd, *supra* note 51, at 190.
98. *See* Foerstel, *supra* note 59, at 22; Ladd, *supra* note 51, at 190.
99. *See* Foerstel, *supra* note 59, at 22.
100. *See* Ladd, *supra* note 51, at 191.
101. *See id.*

employee disloyalty, Moss was still struggling to move a freedom of information bill out of the House of Representatives.[102] He had spent most of these years in Congress immersed in a seemingly endless investigation of what he considered mostly unjustified government refusals to give up information and in an effort to write a bill that could become law.[103] In numerous hearings, he targeted "silly secrecy," or the Government's refusal to disclose such vital data, as: the modern uses of the bow and arrow and the amount of peanut butter consumed by United States soldiers.[104]

Most of the subcommittee investigations, hearings, and reports resulted in confrontations with federal agencies that did not want to give his subcommittee, and the public, information from agency files.[105] *Every* federal agency that testified before the subcommittee opposed what was then known as the "federal records law."[106]

Moss believed that he was fighting a denial of a basic right.[107] But that right was not, and still is not, spelled out in the Constitution. The right to obtain information can only be inferred from the right to speak freely under the First Amendment to the Constitution. Moss wondered—perhaps doubted—if Congress would ever guarantee what most people incorrectly thought was already a part of the right to free speech under the First Amendment.[108]

In 1965, as Moss opened hearings on what would be the final, dramatic struggle over the public information law, he noted that there now was a "legal void" into which executive agencies had moved because of Congress's failure to guarantee a fundamental right.[109]

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102. *See id.* at 204, 206.

103. *See* FOERSTEL, *supra* note 59, at 25; David R. Davies, An Industry in Transition: Major Trends in American Daily Newspapers, 1945-1965, ch. 8 (1997) (unpublished Ph.D. dissertation, University of Alabama) (on file with author), http://ocean.otr.usm.edu/~w304644/ch8.html.

104. *See* LADD, *supra* note 51, at 188-89; Nate Jones, *John Moss's Decade-Long Fight For FOIA, as Chronicled in "People's Warrior" by Michael Lemov*, UNREDACTED: NAT'L SECURITY ARCHIVE BLOG (Oct. 1, 2011), https://nsarchive.wordpress.com/2011/10/01/4230/ (referencing LEMOV, *supra* note 21).

105. *See* C.J. Ciamarella, *The Freedom of Information Act—And the Hero Who Pioneered It*, PAC. STANDARD (June 29, 2016), https://psmag.com/news/the-freedom-of-information-act-and-the-hero-who-pioneered-it.

106. *See Federal Public Records Law: Hearing on H.R. 5012 Before the Subcomm. on Foreign Operations and Gov't Info. of the H. Comm. on Gov't Operations*, 89th Cong. 1 *passim* (1965) [hereinafter *House Hearing*] (statement of Rep. John E. Moss, Chairman, H. Subcomm. on Foreign Operations and Gov't Info); LADD, *supra* note 51, at 204 ("In the past, every executive agency testifying on the legislation had opposed it").

107. *See House Hearing*, *supra* note 106, at 2.

108. *See id.*

109. *Id.*

He also recognized that the issue touched a very sensitive nerve of the executive branch, especially with the president. President Lyndon Johnson did not lean favorably towards increased access to government information.[110] The respected *New York Times* columnist Arthur Krock described Johnson's attitude as "tight official lip."[111] Johnson not only distrusted the press but, "was convinced that the press hated him and wanted to bring him down."[112]

Moss, responding to such concerns, said that, "no one supporting the legislation would want to throw open Government files which would expose national defense plans to hostile eyes."[113] But at the same time, the government should not "impose the iron hand of censorship on routine Government information."[114] Between these extremes, Moss suggested, there might be an opening for compromise, one which had thus far eluded Congress and his subcommittee.[115] Moss knew that, if the bill ever made it to the White House, he did not have the votes to override a presidential veto.[116]

The final round of hearings on the bill was courteously conducted. Beneath the calm lurked a major confrontation between the President and Congress. A key witness for the executive position came from the Department of Justice, Assistant Attorney General Norbert A. Schlei, testifying on behalf of the White House as well as the Justice Department.[117] Schlei stated that the proposed law was unconstitutional because it impinged on the power of the president to keep information secret when release was "not in accord with his judgment of what was in the public interest."[118]

Because of the "scope and complexity of modern government," Schlei said, "there are, literally, an infinite number of situations wherein information in the hands of government must be afforded varying degrees of protection against public disclosure. The possibilities

110. *See* 112 CONG. REC. 13,641 (daily ed. June 20, 1966) (statement of Rep. John E. Moss), https://www.gpo.gov/fdsys/pkg/GPO-CRECB-1966-pt10/pdf/GPO-CRECB-1966-pt10-8-2.pdf.

111. Arthur Krock, *How Johnson Keeps Tight Official Lip*, DES MOINES REG., Mar. 9, 1965, at 6.

112. ROBERT DALLEK, FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961-1973, at 368 (1998).

113. *House Hearing*, *supra* note 106, at 2.

114. *Id.*

115. *See id.*

116. *See* George Kennedy*, How Americans got their right to know*, JOHN E. MOSS FOUND. (1996), http://www.johnemossfoundation.org/foi/kennedy.htm.

117. *House Hearing*, *supra* note 106, at 3 (statement of Norbert A. Schlei, Assistant Att'y Gen. of the United States).

118. *Id.* at 5-6; *see* LEMOV, *supra* note 21, at 55.

of injury to private and public interests through ill-considered publication are limitless."[119] Highly sensitive FBI reports containing the names of undercover agents and informers, for example, were protected only by the president's claimed right of "executive privilege" and ancient legal precedent. The subject was just too complicated, too changing, to be covered by any system of legal rules.[120]

Schlei predicted that Moss's bill would destroy the delicate balance between Congress and the Executive Branch, and that the legislation would eliminate "any application of judgment to questions of disclosure or nondisclosure . . . ."[121] It would substitute a single legal rule that would automatically determine the availability, to any person, of all records in the possession of federal agencies—except Congress and the courts, which were excluded from Moss's bill. That approach, according to the Justice Department representative, was impossible and could only be fatal.[122] There was no way of eliminating judgment from the process used to resolve the problem. "The problem is too vast, too protean to yield to any such solution."[123]

Schlei's testimony ended with an apparent veto threat.[124] Moss's bill, Schlei said, impinged on the authority of the president to withhold documents where he determined that secrecy is in the public interest.[125] Since the bill would contravene the Separation of Powers Doctrine, it would be unconstitutional.[126] Neither the Department of Justice, nor its spokesman, discussed the scope of the claimed executive privilege right—which is not explicitly referred to in the Constitution.[127] Nor did the Justice Department indicate how the term "in the public interest" could be defined.

Moss challenged the witness and, through him, the president. He said the problem they were dealing with would not go away anytime soon.[128] He recalled that the House and the Senate had been working on a freedom of information law for many years.[129] The Senate had recently passed a bill identical to Moss's House proposal and written

119. *House Hearing*, *supra* note 106, at 5 (statement of Norbert A. Schlei, Assistant Att'y Gen. of the United States).
120. *Id.* at 6-7, 16.
121. *Id.* at 5.
122. *Id.*
123. *Id.*
124. *See id.* at 8.
125. *See id*. at 6.
126. *See id.*
127. *See id.* at 11.
128. *See id.* at 17.
129. *See id.*

by Moss's staff. Moss asserted, "[W]e have not been impetuous here. Ten years in moving to a piece of legislation is rather a long period of time. . . . [T]his step can be taken now and . . . it will succeed . . . ."[130]

One of Moss's strongest congressional backers was a freshman Republican congressman from Illinois named Donald Rumsfeld. Rumsfeld, years later a secretary of defense with a very different perspective on information disclosure, not only supported Moss at the hearings, he also maintained his support with speeches on the House floor.[131] According to Bruce Ladd, a member of his staff, Rumsfeld convinced Minority Leader Gerald Ford and the House Republican Policy Committee to back the bill.[132] They attacked the Johnson Administration for not supporting it, although they had been strangely silent on the issue during the Eisenhower Administration.[133] The political stakes over the proposed Freedom of Information Act were growing.[134]

VII. Tactics: The Long Investigation

The Special Subcommittee on Government Information had been created in 1955 with little public notice.[135] The issue of freedom of information versus government secrecy had not yet gained public traction ten years earlier.

The press, however, had long been frustrated by its inability to get government documents. As far back as the 1940s, the ASNE established a Freedom of Information Committee. Initially chaired by James Pope, editor of the *Louisville Journal*, it commissioned the landmark study by Harold Cross, the *Herald Tribune* counsel, which was published in 1953.[136] Pope said, in a forward to the Cross book: "[W]e had only the foggiest idea of whence sprang the blossoming Washington legend that agency and department heads enjoyed a sort of personal ownership of news about their units. We knew it was all wrong, but we didn't know how to start the battle for reformation."[137]

Cross had opened his report with ringing statements of conviction: "Citizens of a self-governing society must have the legal right to examine and investigate the conduct of its affairs, subject only to

130. *Id.*
131. *See* Ladd, *supra* note 51, at 208, 210.
132. *See id.* at 208-09.
133. *See id.* at 207-08.
134. *See id.* at 208.
135. *See House Hearing*, *supra* note 106, at 124.
136. *See* Ladd, *supra* note 51, at 192-93.
137. Cross, supra note 66, at viii.

those limitations imposed by the most urgent necessity. To that end they must have the right to simple, speedy enforcement . . . ."[138] Cross cited Patrick Henry's statement at the dawn of the Republic: "To cover with the veil of secrecy the common routine of business is an abomination in the eyes of every intelligent man."[139]

All that was missing was a workable plan of action. Even when Moss and his special subcommittee got started in November 1955, the press did not focus much attention on the early hearings. As *Congressional Quarterly* reported, representatives of the press were asked to testify first before the subcommittee.[140] Russell Wiggins of the *Washington Post* told the subcommittee that newspaper editors were disturbed by the withholding of information in many areas of government.[141] "We think it is due to the size of Government . . . and . . . to declining faith in the wisdom of the people . . . ."[142] James Reston, chief of the *New York Times* Washington bureau asserted that withholding information was part of a growing tendency by government officials to "manage" news that might harm their image.[143] It was a barely concealed jab at Johnson.

Philip Young, chairman of the Civil Service Commission, countered that the commission, not just the president, had inherent power under the Constitution to withhold information from Congress, the press, and the public.[144] Officials of several government agencies testified that, if transactions or even conferences with private businesses were made public, it would be difficult to obtain frank disclosures and recommendations.[145]

Less than a year after its creation, the Moss subcommittee forwarded its first "interim" report.[146] The idea was to energize members of Congress by telling them what the Executive Branch was doing. The staff report noted that the heads of departments often failed to

138. *Id.* at xiii.

139. *Id.* (quoting THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION VOL. III, at 170 (Jonathan Elliot ed., 2d ed. 1827), http://oll.libertyfund.org/titles/elliot-the-debates-in-the-several-state-conventions-vol-3 (follow "Facsimile PDF" hyperlink under "Available in the following formats")).

140. *See* CONG. QUARTERLY SERV., CONGRESS AND THE NATION 1945-1964, at 1738 (1965) [hereinafter CONG. QUARTERLY SERV., 1956].

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *See* Availability of Information from Fed. Departments and Agencies, H.R. REP. No. 84-2947, at 91 (1956) [hereinafter House Report 84-2947].

furnish information even to Congress, based on a "naked claim of privilege."[147] At that time, the staff was headed by two newspapermen, Sam Archibald and Jack Matteson.[148] Their report argued that "Judicial precedent recognizes the power of Congress to grant control over official government information . . . If Congress can grant control . . . it follows that it can also regulate the release of such information . . . ."[149]

The Department of Justice submitted a 102-page rebuttal.[150] It is hard to conceive of a federal agency asserting any similar definition of unbridled executive power today: "Congress cannot under the Constitution compel heads of departments to make public what the president desires to keep a secret in the public interest. The president alone is the judge of that interest and is accountable only to his country . . . and to his conscience."[151]

As the dispute grew more intense, Moss suggested that if the Department of Justice was right, "Congress might as well fold up its tent and go home."[152]

Defense Department officials were prominent witnesses before the Moss subcommittee.[153] With the Vietnam War expanding and the Cold War still raging, national security fears were a major part of the information debate. Assistant Secretary Robert Ross did offer a minor concession.[154] He said that in the department's recently issued directive, information must make a "constructive contribution to the defense effort or it could not be released."[155] That said, he added that it did *not* apply to press inquiries.[156] He did not mention inquires by Congress or members of the public.

147. *See id.* at 89.

148. *See* LADD, *supra* note 51, at 192 (noting that Congressman Moss, in his capacity "as chairman of the new Subcommittee on Government Information[,]" appointed Samuel J. Archibald as staff director); Memorandum from John S. Warner, Legislative Counsel of the Central Intelligence Agency, to the Office of Legislative Counsel (May 6, 1964) (on file with Central Intelligence Agency Library), https://www.cia.gov/library/readingroom/docs/CIA-RDP66B00403R000200220042-8.pdf (noting Jack Matteson's involvement with Congressman Moss's Subcommittee).

149. CONG. QUARTERLY SERV., 1956, *supra* note 140 (quoting the 26-page staff report of the Subcommittee "presenting legal analysis of the right of Congress to obtain information from the Executive Branch").

150. *See id.*

151. *Id.* (quoting the 102-page rebuttal brief submitted by the Justice Department to the Subcommittee).

152. *Id*.

153. *See id.*

154. *See id.* at 1738-39.

155. *Id*.

156. *See id*.

Another witness, Trevor Gardner, former assistant secretary of the Air Force, had resigned a few months prior, in protest against Defense Department information policies.[157] He stunned the subcommittee, testifying that at least half of all currently classified defense department documents were *not* properly secret.[158] Gardner gave an example of excessive secrecy by noting that a leading nuclear physicist—Robert Oppenheimer—had been denied security clearance by the Atomic Energy Commission in 1954.[159] Inconveniently, Oppenheimer kept coming up with valuable, top secret nuclear ideas.[160] Gardner thought keeping Oppenheimer uninformed was absurd.[161]

In July 1956, the Moss subcommittee issued its first formal report, which summed up its initial year of work.[162] Despite the opposition of every federal agency that testified, the report concluded:

> It, therefore, is now incumbent upon Congress to bring order out of the present chaos. Congress should establish a uniform and universal rule on information practices. This rule should authorize and require full disclosure of information, except for specific exceptions defined by statute or restricted delegation of authority to withhold for an assigned reason within the scope of the authority delegated. The withholding should be subject to judicial review and the burden of proof should be on the official who withholds information.[163]

Republican Congressman Claire Hoffman filed vigorous dissenting views to the report, asserting that the information powers of the president—Dwight Eisenhower—could not be lawfully limited.[164]

But the brief statement in the report by Moss and a nearly unanimous subcommittee, neatly summarized the heart of what was to become the Freedom of Information Act, an act that could not pass Congress for another ten long years. A Moss-Hennings amendment

157. *See id.* at 1739.
158. *See id.*
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.*
163. House Report 84-2947, *supra* note 146, at 93.
164. *Id.* at 96-99. The report was unanimous; however, Ranking Member Clare Hoffman (R-Michigan) filed additional views which were critical of possible legislation regarding public and congressional access to federal records. *See id.* Hoffman stated "the right of the citizen, of the Congress, to be advised of the information possessed by the executive departments is subject to several limitations, as is the right to a free press, to free speech, to freedom of petition, and every other right guaranteed by the Constitution. There must be a reason for the exercise of the right. . . . [The right] is limited by the fact that the Constitution grants to the President certain authority, imposes upon him certain duties. Acting in performance of those duties, within the scope of the authority granted, he is under no obligation to explain or justify his acts, either to individuals or to the Congress." *Id.* at 96.

intended to limit the existing federal Housekeeping Law, giving ownership of records to executive agencies, did not change other federal laws, which were used to deny information to the public.[165] Moss, Hennings, and their allies had failed to bargain on the tenacity of the federal bureaucracy—which had noted the reluctance voiced in President Eisenhower's signing statement on the Moss-Hennings amendment.[166] The Housekeeping amendment was ignored. Federal agencies continued to cite other provisions of law authorizing them to withhold information, either because it was not in the "public interest," the person claiming the information did not have a legitimate right to get it, or the information might impair national security.[167] Rarely did President Eisenhower have to make a formal claim of executive privilege. That authority was delegated down the line to relatively low-level bureaucrats, who routinely blocked access to the public, the press, and Congress.

Another report, issued in 1966 by the full Committee on Government Operations in support of Moss's proposed Freedom of Information Act, claimed that improper denials of information requests had occurred again and again for more than ten years through the administrations of both political parties.[168] Case after case of withholding of information was documented. There was no adequate remedy.[169]

The 1966 report, approved by the full Government Operations Committee, noted many instances of questionable agency denials:

—The National Science Foundation decided it would not be in the "public interest" to disclose competing cost estimates submitted by bidders for the award of a multi-million dollar deep sea study;

—The Department of the Navy ruled that telephone directories fell within the category of information relating to "internal management" of the Navy and could not be released;

—The Postmaster General ruled that the public was not "directly concerned" in knowing the names and salaries of postal employees;

— Federal agencies refused to disclose the opinions of dissenting members, even where a vote on an issue had been taken; and

—The Board of Engineers for Rivers and Harbors, which ruled on billions of dollars of federal construction projects, said that "good

165. *See House Hearing*, *supra* note 106, at 227.

166. Clarifying and Protecting the Right of the Public to Information, H.R. REP. No. 89-1497, at 1, 4 (1966) [hereinafter House Report 1497].

167. *See House Hearing*, *supra* note 106, at 4-5.

168. *See* House Report 1497, *supra* note 166, at 5.

169. *See id.* at 2, 5-6.

cause" had not been shown to disclose the minutes of its meetings and the votes of its members on awarding contracts.[170]

The committee reported that requirements for publication were so hedged with restrictions that twenty-four separate terms were used by federal agencies to deny information.[171] These included "top secret," "secret," "confidential," "official use only," "non-public," "individual company data," and a seemingly endless list of other words and phrases.[172]

VIII. Opposition Increases

Proponents of a federal information law had other hurdles to overcome. There were efforts to deny the Moss subcommittee funding or completely eliminate it.[173] The ASNE committee wrote to the Chairman of the Government Operations Committee, William Dawson, that "the importance of the Committee's work cannot be exaggerated. . . . We who have seen the danger and the need are greatly heartened, and we would like to see the Committee's funds, its powers and its influence vastly expanded."[174]

The effort to de-fund the Moss committee did not succeed, but Moss faced other attempts to take away his committee powers. In 1965, near the end of his long investigation, Moss and his staff wrote and introduced a public information bill—identical to a Senate bill offered by Senator Edward Long of Missouri (after Senator Hennings' death in 1960)—which would enact a freedom of information law similar to the one outlined in the subcommittee's first report in 1955.[175] But Moss's progress was halted when, suddenly, he was unable to muster a quorum of subcommittee members necessary to vote on the bill.

When interviewed by the *Albuquerque Journal* about what was happening to the Moss bill, subcommittee member Donald Rumsfeld suggested that President Johnson's opposition was the problem.[176] According to the *Albuquerque Journal* reporter, when asked why the

170. *Id.* at 5-6.

171. *Id.* at 6.

172. *Id.*

173. Lemov, *supra* note 21, at 60.

174. Letter from James D. Pope, Exec. Editor, Louisville Courier Journal, to William L. Dawson, Congressman, U.S. House of Representatives, Chairman, Committee on Gov't Operations (Dec. 19, 1956) (on file with the National Archives).

175. *See* Ladd, *supra* note 51, at 203-04, 208.

176. Paul R. Wieck, *'Chill' Threatens Press Bill*, Albuquerque J., July 11, 1965, at A5.

subcommittee could not get members to meet and vote on the bill, Rumsfeld answered, "We always managed to meet before."[177]

Newspaper columnists Robert Alan and Paul Scott, writing in the *Tulsa World*, reported that the Johnson Administration was pushing to rewrite the bill to give the heads of all departments and agencies authority to bar publication of official information.[178] An *Associated Press* story said that the president had passed the word to jettison the bill.[179] Moss's actions in continuing to force a quorum and in replacing the two absent subcommittee members showed he was determined to push the bill through, despite the apparent opposition of a president of his own party and, perhaps, of the seemingly conflicted House leadership.

The *Washington Post* editorialized in 1965 that:

> Congress should promptly approve the Federal public records law now reintroduced by Senator Edward V. Long of Missouri and Representative John Moss of California. . . . The principles it involves have been extensively debated for the last decade. . . . Its great contribution to the law is its express acknowledgement that . . . citizens may resort to the courts to compel disclosure where withholding violates the [law].[180]

Columnist Drew Pearson used his syndicated column, "Washington Merry-Go-Round," to attack government secrecy.[181] Pearson wrote that it took a lengthy barrage of correspondence from Representative John Moss, "crusader for freedom of information," to get the Defense Department to reveal the facts about the use of plush private airplanes by defense department officials, even to the Congress.[182]

Before his confrontations with the Johnson Administration, Moss had a positive relationship with President John Kennedy on the issue.[183] That had led to charges that Moss was being "soft" on an administration of his own party.[184] In Moss's defense, Bruce Ladd, who worked for Rumsfeld at the time, said that Kennedy was a supporter of the principle of freedom of information and that Moss was trying to

177. *Id.*

178. Robert S. Allen & Paul Scott, *More Press Controls*, TULSA WORLD, July 31, 1965, at 6.

179. LADD, *supra* note 51, at 208.

180. *Public Records Law*, WASH. POST, TIMES HERALD, Mar. 1, 1965, at A16.

181. *See* Peter Hannaford, *Introduction* to DREW PEARSON, WASHINGTON MERRY-GO-ROUND, THE DREW PEARSON DIARIES, 1960-1969, at xvii, xix (Peter Hannaford ed., 2015).

182. Drew Pearson, *The Washington Merry-Go-Round Release Sunday*, May 28, 1961, http://auislandora.wrlc.org/islandora/object/pearson%3A22500.

183. *See* LADD, *supra* note 51, at 199, 205-06.

184. *See id.* at 201.

work within the administration to change the attitude of federal agencies.[185] Sigma Delta Chi, the national journalism society, nonetheless charged that it was a "gentle" Moss who chided the Democratic bureaucrats over secrecy, instead of the old fire-eating Moss of 1955 to 1960, who put scores of Republican bureaucrats on the witness stand and hammered them relentlessly and publicly.[186]

Ladd, Rumsfeld's staff member, wrote that the Moss critics had overlooked the subcommittee's exhaustive hearings which had defined the secrecy problem. He thought Moss had moved to a less colorful phase of his investigation and was attempting a legislative remedy. Ladd said that Moss was able to establish a working relationship with the Kennedy administration, thus permitting "quiet persuasion" to sometimes take the place of public outcries.[187]

Kennedy did initiate one important change in government information policy. He gave Moss a letter—at Moss's request—agreeing to assert executive privilege only personally and not delegate the power to lower-level officials of his administration.[188] President Richard Nixon later furnished a similar pledge.[189]

Republican support for a freedom of information bill, fueled by Rumsfeld and then Minority Leader Gerald Ford, was new. It was something that had been decidedly absent during the Eisenhower administration. Growing press coverage made the issue better known to the public.[190] The tide gradually began to turn. Moss waited, looking for a way to overcome the hesitation—or opposition—of the House leadership.[191] He decided to ask the Senate to move first.[192]

IX. THE SENATE END RUN; EMANUEL CELLER'S GIFT

Moss's decision to temporarily cede the leadership, of the bill he had written and an issue he had pursued for ten years, was important.

185. *See id.* at 199-201; Barry Schrader, *Bruce Ladd*, NORTHERN STAR, (Jan. 5, 2011), http://northernstar.info/alumni/hall_of_fame/bruce-ladd/article_bbd702ae-1911-11e0-ae70-0017a4a78c22.html.

186. LADD, *supra* note 51, at 201.

187. *Id.*

188. Letter from John F. Kennedy, President, U.S., to John E. Moss, Congressman, U.S. House of Representatives, Chairman, Special Gov't Info. Subcommittee of the Committee on Gov't Operations (Mar. 7, 1962) (on file with the John E. Moss Foundation Website), http://www.johnemossfoundation.org/foi/from_jfk-orig.htm.

189. Presidential Statement About Executive Privilege, 76 PUB. PAPERS 184-86 (Mar. 12, 1973).

190. *See* LADD, *supra* note 51, at 203.

191. *See id.* at 203-04.

192. *See id.*

With the backing of Democrat Senator Edward Long, Republican Senator Everett Dirksen and—surprisingly—even the communist-hunting Senator Joseph McCarthy, the Senate passed a bill identical to the Moss bill in October 1965.[193] The House, however, still refused to act on its own committee bill. So the Senate bill was sent over to the House where it was to be assigned to a committee for consideration.[194]

In a stunning defeat for information advocates, it was not referred to Moss's subcommittee. It was, instead, sent by Speaker John McCormack to the House Judiciary Committee.[195] And there it languished.[196]

When the Senate passed the Long bill and sent it to the House, *Editor and Publisher*, the newspaper industry journal, observed that House members were too involved in "mending fences" to offer the public hope that anything could be accomplished to get the information bill out of the House Judiciary Committee.[197] *Editor and Publisher* added, "It might be worth a try if enough newspapers were to build a bonfire under that august body."[198]

It was Moss who built the bonfire. He arranged a meeting with the chairman of the House Judiciary Committee, the dignified Emanuel Celler, of Brooklyn.[199] Celler was seventy-six years old when Moss met with him in 1965.[200] He had been elected to Congress from Brooklyn's Tenth Congressional District in 1922 when he was in his mid-thirties.[201]

One would like to think that when John Moss came to see the powerful committee chairman, Celler remembered his own economic struggles as a young man, which were surprisingly similar to Moss's. The position of the Democratic leadership—and President Johnson—on the Freedom of Information bill remained unclear.

Celler helped Moss. He turned jurisdiction of the Freedom of Information bill over to Moss's subcommittee.[202]

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193. 112 CONG. REC. 13007 (1966); *see* LADD, *supra* note 51, at 208. *See generally* S. 1160, 89th Cong. (1965).

194. LADD, *supra* note 51, at 208.

195. *See id.* at 203, 205.

196. *See id.*

197. *Id.* at 203.

198. *Id.*

199. *Id.* at 203-04.

200. *See Celler, Emanuel*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000264 (last visited Oct. 18, 2017).

201. *See id.*

202. *See* LADD, *supra* note 51, at 203-04.

Celler's gift to Moss is almost unheard of in Congress. Ordinarily, chairmen of major committees do not turn over significant legislation to a junior member, especially one who is only the chair of a subcommittee. But somehow, Moss had persuaded Celler to give him the bill.[203] Celler may have felt that Moss's ten-year effort to get a freedom of information law through the Congress should not go unrecognized.[204] Perhaps Celler wanted to get rid of a hot potato which might threaten his relations with the White House. Whatever the reason, Celler's action proved a momentous one.

Moss constructed the bonfire that newspapers wanted to build with help from Celler, Rumsfeld, and the House Republicans.[205] With jurisdiction, and at least a grudging yellow light from the House leadership, the Government Operations Committee favorably reported out the Moss information bill in May 1966.[206]

The fact that Moss had been willing to wait for the Senate to act and to take up the Senate bill—not a different House bill—was a key decision. It meant that there would not have to be a possibly divisive conference committee meeting between the two bodies. The bills were the same. The House bill, which was identical to the Senate bill, was reported to the full body and unanimously passed the House on June 20, 1966.[207] Having passed both the House and Senate, it was sent to the White House for the president's signature.[208]

X. Presidential Veto Threat

The stage was now set for either the final chapter or yet another defeat for the unborn Freedom of Information Act. The bill was delivered on June 26, 1966, to President Lyndon Johnson at his Texas ranch in Johnson City on the Pedernales River.[209] There it sat as the hot summer days dragged by.

Neither Moss nor Senator Edward Long knew whether Johnson would sign the bill.[210] The testimony of the Department of Justice in

203. *See id.*

204. *See generally id.* at 207.

205. *Id.* at 203, 210.

206. *See id.* at 204, 210.

207. *See id.* at 210.

208. *Id.*

209. *Id.* at 210; Thomas Blanton, *Freedom of Information at 40*, Nat'l Security Archive (July 4, 2006), http://nsarchive2.gwu.edu//NSAEBB/NSAEBB194/index.htm.

210. Ladd, *supra* note 51, at 210.

1965 had opined the bill was unconstitutional.[211] Speaker McCormack had let Moss know that the president was displeased with the information bill and that the Executive Branch did not like it.[212] Moss had moved forward against the wishes of the president.[213]

In June 1966, the press reported that things were looking bleak for the Freedom of Information Act.[214] In an effort to reach an agreement with the White House that would get the bill signed by Johnson, Moss had met with Attorney General Nicholas Katzenbach.[215] He had offered a concession. Moss suggested the Department give the House some language that they would like to see in the House committee report.[216] Such language, he added, might suggest a more acceptable interpretation of the parts of the legislation that the White House opposed.[217] While offering to accept language in the House report, Moss stood his ground on the terms of the bill itself: "I want this bill to be passed. If counsel and the Justice Department can work out reasonable report language and my committee goes along with it, I'll support it—with the bill as written."[218]

Moss's staff and Justice Department lawyers jointly wrote a House report.[219] It was approved by the committee and released.[220] It was somewhat different than the text of the legislation. The House Report suggested that Executive Branch officials would have more discretion in determining whether authorization existed for them to apply some of the bill's exemptions, in order to deny information requests.[221] Moss went along with the jointly written report, although some referred to it as a "sellout."[222] Benny Kass, Moss's committee counsel, later said, "We believed the clear language of the law would override any negative comments in the House report. If the statute is

211. *See House Hearing*, *supra* note 106, at 6-7 (statement of Norbert A. Schlei, Assistant Att'y Gen., Department of Justice).

212. LADD, *supra* note 51, at 205-06.

213. *Id.*

214. *See, e.g.*, *People's Right to Know at Stake*, L.A. TIMES, June 17, 1966, at B4 (indicating that, "Although [the Freedom of Information Act's] passage is deemed a certainty, its fate at the hands of President Johnson remains in doubt.").

215. LEMOV, *supra* note 21, at 66.

216. *See* LADD, *supra* note 51, at 207.

217. *See id.*; *see also* LEMOV, *supra* note 21, at 66.

218. LEMOV, *supra* note 21, at 66 (quoting *Kass Interview* at 11).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

clear, you don't look to the legislative history."[223] More importantly, it was the price of getting a bill.[224] Moss and the bill's supporters knew they did not have the votes to override a presidential veto.[225]

In summary, the primary objections to the FOIA bill raised by Executive Branch agencies (including the Department of Justice, the Department of Defense, and the Civil Service Commission), incorporated the views of the White House. They included major concerns about disclosure of:

1. information which could damage national defense or foreign policy interests of the U.S.;
2. inter-agency or intra-agency deliberations which might inhibit government decision-making;
3. personal files of individuals which should be kept private;
4. information which could impair law enforcement actions of federal agencies, including the names of FBI informants;
5. trade secrets and other traditionally confidential business information; and
6. any other information which the president or his deputies deemed necessary to kept secret because such action was "in the public interest."[226]

With significant narrowing limitations, particularly incorporating judicial review of agency denials of information requests and a shift of the burden of proof to the government to defend its denials of information requests, most of these executive branch objections were incorporated in some form into the final FOIA bill.[227]

Moss and his allies now waited. The bill was on Johnson's desk in Texas. Moss was not sure whether his agreement with the Department of Justice, which resulted in the House report language, would lead to a presidential signature.[228] Moss had also explained the bill to the

223. *Id.* (quoting *Kass Interview* at 12); *see also* 2 *Executive Privilege, Secrecy in Government, Freedom of Information: Hearings on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923, and S. 2073 Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations and the Subcomm. on Separation of Powers and Administrative Practice and Procedure of the S. Comm. on the Judiciary*, 93d Cong. 126 (1973) [hereinafter *Senate Hearing on Freedom of Information*] (testimony of Benny L. Kass, attorney at law) (Kass testified "I don't think it was a sellout but in any event it was really the price of getting the bill. It was my legal advice to both the chairman of this committee and the chairman, Congressman Moss, that the legislative history only interprets and does not vitiate in any way the legislation and that the legislation was strong and was there.").

224. *Senate Hearing on Freedom of Information*, *supra* note 223.

225. LEMOV, *supra* note 21, at 66.

226. *See* 5 U.S.C. § 552 (b) (1)–(9) (West 2007 & Supp. 2017) (amended 2016).

227. *See id.*

228. LEMOV, *supra* note 21, at 66.

president during at least two meetings at the White House. Whether his explanations had been convincing remained unclear.

Rather than recessing for the July 4 holiday, Congress adjourned that year.[229] The adjournment was significant. Under the Constitution, if Congress is in adjournment and the president fails to sign legislation delivered to him within ten days, the bill is "pocket vetoed."[230] No Congressional vote to override is possible. Thus, if Johnson did not sign the bill by midnight July 4, 1966, it would be dead.[231] The entire process would have to be repeated again, perhaps in some future Congress.

Bill Moyers, Lyndon Johnson's press secretary at the time, had initially been skeptical of the need for a Freedom of Information Act and had sided with all federal agencies in opposition to the bill.[232] But over time, noting broad press support and growing congressional support for the legislation, Moyers changed his position.[233] By July 1966, he had become a supporter.

Moss told his staff to talk to the press.[234] He called newspaper editors all over the country regarding the proposed law.[235]

XI. FOIA Becomes Law

On July 4, the last possible day, it appeared that Johnson would not sign the bill because of his objections to its impact on the powers of the presidency. Pressure from the press and Congress was intense.[236] The issue had become political. The Republican Policy Committee had announced support for the legislation. The mid-term congressional elections were approaching in the fall. The president was focused on problems of foreign policy, mostly the growing Viet-

229. *Id.* at 67.

230. *Pocket Veto*, 4 The Encyclopedia of the United States Congress (Donald C. Bacon et al. eds., 1995).

231. *See* Telegram from Robert C. Notson, Exec. Editor, The Oregonian, and President, American Society Newspaper Editors, to Bill Moyers, Press Secretary of President Lyndon B. Johnson (July 2, 1966) [hereinafter Telegram to Moyers] (on file with the National Security Archive), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB194/Document%2010.pdf.

232. Lemov, *supra* note 21, at 67.

233. *See id.*; *see also, e.g.*, Telegram to Moyers, *supra* note 231.

234. Lemov, *supra* note 21, at 67; *see also* Bill Moyers, *Bill Moyers on the Freedom of Information Act*, PBS (Apr.5, 2002), http://www.pbs.org/now/commentary/moyers4.html ("only some last-minute calls to LBJ from a handful of newspaper editors overcame the President's reluctance . . . .").

235. Lemov, *supra* note 21, at 67; *see also* Bill Moyers, *Bill Moyers on the Freedom of Information Act*, PBS (Apr.5, 2002), http://www.pbs.org/now/commentary/moyers4.html.

236. *See* Moyers, *supra* note 235.

nam conflict.[237] Domestic issues were no longer Johnson's priority. At the last minute, Moyers went to Johnson's office and recommended that he sign the bill. Johnson agreed.[238]

At the signing, Johnson issued a statement alluding to his deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.[239] But Moyers, his press secretary at the time, later wrote about what had happened behind the closed doors. According to Moyers:

> LBJ had to be dragged kicking and screaming to the signing ceremony. [Johnson] hated . . . of journalists rummaging in government closets; hated them challenging the official view of reality. He dug in his heels and even threatened to pocket veto the bill after it reached the White House. Only the courage and political skill of a Congressman named John Moss got the bill passed at all, and that was after a twelve-year battle against his elders in Congress who blinked every time the sun shined in the dark corridors of power. They managed to cripple the bill Moss had drafted. And even then, only some last-minute calls to LBJ from a handful of newspaper editors overcame the President's reluctance; he signed . . . [the f—ing thing] as he called it . . . and then went out to claim credit for it.[240]

So the Freedom of Information Act became law.

The concerns of Moyers, that the bill had been "crippled," and of others, that Moss had sold out, did not prove to be correct. Over the years, the courts have generally adhered to the broad principle of disclosure enunciated in the bill and have been critical of agencies attempting to withhold information.[241] The exception has been in cases involving national security. It is primarily in that area, or where there is a presidential claim of executive privilege, that the law has failed to increase government information to the public.[242] Executive branch delays in furnishing documents and the cost of persons and organiza-

237. *See, e.g.*, Kent Germany, *Lyndon B. Johnson: Foreign Affairs*, MILLER CTR., https://millercenter.org/president/lbjohnson/foreign-affairs (last visited Nov. 19, 2017) (explaining President's Johnson's focus on U.S. foreign affairs, with the Vietnam conflict taking center stage).

238. *See* Press Release, Office of the White House Press Secretary, Statement by the President Lyndon B. Johnson Upon Signing S. 1160 (July 4, 1966) [hereinafter Press Release President Johnson FOIA Signing], https://nsarchive2.gwu.edu//nsa/foia/FOIARelease66.pdf.

239. *Id.*

240. Moyers, *supra* note 235.

241. *See, e.g.*, Hall v. C.I.A., 668 F. Supp. 2d 172, at 182, 194 (D.D.C. 2009) (citing McGehee v. C.I.A., 697 F.2d 1095, 1110 (D.C. Cir. 1983)); *see also* Nat'l Sec. Counselors v. C.I.A., 960 F. Supp. 2d 101, 206 (D.D.C. 2013) (citing Mead Data Cent., Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977)).

242. *See e.g.*, Armstrong v. Exec. Office of the President, 90 F.3d 553, 567 (D.C. Cir. 1996); Kissinger v. Reporters Comm. for Freedom of the Press, 100 S.Ct. 960, 966 (1980).

tions going to court to retain them remain major problems and a deterrent to greater use of the Act.

The legislative struggle that was commenced by Moss in 1954 ended successfully in 1966.[243] "Twas a sparkling Fourth [of July] for FoI [Freedom of Information] crusaders," said J. Edward Murray, chairman of the American Society of Newspaper Editors' Freedom of Information Act Committee.[244] "The long campaign in the never-ending war for freedom of information was crowned by a signal triumph[,]" he said.[245] "The 'dead hero' of the battle was the distinguished newspaper lawyer Harold L. Cross," who wrote the basic treatise in 1953.[246] The "living hero," said Murray, "was the distinguished California Representative John E. Moss, Congress's most inveterate FOIA champion."[247]

The Freedom of Information Act has been amended several times since 1966, most recently in 2016.[248] It has mostly been strengthened by Congress—particularly in 1974 and in 1996—to make the withholding of information by the federal government *more* difficult, to apply to electronic records, and to permit attorney's fees to be awarded to those whose requests for government data are improperly denied.[249]

As Moss understood, despite the list of exemptions, the principle of openness had been firmly established. The law is used annually by as many as 700,000 "persons" (private citizens, newspaper reporters, organizations and businesses) to obtain government information.[250]

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243. *See* Press Release President Johnson FOIA Signing, *supra* note 237.

244. Edward J. Murray, *'Twas a Sparkling Fourth for FOI Crusaders*, 500 BULL. OF THE AM. SOC'Y OF NEWSPAPER EDITORS, Aug. 1, 1966, at 3.

245. *Id.*

246. *Id.*

247. *Id.*

248. FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

249. *See* 5 U.S.C. § 552 (a) (4) (E) (West 2007 & Supp. 2017) (amended 2016) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."); Presidential Statement on Signing the Government in the Sunshine Act, 773 PUB. PAPERS 2236-37 (Sept. 13, 1974) ("[T]he provision of the Freedom of Information Act which permits an agency to withhold certain information when authorized to do so by statute has been narrowed to authorize such withholding only if the statute specifically prohibits disclosure, or establishes particular criteria for the withholding, or refers to particular types of matters to be withheld."); Press Release, Office of the White House Press Secretary, Statement by the President William J. Clinton Upon Signing H.R. 3802 (Oct. 2, 1996), https://nsarchive2.gwu.edu//nsa/foia/presidentstmt.pdf ("The legislation I sign today brings FOIA into the information and electronic age by clarifying that it applies to records maintained in electronic format.").

250. *See* DEP'T OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2012 (2012).

Moss knew the act was not perfect. "You have to make compromises," he said.[251] A decade after FOIA's enactment, he added "If you compare it with today, we've made vast progress. If you ask me if we've made enough, the answer is no."[252]

Before he died in 1997, Moss recalled that he knew from the beginning that the Freedom of Information Act would require continuing change to deal with new conditions. It would be, he predicted, a never-ending battle.[253]

XII. Freedom of Information Worldwide

The "never ending battle" for the Freedom of Information continues around the world today. According to FreedomInfo.org, today there are 117 countries with freedom of information laws, or similar administrative regulations.[254] Some of the most recent to adopt such laws are Sri Lanka, Togo, and Vietnam.[255]

This proliferation of official legal avenues for citizens to access much of their government's information affirms that the "right to know" is considered a universal value. While the motivations for each of the 117 countries with Freedom of Information regimes are as varied as the countries themselves, one-near constant remains: rarely have governments themselves voluntarily opened their files to their citizens; the legislation has been thrust upon them by journalists, environmentalists, historians, and anti-corruption advocates.[256]

The worldwide adoption of freedom of information legislation can perhaps be categorized into three waves: The Early Adopters, including Sweden (the first by 200 years), Finland in 1951, the United States in 1966 and other countries that adopted freedom of information legislation before the end of the Cold War. The Post-Cold War Openness era, including former Communist and Eastern Bloc states like Hungary and Bulgaria, but also a plethora of other countries that, when freed from the worldwide competition of capitalism and communism, were able to become more open. And finally what Thomas S. Blanton of The National Security Archive has termed "The Openness Revolution," a period continuing from the early 1990s to the pre-

251. Interview by Seney with Moss, *supra* note 1, at 204.

252. Kennedy, *supra* note 116.

253. Lemov, *supra* note 21, at 69.

254. *List of Countries with FOI Regimes*, *supra* note 6.

255. *See id.* (indicating that Sri Lanka, Togo, and Vietnam implemented freedom of information regimes in 2016).

256. *See* Thomas S. Blanton, *The Openness Revolution: The Rise of a Global Movement for Freedom of Information*, 1 Dev. Dialogue 7, 7 (2002).

sent.[257] This latest period has even largely overcome the closed-government backlash of the September 11, 2001 terrorist attacks. Over sixty countries including India, Mexico, and Tunisia added freedom of information laws during this period.[258]

In 1766, Swedish Riksdag member Anders Chydenius succeeded in establishing the world's first freedom of information law, *His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press*.[259] It opened "those recesses of knowledge" previously unavailable to the Swedish public—including the cost of pine-tar, the commodity used to seal ships, a key reason the Ordinance was drafted.[260] The right to know remains built into the Swedish Constitution.[261] The next freedom of information law was not passed until 1951 when Finland, still heavily influenced by its neighbor, passed a law similar to Sweden's.[262] But it was not until after John Moss's successful endeavor in 1966 in the United States that other countries in large numbers began realizing the importance of—and enacting their own—freedom of information legislation. France passed its law in 1978.[263] Between 1982 and 1983 commonwealth members Canada, Australia, and New Zealand each passed their own versions of a freedom of information law.[264] Mirroring the challenges Moss faced, an Australian senator commented, upon taking governmental power in 1983, "If we are going to do anything to reform the Freedom of Information Act, and if we want to, we had better do it in the first fortnight, before the new government has any secrets to hide."[265] Of course, simply being an early adopter of freedom of information legislation, or any adopter, does not necessarily guarantee that the legislation is well-drafted or fully enforced.

The second wave of freedom of information laws came after the end of the Cold War, including—but not exclusive to—the previously communist states of eastern and central Europe. One scholar, Ivan Szekely, has written that during the communist era, Eastern Bloc

257. *See id.* at 12-14.

258. *List of Countries with FOI Regimes*, *supra* note 6.

259. *See* Gustav Björkstrand & Juha Mustonen, *Introduction: Anders Chydenius' Legacy Today*, *in* THE WORLD'S FIRST FREEDOM OF INFORMATION ACT 4, 4 (2006).

260. *See* Juha Manninen, *Anders Chydenius and the Origins of World's First Freedom of Information Act*, *in* THE WORLD'S FIRST FREEDOM OF INFORMATION ACT 18, 41 (2006).

261. *See id.* at 18.

262. *See List of Countries with FOI Regimes*, *supra* note 6.

263. *Id.*

264. *Id.*

265. Alan Missen, *Freedom of Information- the Australian Experience*, 100 FREEDOM OF INFO. REV. 42, 43 (2002).

countries had only "peculiar" or limited sources for transparency: *samizdat,* hand-copied, illegally circulated literature, and "the reimported public sphere" of western broadcast radio, including the U.S.-produced and broadcast Radio Free Europe and Radio Liberty.[266] But despite this restricted starting position, these previously communist countries realized the importance of open government and soon began to institute their own freedom of information laws. Among the first was Hungary, which, along with privacy protections has a constitution that, with exceptions, declares the availability of data of public interest as a fundamental right.[267] Ukraine passed a freedom of information law in 1992 and enshrined the right in its constitution in 1996.[268] Bulgaria and Romania have also enacted freedom of information laws, in 2000 and 2001, respectively.[269] While the freedom of information laws established in post-communist countries certainly are not perfectly written or perfectly implemented, information author Ivan Szekely writes that they are having or have had the desired effect: "In all likelihood, greater transparency has complicated the lives of people holding high office, people who attempted to exploit the situation after the democratic transition, and people who tried to preserve and convert their earlier influence."[270]

But the Cold War dividend did not only benefit those formerly communist countries. Other countries including Ireland (1997), Thailand (1997), and Japan (1999) also passed freedom of information laws during this wave.[271] As Blanton writes, each of these three laws was also the result of a public backlash to government scandal or corruption.[272] In Ireland, the most damaging scandal was a public "Anti-D" blood bank in which errors by the Blood Transfusion Service Board potentially put as many as 100,000 mothers at risk, without initially raising any alarm.[273] Thailand adopted freedom of information legislation as part of a wholesale constitutional reform and enacted as a re-

266. Ivan Szekely, *Central and Eastern Europe: Starting from Scratch*, *in* THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD 116, 118 (Ann Florini ed., 2007).

267. *See id.* at 122.

268. *Id.* at 123; *see also* Ukraine Law of Information N.48 Art. 650 (1992).

269. Szekely, *supra* note 266, at 123-24; *see also* Law For Access to Public Information of Bulgaria (2000); Regarding the Free Access to Information of Public Interest Romania (2001).

270. Szekely, *supra* note 266, at 138.

271. Blanton, *supra* note 256, at 12-13.

272. *Id.* at 7, 13.

273. *See id.* at 12; Caroline O'Doherty, *Anti-D Scandal was a Bloody Disgrace*, IRISH EXAMINER (Feb. 21, 2014), http://www.irishexaminer.com/viewpoints/analysis/anti-d-scandal-was-a-bloody-disgrace-259488.html.

sult of mass demonstrations against the military regime.[274] In Japan, local freedom of information laws revealed the billions of yen spent on food and alcohol by Japanese government officials entertaining each other—and led to the passage of a national statute.[275]

Finally, the third, continuing wave of countries enacting freedom of information laws is what Blanton has termed "The Openness Revolution."[276] By 2002, there were some forty-five countries that had established some form of freedom of information legislation.[277] Today, fifteen years later, that number has more than doubled to 117 countries, and shows no sign of slowing.[278] The first two phases of freedom of information laws were primarily spurred from pressure from below—citizens forcing their governments to share the price of pine tar, revealing the disparate funding for different school districts, shining light on government budgets and spending, and disclosing information about ecological issues.[279] During the third phase, this pressure from below is combined with pressure from above. This increased pressure from above came and comes from international institutions, such as the United Nations, which has long declared, "[f]reedom of information is a fundamental human right . . . ."[280] Similarly, other institutions such as the International Monetary Fund and World Bank have concluded that better access to information makes for better markets and better standards of living.[281]

The U.S.-led Open Government Partnership launched in 2011 "to provide an international platform for domestic reformers committed to making their governments more open, accountable, and responsive to citizens[,]" now boasts seventy countries that have committed to

274. Blanton, *supra* note 256, at 13.

275. *Id.* at 13-14.

276. *Id.* at 8.

277. *Id.*

278. *See List of Countries with FOI Regimes*, *supra* note 6; *see also Eight Countries Adopt FOI Regimes in 2016*, FREEDOMINFO.ORG (Dec. 28, 2016), http://www.freedominfo.org/2016/12/eight-countries-adopt-foi-regimes-2016/.

279. *See* Thomas S. Blanton, *The Global Openness Movement in 2006: 240 Years after the First Freedom of Information Law, Access to Government Information Now Seen as a Human Right*, *in* THE WORLD'S FIRST FREEDOM OF INFORMATION ACT 80, 82 (2006); Blanton, *supra* note 256, at 13-14.

280. G.A. Res. 59 (I), at 95 (Dec. 14, 1946); *see also* TOBY MENDEL, FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY 7 (2d ed. 2008).

281. *See* JÖRG DECRESSIN, INT'L MONETARY FUND, EUROPE HITTING ITS STRIDE 46 (2017); MUSTAPHA KAMEL NABLI, THE WORLD BANK, BREAKING THE BARRIERS TO HIGHER ECONOMIC GROWTH 97-98 (2007).

work to "develop and implement ambitious open government reforms."[282]

A few of the many successes from this Openness Revolution include India, Mexico, and Tunisia.[283] After a decades-long fight, spurred along by multiple, diverse, grassroots efforts to end the government's monopoly on information, India passed a freedom of information law in 2002 and a strengthened law in 2005.[284] The Indian law includes a provision that Moss was unable to build into the American FOIA: an Information Commission which (in theory) is the final arbiter responsible for adjudicating disputes between citizens and the government.[285] According to one Indian FOI expert, Shekhar Singh, "perhaps not since the concept of democracy itself was first conceived has any idea so caught the imagination of the people of India and so promised to revolutionize the way they will allow themselves to be governed."[286]

Mexico passed its freedom of information law in 2002.[287] In 2006, the Mexican Constitution was reformed to establish minimum standards of disclosure at the federal, state, and municipal levels. The law established a website called "Infomex," which users can use to send requests, appeal agency decisions, and consult every request and public response ever processed electronically.[288] According to the website Freedominfo.org, "this type of electronic filing system gives citizens the ability to view the progress and trajectory of Mexico's transparency over time, and represents one of the most advanced Web-based information portals in the world."[289] The Mexican freedom of information law also surpasses the U.S. in another key provision that, *at least in theory*, forbids hiding or denying information related to gross human rights violations.[290]

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282. *How It Works*, OPEN GOV'T P'SHIP, https://www.opengovpartnership.org/about/about-ogp/how-it-works (last visited Oct. 21, 2017).

283. MENDEL, *supra* note 280, at 5, 55, 81; Kouloud Dawahi, *Tunisia Breaks Down Government's Secrecy Walls*, FREEDOMINFO.ORG (June 16, 2016), http://www.freedominfo.org/2016/06/tunisia-breaks-down-governments-secrecy-walls/.

284. Shekhar Singh, *India: Grassroots Initiatives*, *in* THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD 19, 23-24, 43-45 (Ann Florini ed., 2007).

285. *Id.* at 45-46.

286. *Id.* at 52.

287. MENDEL, *supra* note 280, at 80.

288. *Freedom of Information: Overview*, FREEDOMINFO.ORG, http://www.freedominfo.org/regions/latin-america/mexico/mexico2/ (last visited Oct. 21, 2017).

289. *Id.*

290. *See* MENDEL, *supra* note 280, at 81.

After establishing itself as perhaps the only successful political revolution of the Arab Spring, Tunisia further solidified its fledgling democracy by passing its own freedom of information law in 2016.[291] According to Kouloud Dawahi, the Tunisian law is based upon published consensus international norms, and succeeded in part because Tunisia made a public commitment to be admitted into the international Open Government Partnership.[292] Again, this young law surpasses the American FOIA in one significant way, requiring the law to apply to both Tunisia's central and local governments, each of the its three branches (executive, legislative, and judiciary), and to other relevant bodies, including public enterprises and regulatory authorities.[293]

The international movement toward freedom of information laws, spurred in part by the American Freedom of Information Act and its author John Moss, is nothing short of remarkable.

XIII. International and American Challenges

At a recent U.S. Senate Judiciary Committee Hearing commemorating the fiftieth anniversary of the U.S. Freedom of Information Act, Senator Al Franken (D-MN) took issue with a survey showing that on paper, Russia had a stronger freedom of information law than the United States.[294] "I can't believe that," Franken said.[295] He had an important point; in one year alone the U.S. Freedom of Information law led to major revelations about Pentagon officials misleading Con-

291. Shelly Culbertson, *Tunisia is an Arab Spring Success Story*, Observer (Apr. 20, 2016), http://observer.com/2016/04/tunisia-is-an-arab-spring-success-story/; Kouloud Dawahi, *Tunisia Breaks Down Government's Secrecy Walls*, Freedominfo.org (June 16, 2016), http://www.freedominfo.org/2016/06/tunisia-breaks-down-governments-secrecy-walls/.

292. Dawahi, *supra* note 291.

293. *Id.* The U.S. law applies only to the federal executive branch. 5 U.S.C. § 552 (f) (West 2007 & Supp. 2017) (amended 2016) ("'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency . . . .").

294. Senate Judiciary Committee Hearing at 1:14:55, *FOIA at Fifty: Has the Sunshine Law's Promise Been Fulfilled?*, Comm. on the Judiciary (July 12, 2016), https://www.judiciary.senate.gov/hearings/watch?hearingid=891D29A7-5056-A066-6027-F695186CBC6A; *see also Country Data*, Right to Info. Rating, http://www.rti-rating.org/country-data/ (last visited Oct. 21, 2017).

295. Senate Judiciary Committee Hearing at 1:15:24, *FOIA at Fifty: Has the Sunshine Law's Promise Been Fulfilled?*, Comm. on the Judiciary (July 12, 2016), https://www.judiciary.senate.gov/hearings/watch?hearingid=891D29A7-5056-A066-6027-F695186CBC6A. Having filed freedom of information requests in both the United States and Russia, we can attest that Franken was correct; in actuality the U.S. system works much better than the Russian. http://old.svobodainfo.org/en/node/2580.

gress on the Department of Defense's handling of sexual assault cases, the EPA and state decisions that led to lead poisoning of children in Flint, Michigan, widespread overcharging in Medicare, cheese marked as being "100% parmesan" actually containing no parmesan, and hundreds more.[296] That is an important yardstick for other governments because the disclosures directly challenged important executive actions and functions.

But merely because information requests can win the release of documents from their governments does not mean that the laws and their implementation do not need to be improved. Of the 117 freedom of information laws that exist, many that appear strong on paper are actually weak in practice. Public servants are often ignorant of, or outright hostile to such laws. Judges and ombuds offices are often overly deferential to their colleagues in governments. Threshold issues, including poor record keeping, destruction of documents, and lack of resources, all too often make requested records difficult or impossible for the public to find. Unacceptably long delays are all too common. For instance, in the United States, the National Security Archive has some FOIA requests that have been pending for two decades.[297]

However, there is progress as well. Countries, including many cited in this paper, have proven that such obstacles can be overcome. Perhaps the best way to measure and improve international openness is for countries to legislate, and to ensure that they actually facilitate the "Five Fundamentals" of openness. As Blanton has written:

> [O]penness advocates have reached consensus on the five fundamentals of effective freedom of information statutes:
>
> * First, such statutes begin with the presumption of openness. In other words, information is not owned by the state; it belongs to the citizens.
>
> * Second, any exceptions to the presumption must be as narrow as possible and written in statute, not subject to bureaucratic variation and the change of administrations.

296. *FOIA Commands Headlines as Law Approaches 50th Birthday*, NAT'L SECURITY ARCHIVE (June 13, 2016), http://nsarchive2.gwu.edu/news/20160613-FOIA-Commands-Headlines-as-Law-Approaches-50th-Birthday/.

297. NAT'L ARCHIVES AND RECORDS ADMIN., ANNUAL FREEDOM OF INFORMATION ACT (FOIA) REPORT VII.E. (2015), https://www.archives.gov/files/foia/reports/2015.pdf; *see also* Nate Jones, *The Long, Ugly Journey of a FOIA Request Through the Referral Black Hole*, UNREDACTED: NAT'L SECURITY ARCHIVE BLOG (June 3, 2016) [hereinafter *The Long, Ugly Journey of a FOIA Request*], https://nsarchive.wordpress.com/2016/06/03/the-long-ugly-journey-of-a-foia-request-through-the-referral-black-hole/.

> * Third, any exceptions to release must be based on identifiable harm to specific state interests, not general categories like "national security" or "foreign relations."
> * Fourth, even where there is identifiable harm, the harm must outweigh the public interest served by releasing the information, such as the general public interest in open and accountable government, and the specific public interest in exposing waste, fraud, abuse, criminal activity, and so forth.
> * Fifth, a court, an information commissioner, an ombudsperson or other authority that is independent of the original bureaucracy holding the information should resolve any dispute over access.[298]

Beyond these fundamentals, it is now increasingly clear that, in the information age, a "sixth fundamental" is required for freedom of information laws.[299] This policy requires that governments make their information widely available to and easily usable by the public.[300] Documents likely to be requested under freedom of information laws should be proactively posted online; releases to requesters—processed with taxpayer funds—should also be made digitally available to the widest possible audience, not shipped in a package and possibly lost forever in a desk drawer.[301]

Even after the passage of the 2016 FOIA Improvement Act,[302] (creating a requirement of reasonably foreseeable harm to a protected interest, if a request for government information is denied) an honest appraisal of the American law shows that often in practice—if not in text—it does not fulfill all of the six principles of openness. In a study of one recent year, up to sixty percent of all American FOIA requests were withheld in whole or in part.[303] The government's FOIA exemptions remain very broad and easy to apply;[304] years and decade-long

298. Thomas S. Blanton, *The Global Openness Movement in 2006: 240 Years after the First Freedom of Information Law, Access to Government Information Now Seen as a Human Right*, *in* THE WORLD'S FIRST FREEDOM OF INFORMATION ACT 80, 87 (2006).

299. *See* Lauren Harper*, What the US National Action Plan is Missing*, UNREDACTED: NAT'L SECURITY ARCHIVE BLOG (Nov. 8, 2013), https://nsarchive.wordpress.com/2013/11/08/what-the-us-national-action-plan-is-missing/.

300. *See id.*

301. *Id.*

302. *President Obama Signs Freedom of Information Act Improvements into Law*, NAT'L SECURITY ARCHIVE (June 30, 2016), http://nsarchive2.gwu.edu/news/20160630-Obama-signs-Freedom-of-Information-Act-Improvemnents/. *See generally* Freedom of Information Improvement Act of 2016, Pub L. No. 114-185, S. 337, 114th Congress (2016).

303. *See* Nate Jones, *FOIA Statistics Shows the DOJ's "94.5% Release Rate" is a –Ahem– "Stretch*", UNREDACTED: NAT'L SECURITY ARCHIVE BLOG (Feb. 29, 2012), https://nsarchive.wordpress.com/2012/02/29/foia-statistics-shows-the-dojs-94-5-release-rate-is-a-ahem-stretch/.

304. *See* Nate Jones, *The Next FOIA Fight: The B(5) "Withhold It Because You Want To" Exemption*, UNREDACTED: NAT'L SECURITY ARCHIVE BLOG (Mar. 27, 2014), https://ns

delays often effectively deny requesters the information they need,[305] and fees are often used to deter people from making requests (even though they cover just one percent of all government FOIA costs).[306] The Department of Justice (which implements FOIA), the FOIA Ombuds Office, and the federal courts all too often provide unqualified support to agency withholdings.[307]

But as FOIA's author, Representative John Moss knew all too well, this reality should not be surprising. Despite the "vast progress"[308] made in the United States and internationally, there is always much more to be done to ensure that citizens have full access to their information.

archive.wordpress.com/2014/03/27/the-next-foia-fight-the-b5-withold-it-because-you-want-to-exemption/.

305. *The Long, Ugly Journey of a FOIA Request*, *supra* note 296.

306. Nate Jones, *Unnecessary Freedom of Information Act Fees*, UNREDACTED: NAT'L SECURITY ARCHIVE BLOG (Mar. 18, 2015), https://nsarchive.wordpress.com/2015/03/18/unnecessary-freedom-of-information-act-fees/. https://nsarchive.wordpress.com/2015/03/18/unnecessary-freedom-of-information-act-fees/.

307. *See, e.g.*, Nat'l Sec. Archive v. Cent. Intelligence Agency, 752 F.3d 461, 463, 468 (D.C. Cir. 2014); *CIA Successfully Conceals Bay of Pigs History*, NAT'L SECURITY ARCHIVE (May 21, 2014), http://nsarchive2.gwu.edu/news/20140521/ (quoting *Nat'l Sec. Archive*, 752 F.3d at 463, 468).

308. LEMOV, *supra* note 21, at 69; *see also* Kennedy, *supra* note 116 (quoting author's 1996 interview with John E. Moss).

To: [redacted] (LA) (FBI)
Cc: [redacted] (LA) (FBI)
Subject: 350.org Results --- UNCLASSIFIED//~~FOUO~~

SentinelCaseId: [redacted]
SentToSentinel: 5/13/2016 5:33:00 PM

Classification: UNCLASSIFIED//~~FOUO~~
==========
Sent for Approval for RECORD//Sentinel Case [redacted]

[redacted]
Per your request, this is what we have on the 350.org planned protests:

FBINET:
According to [redacted] ((U) [redacted] [redacted] dated 05/02/2016:

Environmental activists are calling for "mass action" protests against "bomb trains" and fracked gas or oil infrastructure during the period of May 4 to 15, 2016.
National activist groups, and regional chapters, have expressed support for protests at rail corridors and key sites related to production and transport of fossil fuels in the United States and Canada.
To date, the activist group 350.org cites planned protests in:
- Albany, New York (May 14 for protest; training camp during May 11-13);
- Anacortes, Washington (May 14 cited for protest; unstated activities planned for May 13 and 15);
- Denver, Colorado (May 12 and 14);
- Los Angeles, California (May 14);
- Philadelphia, Pennsylvania (May 7);
- St. Augustine, Florida (May 15);
- Vancouver, British Columbia (May 13-14);
- Washington, DC (May 15); and
- Whiting, Indiana, near Chicago (May 14).

Los Angeles, California: Protest march planned to take place on Saturday, May 14, 2016, for the downtown Los Angeles area, described by activists as "the epicenter of neighborhood and urban drilling in California – and stronghold of the fossil fuel industry," during the April 6 preparatory webinar the organizer from 350.org cited the following reasons as the impetus for the march and protest in Los Angeles:
- In November 2014, nearly three billion gallons of waste water from oil fracking companies in central California spilled into water aquifers, compounding issues during an ongoing drought.
- Oil spills into the ocean from offshore oil fracking are common.
- Fracking residue is "dumped in the ocean" and "contaminates aquifers at a time of drought."

Activists plan to march through downtown Los Angeles on Saturday, May 14, "hitting" a corporate headquarters in a demand to move to 100% renewable energy "as soon as possible."
- The demonstration **begins with a rally at Los Angeles City Hall, starting at 1:00 Pacific time**.
- Protesters will march approximately one mile through downtown Los Angeles, with a stop at SoCal Gas Headquarters (https://la.breakfree2016.org/logistics/).

b6 -1
b7C -1
b7E -1

b3 -2
b6 -1
b7C -1
b7E -1

- The **march route will "snake" for approximately 1 mile through the downtown area, with stops at the offices of SoCal Gas and the Los Angeles City Council**.
- In a posting on the promotional website, the organizers of this state, "We'll let you know the exact meeting place soon."
- **Participants are urged to "bring: Signs, Bullhorns, Musical Instruments, Walking shoes, Snacks/Food, Water**, You shouldn't bring: Weapons of any kind, Drugs or illegal contraband."
- Information on this planned protest may be accessed at: https://la.breakfree2016.org/logistics/.*

For each of the planned events, **promotional materials seek volunteers willing to engage in civil disobedience and risk arrest to block access to ports or to "Stop the Bomb Trains**."
Organizers recommend that prospective protesters who do not live near locations of planned demonstrations travel to participate or support the cause by other means, such as fundraising, making phone calls, and supporting social media advocacy campaigns.

350.org are referenced in multiple FBI investigations and assessments for their planned protests and disruptions.

UNET/Open Source:

[redacted] b7E -3

350.org is a climate-focused online campaign founded by writer/activist [redacted] b6 -5 b7C -5

No further information regarding specific LA targets.

Let me know if you have any questions.

Thanks,

[redacted] b6 -1 b7C -1

SOS
Los Angeles/CT-3

[redacted]

==========
Classification: UNCLASSIFIED//~~FOUO~~

The Guardian

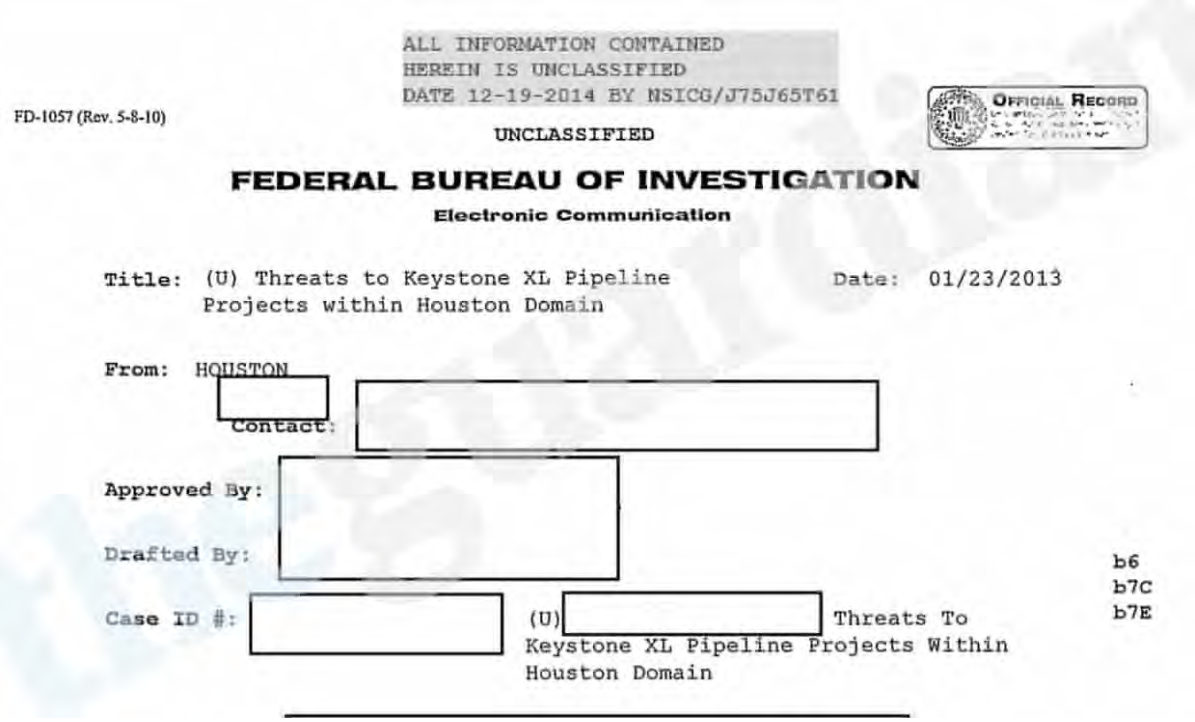
This article is more than **4 years old**

Revealed: FBI violated its own rules while spying on Keystone XL opponents

Houston investigation amounted to 'substantial non-compliance' of rules
Internal memo labels pipeline opponents as 'environmental extremists'
FBI failed to get approval before it opened files on protesters in Texas

Paul Lewis *in Washington and Adam Federman*

Tue 12 May 2015
06.59 EDT



ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 12-19-2014 BY NSICG/J75J65T61

FD-1057 (Rev. 5-8-10)

UNCLASSIFIED

OFFICIAL RECORD

FEDERAL BUREAU OF INVESTIGATION

Electronic Communication

Title: (U) Threats to Keystone XL Pipeline Projects within Houston Domain

Date: 01/23/2013

From: HOUSTON

Contact:

Approved By:

Drafted By:

Case ID #:

(U) Threats To Keystone XL Pipeline Projects Within Houston Domain

b6
b7C
b7E

Documents show for the first time how FBI agents have been closely monitoring anti-Keystone activists in violation of its guidelines. Photograph: Guardian

The FBI breached its own internal rules when it spied on campaigners against the Keystone XL pipeline, failing to get approval before it cultivated informants and opened files on individuals protesting against the construction of the pipeline in Texas, documents reveal.

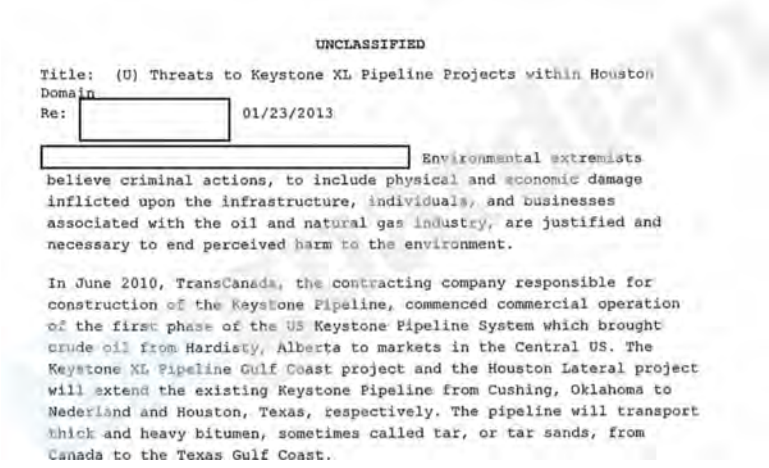
Internal agency documents show for the first time how FBI agents have been closely monitoring anti-Keystone activists, in violation of guidelines designed to prevent the agency from becoming unduly involved in sensitive political issues.

The hugely contentious Keystone XL pipeline, which is awaiting approval from the Obama administration, would transport tar sands oil from Canada to the Texas Gulf coast.

It has been strongly opposed for years by a coalition of environmental groups, including some involved in nonviolent civil disobedience who have been monitored by federal law enforcement agencies.

The documents reveal that one FBI investigation, run from its Houston field office, amounted to "substantial non-compliance" of Department of Justice rules that govern how the agency should handle sensitive matters.

One FBI memo, which set out the rationale for investigating campaigners in the Houston area, touted the economic advantages of the pipeline while labelling its opponents "environmental extremists".



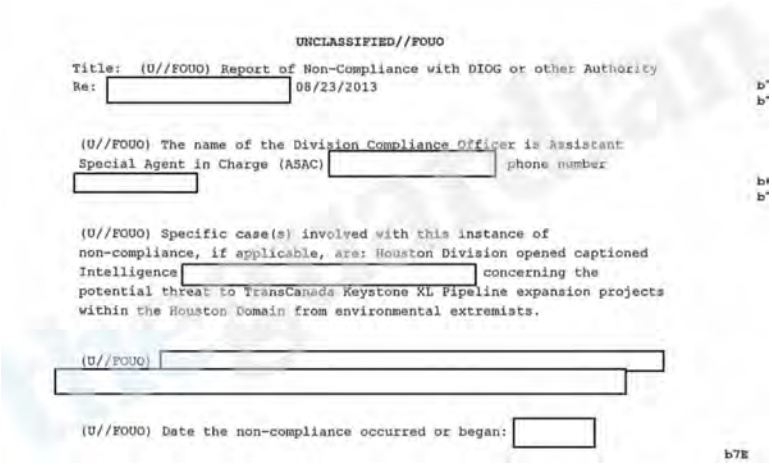
UNCLASSIFIED

Title: (U) Threats to Keystone XL Pipeline Projects within Houston Domain
Re: [redacted] 01/23/2013

[redacted] Environmental extremists believe criminal actions, to include physical and economic damage inflicted upon the infrastructure, individuals, and businesses associated with the oil and natural gas industry, are justified and necessary to end perceived harm to the environment.

In June 2010, TransCanada, the contracting company responsible for construction of the Keystone Pipeline, commenced commercial operation of the first phase of the US Keystone Pipeline System which brought crude oil from Hardisty, Alberta to markets in the Central US. The Keystone XL Pipeline Gulf Coast project and the Houston Lateral project will extend the existing Keystone Pipeline from Cushing, Oklahoma to Nederland and Houston, Texas, respectively. The pipeline will transport thick and heavy bitumen, sometimes called tar, or tar sands, from Canada to the Texas Gulf Coast.

An FBI memo labels opponents of the controversial pipeline as 'environmental extremists'. Photograph: Guardian



UNCLASSIFIED//FOUO

Title: (U//FOUO) Report of Non-Compliance with DIOG or other Authority
Re: [redacted] 08/23/2013

(U//FOUO) The name of the Division Compliance Officer is Assistant Special Agent in Charge (ASAC) [redacted] phone number [redacted]

(U//FOUO) Specific case(s) involved with this instance of non-compliance, if applicable, are: Houston Division opened captioned Intelligence [redacted] concerning the potential threat to TransCanada Keystone XL Pipeline expansion projects within the Houston Domain from environmental extremists.

(U//FOUO) [redacted]

(U//FOUO) Date the non-compliance occurred or began: [redacted]

b7E

An FBI memo detailing 'non-compliance' by the Houston field office. Photograph: Guardian

"Many of these extremists believe the debates over pollution, protection of wildlife, safety, and property rights have been overshadowed by the promise of jobs and cheaper oil prices," the FBI document states. "The Keystone pipeline, as part of the oil and natural gas industry, is vital to the security and economy of the United States."

The documents are among more than 80 pages of previously confidential FBI files obtained by the Guardian and Earth Island Journal after a request under the Freedom of Information Act.

Between November 2012 and June 2014, the documents show, the FBI collated inside knowledge about forthcoming protests, documented the identities of individuals photographing oil-related infrastructure, scrutinised police intelligence and cultivated at least one informant.

It is unclear whether the source or sources were protesters-turned-informants, private investigators or hackers. One source is referred to in the documents as having had “good access and a history of reliable reporting”.

The FBI investigation targeted Tar Sands Blockade, a direct action group that was at the time campaigning in southern Texas.

However, the partially redacted documents reveal the investigation into anti-Keystone activists occurred without prior approval of the top lawyer and senior agent in the Houston field office, a stipulation laid down in rules provided by the attorney general.

Confronted by evidence contained in the cache of documents, the agency admitted that “FBI approval levels required by internal policy were not initially obtained” for the investigation, but said the failure was remedied and later reported internally.

The FBI files appear to suggest the Houston branch of the investigation was opened in early 2013, several months after a high-level strategy meeting between the agency and TransCanada, the company building the pipeline.

For a period of time - possibly as long as eight months - agents acting beyond their authority were monitoring activists aligned with Tar Sands Blockade.

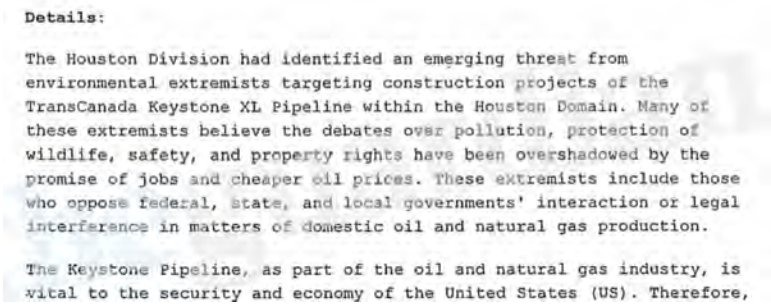
Tar Sands Blockade appeared on the FBI’s radar in late 2012, not long after the group began organising in east Houston, the end destination for Keystone’s 1,660-mile pipeline.

Environmental activists affiliated with the group were committed to peaceful civil disobedience that can involve minor infractions of law, such as trespass. But they had no history of violent or serious crime.

Ron Seifert, a key organiser at Tar Sands Blockade, said dozens of campaigners were arrested in Texas for protest-related activity around that time, but not one of them was accused of violent crime or property destruction.

The group focused on Houston’s heavily industrialised neighbourhood of Manchester, where the Valero Energy Corporation has a massive refinery capable of processing heavy crude oil.

Between early November 2012 and June 2014, the documents show, the FBI collated inside-knowledge about forthcoming protests, documented the identities of individuals photographing oil-related infrastructure, scrutinised police intelligence and cultivated at least one informant.



Details:

The Houston Division had identified an emerging threat from environmental extremists targeting construction projects of the TransCanada Keystone XL Pipeline within the Houston Domain. Many of these extremists believe the debates over pollution, protection of wildlife, safety, and property rights have been overshadowed by the promise of jobs and cheaper oil prices. These extremists include those who oppose federal, state, and local governments' interaction or legal interference in matters of domestic oil and natural gas production.

The Keystone Pipeline, as part of the oil and natural gas industry, is vital to the security and economy of the United States (US). Therefore,

'The Houston Division had identified an emerging threat from environmental extremists targeting construction projects of the TransCanada Keystone XL Pipeline within the Houston Domain.' Photograph: Guardian

It is unclear whether the source or sources were protesters-turned-informants, private investigators or hackers. One source is referred to in the documents as having had "good access, and a history of reliable reporting".

At one point, the FBI's Houston office said it would share with TransCanada "any pertinent intelligence regarding any threats" to the company in advance of a forthcoming protest.

One of the files refers to Houston police officers who stopped two men and a woman taking photographs near the city's industrial port, noting they were using a "large and sophisticated looking" camera.

Two of the individuals were described as having larger subject files in the FBI's Guardian Threat Tracking System.

In another incident, the license plate belonging to a Silver Dodge was dutifully entered into the FBI's database, after a "source" spotted the driver and another man photographing a building associated with TransCanada.

Sensitive matters

The FBI rules, laid out in the FBI's Domestic Investigations and Operations Guide, dictate that special care should be taken over sensitive investigations such as those targeting elected officials, journalists and political organisations.

FBI work on "sensitive investigative matters" requires prior approval of both the chief division counsel (CDC), the top lawyer in the field office, and the special agent in charge (SAC).

Both are supposed to consider the severity of the threat and the consequences of "adverse impact on civil liberties and public confidence" should the investigation be made public.

Tar Sands Blockade occupy the corporate offices of TransCanada in January 2013. Photograph: Laura Borealis/Tar Sands Blockade

However, neither Houston's CDC or SAC were consulted in relation to the FBI's monitoring of Tar Sands Blockade activists, the documents show.

Explaining the breach of protocols, the FBI said in a statement that it was committed to "act properly under the law".

"While the FBI approval levels required by internal policy were not initially obtained, once discovered, corrective action was taken, non-compliance was remedied, and the oversight was properly reported through the FBI's internal oversight mechanism," it said.

The FBI did not deny opening an investigation into anti-Keystone campaigners, and said it was compelled to "take the initiative to secure and protect activities and entities which may be targeted for terrorism or espionage".

But the precise nature of the FBI's investigation, which continued for almost a year after the Houston Division acknowledged it had violated protocol, remains unclear.

The documents appear to suggest the investigation was one branch of a wider set of investigations, possibly including anti-Keystone activists elsewhere in the country.

The documents connect the investigation into anti-Keystone activists to other "domestic terrorism issues" in the agency and show there was some liaison with the local FBI "assistant weapons of mass destruction coordinator".

Mike German, a former FBI agent, who assisted the Guardian in deciphering the bureau's documentation, said they indicated the agency had opened a category of investigation that is known in agency parlance as an "assessment".

Introduced as part of an expansion of FBI powers after 9/11, assessments allow agents to open intrusive investigations into individuals or groups, even if they have no reason to believe they are breaking the law.

German, now a fellow at the Brennan Center for Justice in New York, said the documents also raised questions over collusion between law enforcement and TransCanada.

“It is clearly troubling that these documents suggest the FBI interprets its national security mandate as protecting private industry from political criticism,” he said.

According to the FBI documents, the FBI concluded there were “no adverse consequences” emanating from its failure to seek approval for the sensitive investigation, noting the mistake was later “remedied”.

The investigation continued for 11 months after the mistake was spotted. It was closed after the FBI’s Houston division acknowledged its failure to find sufficient evidence of “extremist activity”.

Before closing the case, however, agents noted the existence of a file that was to be used as a repository for future intelligence “regarding the Keystone XL pipeline”.

Since then, at least a dozen anti-tar sands campaigners in Oregon, Washington, and Idaho have been contacted by the FBI. The agency has said they are not under investigation.

Adam Federman is a contributing editor of Earth Island Journal

Topics
- FBI
- Keystone XL pipeline
- Tar sands
- Obama administration
- news

U.S Department of Justice

Certification of Identity

FORM APPROVED OMB NO
1103-0016 EXPIRES 05/31/2020

Privacy Act Statement. In accordance with 28 CFR Section 16.41(d) personal data sufficient to identify the individuals submitting requests by mail under the Privacy Act of 1974, 5 U.S.C. Section 552a, is required. The purpose of this solicitation is to ensure that the records of individuals who are the subject of U.S. Department of Justice systems of records are not wrongfully disclosed by the Department. Requests will not be processed if this information is not furnished. False information on this form may subject the requester to criminal penalties under 18 U.S.C. Section 1001 and/or 5 U.S.C. Section 552a(i)(3).

Public reporting burden for this collection of information is estimated to average 0.50 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Suggestions for reducing this burden may be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Public Use Reports Project (1103-0016), Washington, DC 20503.

Full Name of Requester [1] _____

Citizenship Status [2] _____ Social Security Number [3] _____

Current Address _____

Date of Birth _____ Place of Birth _____

OPTIONAL: Authorization to Release Information to Another Person

This form is also to be completed by a requester who is authorizing information relating to himself or herself to be released to another person.

Further, pursuant to 5 U.S.C. Section 552a(b), I authorize the U.S. Department of Justice to release any and all information relating to me to:

_____

Print or Type Name

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am the person named above, and I understand that any falsification of this statement is punishable under the provisions of 18 U.S.C. Section 1001 by a fine of not more than $10,000 or by imprisonment of not more than five years or both, and that requesting or obtaining any record(s) under false pretenses is punishable under the provisions of 5 U.S.C. 552a(i)(3) by a fine of not more than $5,000.

Signature [4] _____ **Date** _____

[1] Name of individual who is the subject of the record(s) sought.

[2] Individual submitting a request under the Privacy Act of 1974 must be either "a citizen of the United States or an alien lawfully admitted for permanent residence," pursuant to 5 U.S.C. Section 552a(a)(2). Requests will be processed as Freedom of Information Act requests pursuant to 5 U.S.C. Section 552, rather than Privacy Act requests, for individuals who are not United States citizens or aliens lawfully admitted for permanent residence.

[3] Providing your social security number is voluntary. You are asked to provide your social security number only to facilitate the identification of records relating to you. Without your social security number, the Department may be unable to locate any or all records pertaining to you.

[4] Signature of individual who is the subject of the record sought.

CIVIL LIBERTIES DEFENSE CENTER

CLDC
1430 Willamette St. #359
Eugene, OR 97401
Phone: 541-687-9180 Fax: 541-804-7391
E-Mail: cbrinson@cldc.org Web: www.cldc.org

Date: April 17, 2018

Attn: USDA Forest Service, FOIA Liaison (Region 6)

Date range of request: January 1, 2017 – April 17, 2018

Subject of the request: [redacted]

Civil Liberties Defense Center, a 501(c)(3) nonprofit, is requesting any and all records regarding [redacted]

Information requested:

This request is for any and all records maintained by or under the control of the USDA Forest Service that contain any reference to [redacted], or other reasonably identifying information pertaining to [redacted] were created during the date range noted above.

Mr. Otte was contacted by Forest Service personnel on November 5, 2017 in the **Willamette National Forest**. We are seeking all records related to this encounter as well as any additional records referencing [redacted], "Cascadia Forest Defenders," or protestors involved in a protest on or around November 5, 2017 in the vicinity of Forest Service Road 705. The encounter involved several Forest Service personnel, including Christopher Kuykendall and a Ranger identified as "R. Thompson." The incident occurred on Forest Service road 705.

Please search for any and all records concerning the subject, including but not limited to the following:

a) Main file and main file equivalents, including all administrative and appendix pages;
b) Do Not File records;
c) Channelized records, search records, including search records of any kind used to process this request;
d) ELSUR records;

e) Index cards or copies of law enforcement notes;
f) Records that are or were maintained in SAC safes;
g) Any exhibits; and
h) Abstract records.

The CLDC is requesting any and all records concerning the subject in any way, including but not limited to those listed in the General Index and any and all other indices.

Please disclose all identifiable records within this request, even if reports based on those records may have been sent to other Forest Service offices, state and local government offices, even though there may be duplications between sets of files.

In excising material (if required), please black out rather than white out or cut out material.

For your further reference, please note that records responsive to this request may include information concerning other people who are deceased and/or public figures. In that case, the law requires greater disclosure of this information.

The Civil Liberties Defense Center is willing to pay up to $25 for the processing of this request. Please inform me if the estimated fees will exceed this limit before processing my request.

The CLDC is seeking information for personal and educational use. This request is for nonprofit use and any disclosures made pursuant to this request are not for commercial use.

Thank you for your consideration,

Cooper Brinson
Staff Attorney, Civil Liberties Defense Center

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

March 19, 2018

VIA U.S. POSTAL SERVICE, CERTIFIED MAIL
RETURN RECEIPT REQUESTED

VIA EMAIL ICE-FOIA@dhs.gov

U.S. Immigration and Customs Enforcement
FOIA Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009

Re: Freedom of Information Act Request
Expedited Processing Requested

Attention:

I am a staff attorney at the American Civil Liberties Union Foundation of Northern California. I write on behalf of the American Civil Liberties Union of Northern California to request records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522 *et seq.*, implementing regulations 6 C.F.R. § 5.1 *et seq.*, and any other applicable regulations.

I. REQUEST FOR INFORMATION

The American Civil Liberties Union of Northern California (the "ACLU-NC") hereby requests disclosure of all records in your possession relating to contracts by and between the U.S. Immigration and Customs Enforcement ("ICE") and contractors related to Automated License Plate Reader ("ALPR") systems, databases, and technology.[1]

[1] The term "records" as used herein includes all records or communications preserved in written or electronic form, including but not limited to: correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, training manuals, other manuals, or studies. With respect to privacy concerns for members of the public, we will accept copies that are redacted to protect identifying information such as names, social security numbers, and alien numbers, but we would object to the redaction of birthdates and birthplaces that would interfere with our ability to determine the ages and countries of origin for members of the public. In addition, we request that members of the public whose identifying information is redacted be identified with an alphanumeric code so that multiple records related to the same individual will be recognized as such. This redaction agreement does not apply to identifying information such as names and badge numbers for federal agents.

In particular, we request disclosure of records containing the following information:

1. Any contracts, addenda, attachments, memoranda of understanding, amendments, modifications, or other agreements made and/or negotiated pursuant to the Request for Quotation No. 70CDCR18Q00000005, "Request for Quote for Access to License Plate Reader (LPR) Database," issued by ICE/Detention Compliance & Removals on December 15, 2017 (the "Request for Quotation"), along with communications related to such contracts, memoranda of understanding, or other agreements;

2. The contract with the vendor that is referenced in the document titled "Privacy Impact Assessment Update for the Acquisition and Use of License Plate Reader (LPR) Data from a Commercial Service," DHS/ICE/PIA-039(a), dated December 27, 2017 (the "Updated PIA") related to access to a commercial ALPR database, along with all associated communications, addenda, attachments, memoranda of understanding, amendments, modifications, or other agreements;[2] and

3. Any contracts, addenda, attachments, memoranda of understanding, amendments, modifications, or other agreements made and/or negotiated pursuant to the Solicitation and Contract Award No. 70CDCR18P00000017, "Access to Commercially Available LPR Database," issued by ICE, along with communications related to such contracts, memoranda of understanding, or other agreements.[3]

II. REQUEST FOR EXPEDITED PROCESSING

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and the statute's implementing regulations. There is a "compelling need" for these records, as defined in the statute and regulations, because there is urgency to inform the public concerning actual or alleged Federal Government activity and the request has been made by an organization primarily engaged in disseminating information. *See* 5 U.S.C. § 552(a)(6)(E)(v); 6 C.F.R. § 5.5(e)(1)(ii).

First, the ACLU-NC is a requestor "primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii). The ACLU-NC is an affiliate of the ACLU, a national organization that works to protect civil liberties of all people, including the safeguarding of the basic constitutional rights to privacy, free expression, and due process of law. The ACLU-NC is responsible for serving the population of northern California. ACLU-NC staff persons are frequent spokespersons in television and print media and make frequent public presentations at meetings and events. The ACLU-NC plans to analyze and disseminate to the public the information gathered through this Request at no cost, and the records are not sought for any commercial purpose.

Dissemination of information about actual or alleged governmental activity is a critical and substantial component of the ACLU's mission and work. The ACLU-NC actively

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[2] *See* https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-lpr-january2018.pdf.
[3] https://www.fbo.gov/index?s=opportunity&mode=form&id=5629706f5736d22bd174b11965f5ac4c&tab=core&_cview=0.

disseminates and frequently garners extensive media coverage of the information it obtains about actual or alleged government activity through FOIA and California's statutory counterpart, the California Public Records Act. It does so through a heavily visited website (averaging between 10,000 and 20,000 visitors per week) and a paper newsletter distributed to its members, who now number over 170,000. In the past, FOIA requests, litigation over FOIA responses, and information obtained by the ACLU-NC through FOIA about the federal government's immigration enforcement, ethnic and racial profiling, and detention operations have been the subject of articles on the ACLU-NC's website.[4] They have also garnered coverage by other news media.[5] ACLU-NC staff persons are frequent spokespersons in television and print media and make frequent public presentations at meetings and events.

Courts have found that the ACLU and similar organizations are "primarily engaged in disseminating information" for purposes of expedited processing under FOIA. *See ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit, public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" is "primarily engaged in disseminating information" (internal citation omitted)); *see also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference—whose mission is to "disseminate[] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws"—to be "primarily engaged in the dissemination of information").

Second, there is urgency to inform the public concerning actual or alleged federal government activity. Recent news articles reflect the significant media and public interest in the use of ALPR technology by governments. *See* Russel Brandom, *ICE Is About to Start Tracking License Plates Across the US*, THE VERGE (Jan. 26, 2018), https://www.theverge.com/2018/1/26/16932350/ice-immigration-customs-license-plate-recognition-contract-vigilant-solutions; Tal Kopan, *ICE Inks Contract for Access to License Plate Database*, CNN(Jan. 26, 2018), https://www.cnn.com/2018/01/26/politics/ice-license-plate-readers/index.html; Chantal Da Silva, *City Refuses to Let Ice Track License Plates With 'Digital Deportation Machine'*, NEWSWEEK (Feb. 14, 2018), http://www.newsweek.com/city-refuses-let-ice-track-licenses-places-digital-deportation-machine-806845. This request will

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[4] *See, e.g.*, https://www.aclunc.org/news/aclu-northern-california-files-demands-documents-implementation-trump-s-muslim-ban (FOIA request for CBP detention and deportation records); https://www.aclunc.org/news/aclu-northern-california-files-lawsuit-demanding-documents-implementation-trumps-muslim-ban (lawsuit challenging government's response to FOIA request for CBP records) https://www.aclunc.org/news/aclu-seeks-records-immigration-enforcement-actions-northern-california (FOIA request for ICE enforcement action records); https://www.aclunc.org/news/lawsuit-seeks-documents-regarding-ice-raids (lawsuit challenging government's response to FOIA request for ICE enforcement action records);

[5] *See, e.g.*, Eric Tucker, *5 Men Sue Over Anti-Terror Info-Sharing Program*, Associated Press, July 9, 2014, http://goo.gl/NYgF8p; Hameed Aleaziz, *Lawsuit Against ICE Seeks Information on Asylum Seekers*, SFGate.com, Oct. 20, 2016, http://goo.gl/VjBJYZ; Luke Darby, *What Surveillance Looks Like Under the Trump Administration*, GQ Magazine, May 1, 2017, http://goo.gl/oYvQfq; Daisy Alioto, *How Taking a Photograph Can Land You a Visit from the FBI*, Artsy.com, June 20, 2017, http://goo.gl/bGZvPh; Nicole Narea, *ICE To Hand Over Asylum Seeker Detention Policy Data*, Law360.com, Aug. 9, 2017, http://goo.gl/Q4y34D.

inform an urgent ongoing debate about the use of ALPR tracking by governments agencies, and specifically seeks to inform the public's understanding of how federal agencies utilize ALPR data in immigration enforcement.

III. APPLICATION FOR WAIVER OR LIMITATION OF FEES

A. Release of the records is in the public interest.

We request a waiver of search, review, and reproduction fees on the grounds that disclosure of the requested records is in the public interest because it is likely to contribute significantly to the public understanding of the United States government's operations or activities and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k).

As discussed above, numerous news accounts reflect the considerable public interest in the requested records. Given the ongoing and widespread media attention to this issue, the records sought by the Request will significantly contribute to the public understanding of the operations and activities of the Department of Homeland Security and ICE, and will be of interest to a broad interest. *See* 6 C.F.R. § 5.11(k)(1)(i), (k)(2)(iii). In addition, disclosure is not in the ACLU-NC's commercial interest. As described above, any information disclosed as a part of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'") (citation omitted); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2, 121 Stat. 2524 (finding that "disclosure, not secrecy, is the dominant objective of the Act," quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1992)).

B. The ACLU-NC qualifies as a representative of the news media.

A waiver of search and review fees is warranted because the ACLU-NC qualifies as a "representative of the news media" and the requested records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii); *see also* 6 C.F.R. §§ 5.11(b)(6), (k)(2)(iii). Accordingly, fees associated with the processing of this request should be "limited to reasonable standard charges for document duplication." The ACLU-NC meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be "primarily engaged in disseminating information"). The ACLU-NC is a "representative of the news media" for the same reasons that it is "primarily engaged in the dissemination of information." *See Elec. Privacy Info.Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 10–15 (D.D.C. 2003) (finding nonprofit public interest group that disseminated an electronic newsletter and published books was a "representative of the news media" for FOIA purposes). The ACLU-NC recently was held to be a "representative of the news media." *Serv. Women's Action Network v. Dep't of Def.*, No. 3:11CV1534 (MRK), 2012 WL 3683399, at *3 (D. Conn. May 14, 2012); *see*

also ACLU of Wash. v. Dep't of Justice, No. C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding ACLU of Washington to be a "representative of the news media"), *reconsidered in part on other grounds*, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

* * *

Pursuant to the applicable statute and regulations, we expect a determination regarding expedited processing within ten (10) calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 6 C.F.R. § 5.5(e)(4).

If this request for information is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to the Freedom of Information Act. We expect you to release all segregable portions of otherwise exempt material in accordance with 5 U.S.C. § 552(b). We reserve the right to appeal a decision to withhold any information.

Thank you for your prompt attention to this matter. Please furnish all applicable records to Vasudha Talla, American Civil Liberties Union of Northern California, 39 Drumm Street, San Francisco, California 94111, telephone (415) 621-2493 ext. 308.

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Executed on the 19th day of March, 2018.

Sincerely,

Vasudha Talla
Staff Attorney
American Civil Liberties Union Foundation of Northern California

LEGAL DEPARTMENT

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Re: Request Under Freedom of Information Act (Expedited Processing & Fee Waiver Requested)

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU")[1] submit this Freedom of Information Act ("FOIA") request (the "Request") for records pertaining to cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for anticipated protests against the Keystone XL pipeline.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

I. Background

On January 27, 2017, the White House released its Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, which expedited the approval process for the Canada-to-Texas oil pipeline that President Barack Obama had previously rejected.[2] Two months later, President Donald Trump announced that his administration had formally approved the pipeline.[3]

These decisions generated intense public controversy and debate. The president's approval of the Keystone XL Pipeline set the stage for renewed protest against oil pipelines, which activist groups say accelerate climate change,

[1] The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about civil rights and civil liberties issues across the country, directly lobbies legislators, and mobilizes the American Civil Liberties Union's members to lobby their legislators. The American Civil Liberties Union is a separate non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

[2] *See* Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Jan. 24, 2017), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-construction-keystone-xl-pipeline/; Elise Labott & Dan Berman, *Obama Rejects Keystone XL Pipeline*, CNN (Nov. 6, 2015), http://www.cnn.com/2015/11/06/politics/keystone-xl-pipeline-decision-rejection-kerry/index html.

[3] Elise Labott & Jeremy Diamond, *Trump Administration Approves Keystone XL Pipeline*, CNN (Mar. 24, 2017), http://www.cnn.com/2017/03/23/politics/keystone-xl-pipeline-trump-approve/index.html.

threaten clean water reserves, and invade cultural sites of American Indian tribes.[4] In response to the president's announcement, then-chairman of the Standing Rock Sioux tribe, David Archambault II, stated, "We opposed Keystone before, and we'll oppose it again."[5] Environmental groups, too, have made clear their intention to protest Keystone XL's construction; one prominent group has invited advocates to sign a "Pledge of Resistance," which includes a commitment to "participate in peaceful direct action that may result in my arrest, should construction begin on the Keystone XL pipeline."[6]

Government officials have consequently made clear their intention to prevent a repeat of the prolonged protests against the Dakota Access Pipeline, which drew thousands of activists to the North Dakota site, sparked physical confrontation with law enforcement authorities, and captured worldwide attention.[7] Officials have pursued numerous strategies for impeding these protests, such as asking the federal government for guidance on the possibility of prosecuting protestors under domestic terrorism laws,[8] enacting legislation that allows a governor or sheriff to prohibit groups numbering more than 20 from gathering on public land,[9] and fostering cooperation between federal, state, and local law enforcement entities and private security contractors.[10] As a

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[4] Heather Brady, *4 Key Impacts of the Keystone XL and Dakota Access Pipelines*, National Geographic (Jan. 25, 2017), https://news nationalgeographic.com/2017/01/impact-keystone-dakota-access-pipeline-environment-global-warming-oil-health/.

[5] Stand with Standing Rock, *Standing Rock Sioux Chairman Responds to Keystone Pipeline Permit Approval* (Mar. 24, 2017), http://standwithstandingrock.net/standing-rock-sioux-chairman-responds-keystone-pipeline-permit-approval/.

[6] Bold Alliance, *Sign the Keystone XL Pledge of Resistance* (last visited Dec. 27, 2017), https://boldalliance.webaction.org/p/dia/action3/common/public/?action_KEY=20257; *see also* Michael McLaughlin, *Keystone XL Protestors Won't Back Down After Trump Approval*, Huffington Post (Mar. 24, 2017), https://www huffingtonpost.com/entry/keystone-xl-protesters-trump-approval_us_58d55333e4b02a2eaab3819e.

[7] *See, e.g.*, Paul Hammel, *Nebraska Law Enforcement, Keystone XL Pipeline Foes Prepare for Possible Protests*, Omaha World-Herald (Apr. 11, 2017), http://www.omaha.com/news/nebraska/nebraska-law-enforcement-keystone-xl-pipeline-foes-prepare-for-possible/article_d85522c1-73cd-541c-98f2-f9b3375e8a3c html.

[8] Timothy Gardner, *U.S. Lawmakers Ask DOJ If Terrorism Law Covers Pipeline Activists*, Reuters (Oct. 23, 2017), https://www.reuters.com/article/us-usa-pipelines-activism/u-s-lawmakers-ask-doj-if-terrorism-law-covers-pipeline-activists-idUSKBN1CS2XY.

[9] South Dakota Senate Bill 176 (Mar. 27, 2017), https://www.courthousenews.com/wp-content/uploads/2017/03/SB-176.pdf.

[10] Alleen Brown, *Nebraska Approves Keystone XL Pipeline as Opponents Face Criminalization of Protests*, The Intercept (Nov. 20, 2017), https://theintercept.com/2017/11/20/nebraska-approves-keystone-xl-pipeline-as-opponents-face-criminalization-of-protests/; *Lincoln Police Prepare for All Scenarios as Pipeline Protests Near*,

further threat to activists who may wish to repeat their actions at the Dakota Access Pipeline, the *Guardian* reports that Joint Terrorism Task Force agents have attempted to contact multiple individuals involved with the North Dakota anti-pipeline movement.[11]

Evidence of cooperation among law enforcement officials and private corporations in the area of oil pipeline protests has been widely documented. On May 27, 2017, *The Intercept* published internal documents of the security firm TigerSwan that revealed close cooperation between TigerSwan, state police forces, and federal law enforcement in at least five states around the Dakota Access Pipeline.[12] For example, a TigerSwan situation report on March 29, 2016 explicitly named the state and federal actors in attendance at a joint meeting the day before: "Met with the Des Moines Field Office of the FBI, with the Omaha and Sioux Fall offices joining by conference call. Also in attendance were representatives of the Joint Terrorism Task Force, Department of Homeland Security . . . Topics covered included the current threat assessment of the pipeline, the layout of current security assets and persons of interests. The FBI seemed were [sic] very receptive . . . follow-up meetings with individuals will be scheduled soon[.]"[13] *The Intercept* also published communications detailing coordination "between a wide range of local, state, and federal agencies," including the revelation that the FBI participated in law enforcement operations related to the Dakota Access Pipeline protests.[14] Finally, a review of federal lobbying disclosure forms by *DeSmog*, a blog focused on topics related to climate change, has revealed that the National Sheriffs' Association was

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1011 Now (Aug. 1, 2017), http://www.1011now.com/content/news/Lincoln-Police-prepare-for-all-scenarios-as-pipeline-protests--437938853.html.

[11] Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists*, The Guardian (Feb. 10, 2017), https://www.theguardian.com/us-news/2017/feb/10/standing-rock-fbi-investigation-dakota-access.

[12] Alleen Brown, Will Parrish, and Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to "Defeat Pipeline Insurgencies"*, The Intercept (May 27, 2017), https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/.

[13] Alleen Brown, Will Parrish, and Alice Speri, *TigerSwan Responded to Pipeline Vandalism by Launching Multistate Dragnet*, The Intercept (Aug. 26, 2017), https://theintercept.com/2017/08/26/dapl-security-firm-tigerswan-responded-to-pipeline-vandalism-by-launching-multistate-dragnet/.

[14] Brown, Parrish & Speri, *Leaked Documents Reveal Counterterrorism Tactics*; *see also Intel Group Email Thread*, The Intercept (May 27, 2017), https://theintercept.com/document/2017/05/27/intel-group-email-thread/ (documenting FBI participation in law enforcement operations around the Dakota Access Pipeline protests).

lobbying Congress for surplus military gear and on issues related to the Dakota Access Pipeline.[15]

Law enforcement officials have signaled that such cooperation will assist them in responding to future protests against Keystone XL and other oil pipelines. For example, on April 11, 2017, the *Omaha Herald* reported that Morton County, North Dakota Sheriff Kyle Kirchmeier, whose department was involved in responding to the Dakota Access Pipeline protests, has been in communication with other states over how to respond to oil pipeline protestors.[16]

Such indications and the recent existence of cooperation on this exact issue raise important questions about federal agencies' level of collaboration with state and local governments and with private security contractors in connection with oil pipeline protest actions. These questions are especially important given the uncertainty around whether and to what extent the government was engaged in surveillance of Dakota Access Pipeline protestors.[17] The First Amendment protects political speech from the threat of undue government scrutiny, and the extent of such scrutiny is currently unknown.[18]

To provide the American public with information about federal cooperation with state and local governments and with private security contractors over possible oil pipeline protests, the ACLU seeks such information through this FOIA request.

II. Requested Records

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[15] Steven Horn & Curtis Waltman, *In Heat of Dakota Access Protests, National Sheriffs' Association Lobbied for More Military Gear*, DeSmog (Apr. 27, 2017), https://www.desmogblog.com/2017/04/27/dakota-access-sheriffs-lobbying-military-gear.

[16] Paul Hammel, *Nebraska Law Enforcement, Keystone XL Pipeline Foes Prepare for Possible Protests*, Omaha World Herald (Apr. 11, 2017), http://www.omaha.com/news/nebraska/nebraska-law-enforcement-keystone-xl-pipeline-foes-prepare-for-possible/article_d85522c1-73cd-541c-98f2-f9b3375e8a3c html.

[17] Alyssa Newcomb, Daniel A. Medina, Emmanuelle Saliba, and Chiara A. Sottile, *At Dakota Pipeline, Protestors Questions of Surveillance and 'Jamming' Linger*, NBC (Oct. 31, 2016), https://www.nbcnews.com/storyline/dakota-pipeline-protests/dakota-pipeline-protesters-questions-surveillance-jamming-linger-n675866; Morgan Chalfant, *ACLU Challenges Warrant to Search Facebook Page of Dakota Access Opponents*, The Hill (Mar. 9, 2017), http://thehill.com/policy/cybersecurity/323131-aclu-challenges-police-effort-to-search-facebook-page-of-dakota-access.

[18] *See* Motion to Quash Search Warrant, American Civil Liberties Union, *In Re Search Warrant No. 17A03639 Served On Facebook* at 5 (filed Mar. 8, 2017), https://www.aclu.org/sites/default/files/field_document/motion_to_quash_-_filed.pdf.

With respect to **all agencies** listed above, the ACLU seeks the release of all records[19] created since January 27, 2017, concerning:

(1) Legal and policy analyses and recommendations related to law enforcement funding for and staffing around oil pipeline protests. Such recommendations may include, but are not limited to, declarations of a state of emergency by state and local entities in order to marshal additional funds, and requests by state or local entities for federal agencies to provide funding or personnel for counter-protest operations; and

(2) Travel of federal employees to speaking engagements, private and public meetings, panels, and conferences on the subject of preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and

(3) Meeting agendas, pamphlets, and other distributed matter at speaking engagements, private and public meetings, panels, and conferences where federal employees are present to discuss preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and

(4) Communications between federal employees and state or local law enforcement entities or employees thereof, and between federal employees and private security companies or employees thereof, discussing cooperation in preparation for oil pipeline protests.

With respect to the **Office of the Secretary of Defense**, the ACLU seeks the release of all records created since January 27, 2017, concerning:

(5) Purchases, requests for purchase, and requests by state and local law enforcement officials of riot gear, including but not limited to tear gas, concussion grenades, and water cannons, from the U.S. Department of Defense's Law Enforcement Support Office, also known as the 1033 program.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

III. Application for Expedited Processing

[19] For the purposes of this Request, "records" are collectively defined to include, but are not limited to, final drafts of legal and policy memoranda; guidance documents; instructions; training documents; formal and informal presentations; directives; contracts or agreements; and memoranda of understanding.

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).[20] There is a "compelling need" for these records, as defined in the statute, because the information requested is "urgen[tly]" needed by an organization primarily engaged in disseminating information "to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II).

A. The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.

The ACLU is "primarily engaged in disseminating information" within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II).[21] Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information").[22]

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 980,000 people. The ACLU also publishes regular updates and alerts via email to over 3.1 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 3.8 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,[23]

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[20] *See also* 28 C.F.R. § 16.5(e); 32 C.F.R. § 286.8(e); 6 C.F.R. § 5.5(e).

[21] *See also* 28 C.F.R. 16.5(e)(1)(ii); 32 C.F.R. § 286.8(e)(1)(i)(B); 6 C.F.R. § 5.5(e)(1)(ii).

[22] Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are "primarily engaged in disseminating information." *See, e.g.*, *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

[23] *See, e.g.*, Press Release, American Civil Liberties Union, U.S. Releases Drone Strike 'Playbook' in Response to ACLU Lawsuit (Aug. 6, 2016), https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit; Press Release, American Civil Liberties Union, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit; Press

and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.[24]

Similarly, the ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.[25] The ACLU also regularly publishes books, "know your rights" materials, fact sheets, and

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Release, American Civil Liberties Union, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit; Press Release, American Civil Liberties Union, Justice Department White Paper Details Rationale for Targeted Killing of Americans (Feb. 4, 2013), https://www.aclu.org/national-security/justice-department-white-paper-details-rationale-targeted-killing-americans; Press Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), https://www.aclu.org/news/documents-show-fbi-monitored-bay-area-occupy-movement-insidebayareacom.

[24] *See, e.g.*, Cora Currier, *TSA's Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, The Intercept, Feb. 8, 2017, https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program/ (quoting ACLU attorney Hugh Handeyside); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes,* Wash. Post, Aug. 6, 2016, http://wapo.st/2jy62cW (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About 'Torture' in Its Former Detention Program,* ABC, June 15, 2016, http://abcn.ws/2jy40d3 (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent $10M on Equipment for Warrantless Stingray Device*, Guardian, Mar. 17, 2016, https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne (quoting ACLU attorney Nate Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret,* NPR, Dec. 9, 2015, http://n.pr/2jy2p71 (quoting ACLU project director Hina Shamsi).

[25] *See, e.g.*, Hugh Handeyside, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable — But Still It Continues* (Feb. 8, 2017, 11:45 AM), https://www.aclu.org/blog/speak-freely/new-documents-show-tsa-program-blamed-profiling-unscientific-and-unreliable-still; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA's Torture Site* (Nov. 22, 2016, 3:15 PM), https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture; Brett Max Kaufman, *Details Abound in Drone 'Playbook' – Except for the Ones That Really Matter Most* (Aug. 8, 2016, 5:30 PM), https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most; Nathan Freed Wessler, *ACLU- Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015, 5:30 PM), https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014, 3:29 PM), https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333; ACLU, *ACLU Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government's "Suspicious Activity Report" Systems* (Oct. 29, 2013), https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf.

educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.

The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* https://www.aclu.org/blog. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. *See* https://www.aclu.org/multimedia. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU's website also serves as a clearinghouse for news about ACLU cases, as well as analysis about case developments, and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant Congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.

The ACLU website includes many features on information obtained through the FOIA.[26] For example, the ACLU's "Predator Drones FOIA" webpage, https://www.aclu.org/national-security/predator-drones-foia, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves. Similarly, the ACLU maintains an online "Torture Database," a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition,

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[26] *See, e.g.*, Nathan Freed Wessler & Dyan Cortez, *FBI Releases Details of 'Zero-Day' Exploit Decisionmaking Process* (June 26, 2015, 11:00 AM), https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights; *ACLU v. DOJ – FOIA Case for Records Relating to the Killing of Three U.S. Citizens*, ACLU Case Page, https://www.aclu.org/national-security/anwar-al-awlaki-foia-request; *ACLU v. Department of Defense*, ACLU Case Page, https://www.aclu.org/cases/aclu-v-department-defense; *Mapping the FBI: Uncovering Abusive Surveillance and Racial Profiling*, ACLU Case Page, https://www.aclu.org/mappingthefbi; *Bagram FOIA*, ACLU Case Page https://www.aclu.org/cases/bagram-foia; *CSRT FOIA*, ACLU Case Page, https://www.aclu.org/national-security/csrt-foia; *ACLU v. DOJ – Lawsuit to Enforce NSA Warrantless Surveillance FOIA Request*, ACLU Case Page, https://www.aclu.org/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request; *Patriot FOIA*, ACLU Case Page, https://www.aclu.org/patriot-foia; *NSL Documents Released by DOD*, ACLU Case Page, https://www.aclu.org/nsl-documents-released-dod?redirect=cpredirect/32088.

detention, and interrogation.[27]

The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA requests—the ACLU created an original chart that provides the public and news media with a comprehensive summary index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance.[28] Similarly, the ACLU produced an analysis of documents released in response to a FOIA request about the TSA's behavior detection program[29]; a summary of documents released in response to a FOIA request related to the FISA Amendments Act[30]; a chart of original statistics about the Defense Department's use of National Security Letters based on its own analysis of records obtained through FOIA requests[31]; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.[32]

The ACLU plans to analyze, publish, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.

B. The records sought are urgently needed to inform the public about actual or alleged government activity.

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[27] *The Torture Database*, ACLU, https://www.thetorturedatabase.org; *see also Countering Violent Extremism FOIA Database*, ACLU, https://www.aclu.org/foia-collection/cve-foia-documents; *TSA Behavior Detection FOIA Database*, ACLU, https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database; *Targeted Killing FOIA Database*, ACLU, https://www.aclu.org/foia-collection/targeted-killing-foia-database.

[28] *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (Mar. 5, 2009), https://www.aclu.org/sites/default/files/pdfs/safefree/ olcmemos_2009_0305.pdf.

[29] *Bad Trip: Debunking the TSA's 'Behavior Detection' Program*, ACLU (2017), https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf.

[30] *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU, https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf.

[31] *Statistics on NSL's Produced by Department of Defense*, ACLU, https://www.aclu.org/other/statistics-nsls-produced-dod.

[32] Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights.

These records are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).[33] Specifically, the requested records relate to forthcoming cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for protests against the Keystone XL pipeline. As discussed in Part I, *supra*, oil pipelines, protests against them, and law enforcements responses to these protests are the subject of widespread public controversy and media attention.[34] The records sought relate to a matter of widespread and exceptional media interest in planned oil pipelines, protests against them, and law enforcement responses to these protests.

Given the foregoing, the ACLU has satisfied the requirements for expedited processing of this Request.

IV. Application for Waiver or Limitation of Fees

The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).[35] The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

A. The Request is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the ACLU.

As discussed above, credible media and other investigative accounts underscore the substantial public interest in the records sought through this Request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance. Because little specific information about cooperation between federal, state, and local law enforcement entities and between federal entities and private security companies around anticipated pipeline protests is publicly available, the records sought are certain to contribute significantly to the public's understanding of what type of efforts the federal government is undertaking in preparation for protests against the Keystone XL pipeline.

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[33] *See also* 28 C.F.R. 16.5(e)(1)(ii); 32 C.F.R. § 286.8(e)(1)(i)(B); 6 C.F.R. § 5.5(e)(1)(ii).

[34] *See supra* notes 4–7 and accompanying text.

[35] *See also* 28 C.F.R. § 16.10(k)(2); 32 C.F.R. § 286.12(l)(1); 6 C.F.R. § 5.11(k)(1).

The ACLU is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." (quotation marks omitted)).

B. The ACLU is a representative of the news media and the records are not sought for commercial use.

The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).[36] The ACLU meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III)[37]; *see also Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of the FOIA); *Serv. Women's Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. DOJ*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience"); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information"). The ACLU is therefore a "representative of the news media" for the same reasons it is "primarily engaged in the dissemination of information."

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU's to be "representatives of the news media" as well. *See, e.g.*, *Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that

[36] *See also* 28 C.F.R. 16.10(k)(2)(ii)(B); 32 C.F.R. § 286.12 (l)(2)(ii)(b); 6 C.F.R. § 5.11(k)(2)(iii).

[37] *See also* 28 C.F.R. 16.10(b)(6); 32 C.F.R. § 286.12(b)(6); 6 C.F.R. § 5.11(b)(6).

disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of the FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a "public interest law firm," a news media requester).[38]

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a "representative of the news media."[39] As was true in those instances, the ACLU meets the requirements for a fee waiver here.

* * *

Pursuant to applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 28 C.F.R. 16.5(e)(4); 32 C.F.R.§ 286.8(e)(1); 6 C.F.R. § 5.5(e)(4).

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific exemptions to FOIA. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU reserves the right to appeal a decision to withhold any information or deny a waiver of fees.

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[38] Courts have found these organizations to be "representatives of the news media" even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g.*, *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat'l Sec. Archive*, 880 F.2d at 1387; s*ee also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

[39] In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to "national security letters" issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists.

Thank you for your prompt attention to this matter. Please furnish the applicable records to:

Jacob Hutt
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004
T: 212.519.7809
jhutt@aclu.org

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

Respectfully,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

/s/ Jacob J. Hutt

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Presidential Documents

Title 3—

The President

Executive Order 13526 of December 29, 2009

Classified National Security Information

This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information both within the Government and to the American people. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security and demonstrating our commitment to open Government through accurate and accountable application of classification standards and routine, secure, and effective declassification are equally important priorities.

NOW, THEREFORE, I, BARACK OBAMA, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

PART 1—ORIGINAL CLASSIFICATION

Section 1.1. *Classification Standards.* (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

(1) an original classification authority is classifying the information;

(2) the information is owned by, produced by or for, or is under the control of the United States Government;

(3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and

(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

(b) If there is significant doubt about the need to classify information, it shall not be classified. This provision does not:

(1) amplify or modify the substantive criteria or procedures for classification; or

(2) create any substantive or procedural rights subject to judicial review.

(c) Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.

(d) The unauthorized disclosure of foreign government information is presumed to cause damage to the national security.

Sec. 1.2. *Classification Levels.* (a) Information may be classified at one of the following three levels:

(1) ''Top Secret'' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.

(2) ''Secret'' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the

national security that the original classification authority is able to identify or describe.

(3) ''Confidential'' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.

(b) Except as otherwise provided by statute, no other terms shall be used to identify United States classified information.

(c) If there is significant doubt about the appropriate level of classification, it shall be classified at the lower level.

Sec. 1.3. *Classification Authority.* (a) The authority to classify information originally may be exercised only by:

(1) the President and the Vice President;

(2) agency heads and officials designated by the President; and

(3) United States Government officials delegated this authority pursuant to paragraph (c) of this section.

(b) Officials authorized to classify information at a specified level are also authorized to classify information at a lower level.

(c) Delegation of original classification authority.

(1) Delegations of original classification authority shall be limited to the minimum required to administer this order. Agency heads are responsible for ensuring that designated subordinate officials have a demonstrable and continuing need to exercise this authority.

(2) ''Top Secret'' original classification authority may be delegated only by the President, the Vice President, or an agency head or official designated pursuant to paragraph (a)(2) of this section.

(3) ''Secret'' or ''Confidential'' original classification authority may be delegated only by the President, the Vice President, an agency head or official designated pursuant to paragraph (a)(2) of this section, or the senior agency official designated under section 5.4(d) of this order, provided that official has been delegated ''Top Secret'' original classification authority by the agency head.

(4) Each delegation of original classification authority shall be in writing and the authority shall not be redelegated except as provided in this order. Each delegation shall identify the official by name or position.

(5) Delegations of original classification authority shall be reported or made available by name or position to the Director of the Information Security Oversight Office.

(d) All original classification authorities must receive training in proper classification (including the avoidance of over-classification) and declassification as provided in this order and its implementing directives at least once a calendar year. Such training must include instruction on the proper safeguarding of classified information and on the sanctions in section 5.5 of this order that may be brought against an individual who fails to classify information properly or protect classified information from unauthorized disclosure. Original classification authorities who do not receive such mandatory training at least once within a calendar year shall have their classification authority suspended by the agency head or the senior agency official designated under section 5.4(d) of this order until such training has taken place. A waiver may be granted by the agency head, the deputy agency head, or the senior agency official if an individual is unable to receive such training due to unavoidable circumstances. Whenever a waiver is granted, the individual shall receive such training as soon as practicable.

(e) Exceptional cases. When an employee, government contractor, licensee, certificate holder, or grantee of an agency who does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent

with this order and its implementing directives. The information shall be transmitted promptly as provided under this order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within 30 days whether to classify this information.

Sec. 1.4. *Classification Categories.* Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following:

(a) military plans, weapons systems, or operations;

(b) foreign government information;

(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;

(d) foreign relations or foreign activities of the United States, including confidential sources;

(e) scientific, technological, or economic matters relating to the national security;

(f) United States Government programs for safeguarding nuclear materials or facilities;

(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or (h) the development, production, or use of weapons of mass destruction.

Sec. 1.5. *Duration of Classification.* (a) At the time of original classification, the original classification authority shall establish a specific date or event for declassification based on the duration of the national security sensitivity of the information. Upon reaching the date or event, the information shall be automatically declassified. Except for information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, the date or event shall not exceed the time frame established in paragraph (b) of this section.

(b) If the original classification authority cannot determine an earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original decision, unless the original classification authority otherwise determines that the sensitivity of the information requires that it be marked for declassification for up to 25 years from the date of the original decision.

(c) An original classification authority may extend the duration of classification up to 25 years from the date of origin of the document, change the level of classification, or reclassify specific information only when the standards and procedures for classifying information under this order are followed.

(d) No information may remain classified indefinitely. Information marked for an indefinite duration of classification under predecessor orders, for example, marked as ''Originating Agency's Determination Required,'' or classified information that contains incomplete declassification instructions or lacks declassification instructions shall be declassified in accordance with part 3 of this order.

Sec. 1.6. *Identification and Markings.* (a) At the time of original classification, the following shall be indicated in a manner that is immediately apparent:

(1) one of the three classification levels defined in section 1.2 of this order;

(2) the identity, by name and position, or by personal identifier, of the original classification authority;

(3) the agency and office of origin, if not otherwise evident;

(4) declassification instructions, which shall indicate one of the following:

(A) the date or event for declassification, as prescribed in section 1.5(a);

(B) the date that is 10 years from the date of original classification, as prescribed in section 1.5(b);

(C) the date that is up to 25 years from the date of original classification, as prescribed in section 1.5(b); or

(D) in the case of information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, the marking prescribed in implementing directives issued pursuant to this order; and

(5) a concise reason for classification that, at a minimum, cites the applicable classification categories in section 1.4 of this order.

(b) Specific information required in paragraph (a) of this section may be excluded if it would reveal additional classified information.

(c) With respect to each classified document, the agency originating the document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are unclassified. In accordance with standards prescribed in directives issued under this order, the Director of the Information Security Oversight Office may grant and revoke temporary waivers of this requirement. The Director shall revoke any waiver upon a finding of abuse.

(d) Markings or other indicia implementing the provisions of this order, including abbreviations and requirements to safeguard classified working papers, shall conform to the standards prescribed in implementing directives issued pursuant to this order.

(e) Foreign government information shall retain its original classification markings or shall be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the entity that furnished the information. Foreign government information retaining its original classification markings need not be assigned a U.S. classification marking provided that the responsible agency determines that the foreign government markings are adequate to meet the purposes served by U.S. classification markings.

(f) Information assigned a level of classification under this or predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings. Whenever such information is used in the derivative classification process or is reviewed for possible declassification, holders of such information shall coordinate with an appropriate classification authority for the application of omitted markings.

(g) The classification authority shall, whenever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document or prepare a product to allow for dissemination at the lowest level of classification possible or in unclassified form.

(h) Prior to public release, all declassified records shall be appropriately marked to reflect their declassification.

Sec. 1.7. *Classification Prohibitions and Limitations.* (a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:

(1) conceal violations of law, inefficiency, or administrative error;

(2) prevent embarrassment to a person, organization, or agency;

(3) restrain competition; or

(4) prevent or delay the release of information that does not require protection in the interest of the national security.

(b) Basic scientific research information not clearly related to the national security shall not be classified.

(c) Information may not be reclassified after declassification and release to the public under proper authority unless:

(1) the reclassification is personally approved in writing by the agency head based on a document-by-document determination by the agency that reclassification is required to prevent significant and demonstrable damage to the national security;

(2) the information may be reasonably recovered without bringing undue attention to the information;

(3) the reclassification action is reported promptly to the Assistant to the President for National Security Affairs (National Security Advisor) and the Director of the Information Security Oversight Office; and

(4) for documents in the physical and legal custody of the National Archives and Records Administration (National Archives) that have been available for public use, the agency head has, after making the determinations required by this paragraph, notified the Archivist of the United States (Archivist), who shall suspend public access pending approval of the reclassification action by the Director of the Information Security Oversight Office. Any such decision by the Director may be appealed by the agency head to the President through the National Security Advisor. Public access shall remain suspended pending a prompt decision on the appeal.

(d) Information that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (5 U.S.C. 552), the Presidential Records Act, 44 U.S.C. 2204(c)(1), the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of section 3.5 of this order only if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order. The requirements in this paragraph also apply to those situations in which information has been declassified in accordance with a specific date or event determined by an original classification authority in accordance with section 1.5 of this order.

(e) Compilations of items of information that are individually unclassified may be classified if the compiled information reveals an additional association or relationship that:

(1) meets the standards for classification under this order; and

(2) is not otherwise revealed in the individual items of information.

Sec. 1.8. *Classification Challenges.* (a) Authorized holders of information who, in good faith, believe that its classification status is improper are encouraged and expected to challenge the classification status of the information in accordance with agency procedures established under paragraph (b) of this section.

(b) In accordance with implementing directives issued pursuant to this order, an agency head or senior agency official shall establish procedures under which authorized holders of information, including authorized holders outside the classifying agency, are encouraged and expected to challenge the classification of information that they believe is improperly classified or unclassified. These procedures shall ensure that:

(1) individuals are not subject to retribution for bringing such actions;

(2) an opportunity is provided for review by an impartial official or panel; and

(3) individuals are advised of their right to appeal agency decisions to the Interagency Security Classification Appeals Panel (Panel) established by section 5.3 of this order.

(c) Documents required to be submitted for prepublication review or other administrative process pursuant to an approved nondisclosure agreement are not covered by this section.

Sec. 1.9. *Fundamental Classification Guidance Review.* (a) Agency heads shall complete on a periodic basis a comprehensive review of the agency's classification guidance, particularly classification guides, to ensure the guidance reflects current circumstances and to identify classified information that no longer requires protection and can be declassified. The initial fundamental classification guidance review shall be completed within 2 years of the effective date of this order.

(b) The classification guidance review shall include an evaluation of classified information to determine if it meets the standards for classification under section 1.4 of this order, taking into account an up-to-date assessment of likely damage as described under section 1.2 of this order.

(c) The classification guidance review shall include original classification authorities and agency subject matter experts to ensure a broad range of perspectives.

(d) Agency heads shall provide a report summarizing the results of the classification guidance review to the Director of the Information Security Oversight Office and shall release an unclassified version of this report to the public.

PART 2—DERIVATIVE CLASSIFICATION

Sec. 2.1. *Use of Derivative Classification.* (a) Persons who reproduce, extract, or summarize classified information, or who apply classification markings derived from source material or as directed by a classification guide, need not possess original classification authority.

(b) Persons who apply derivative classification markings shall:

(1) be identified by name and position, or by personal identifier, in a manner that is immediately apparent for each derivative classification action;

(2) observe and respect original classification decisions; and

(3) carry forward to any newly created documents the pertinent classification markings. For information derivatively classified based on multiple sources, the derivative classifier shall carry forward:

(A) the date or event for declassification that corresponds to the longest period of classification among the sources, or the marking established pursuant to section 1.6(a)(4)(D) of this order; and

(B) a listing of the source materials.

(c) Derivative classifiers shall, whenever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document or prepare a product to allow for dissemination at the lowest level of classification possible or in unclassified form.

(d) Persons who apply derivative classification markings shall receive training in the proper application of the derivative classification principles of the order, with an emphasis on avoiding over-classification, at least once every 2 years. Derivative classifiers who do not receive such training at least once every 2 years shall have their authority to apply derivative classification markings suspended until they have received such training. A waiver may be granted by the agency head, the deputy agency head, or the senior agency official if an individual is unable to receive such training due to unavoidable circumstances. Whenever a waiver is granted, the individual shall receive such training as soon as practicable.

Sec. 2.2. *Classification Guides.* (a) Agencies with original classification authority shall prepare classification guides to facilitate the proper and uniform derivative classification of information. These guides shall conform to standards contained in directives issued under this order.

(b) Each guide shall be approved personally and in writing by an official who:

(1) has program or supervisory responsibility over the information or is the senior agency official; and

(2) is authorized to classify information originally at the highest level of classification prescribed in the guide.

(c) Agencies shall establish procedures to ensure that classification guides are reviewed and updated as provided in directives issued under this order.

(d) Agencies shall incorporate original classification decisions into classification guides on a timely basis and in accordance with directives issued under this order.

(e) Agencies may incorporate exemptions from automatic declassification approved pursuant to section 3.3(j) of this order into classification guides, provided that the Panel is notified of the intent to take such action for specific information in advance of approval and the information remains in active use.

(f) The duration of classification of a document classified by a derivative classifier using a classification guide shall not exceed 25 years from the date of the origin of the document, except for:

(1) information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction; and

(2) specific information incorporated into classification guides in accordance with section 2.2(e) of this order.

PART 3—DECLASSIFICATION AND DOWNGRADING

Sec. 3.1. *Authority for Declassification.* (a) Information shall be declassified as soon as it no longer meets the standards for classification under this order.

(b) Information shall be declassified or downgraded by:

(1) the official who authorized the original classification, if that official is still serving in the same position and has original classification authority;

(2) the originator's current successor in function, if that individual has original classification authority;

(3) a supervisory official of either the originator or his or her successor in function, if the supervisory official has original classification authority; or (4) officials delegated declassification authority in writing by the agency head or the senior agency official of the originating agency.

(c) The Director of National Intelligence (or, if delegated by the Director of National Intelligence, the Principal Deputy Director of National Intelligence) may, with respect to the Intelligence Community, after consultation with the head of the originating Intelligence Community element or department, declassify, downgrade, or direct the declassification or downgrading of information or intelligence relating to intelligence sources, methods, or activities.

(d) It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure. This provision does not:

(1) amplify or modify the substantive criteria or procedures for classification; or

(2) create any substantive or procedural rights subject to judicial review.

(e) If the Director of the Information Security Oversight Office determines that information is classified in violation of this order, the Director may require the information to be declassified by the agency that originated the classification. Any such decision by the Director may be appealed to the President through the National Security Advisor. The information shall remain classified pending a prompt decision on the appeal.

(f) The provisions of this section shall also apply to agencies that, under the terms of this order, do not have original classification authority, but had such authority under predecessor orders.

(g) No information may be excluded from declassification under section 3.3 of this order based solely on the type of document or record in which it is found. Rather, the classified information must be considered on the basis of its content.

(h) Classified nonrecord materials, including artifacts, shall be declassified as soon as they no longer meet the standards for classification under this order.

(i) When making decisions under sections 3.3, 3.4, and 3.5 of this order, agencies shall consider the final decisions of the Panel.

Sec. 3.2. *Transferred Records.*

(a) In the case of classified records transferred in conjunction with a transfer of functions, and not merely for storage purposes, the receiving agency shall be deemed to be the originating agency for purposes of this order.

(b) In the case of classified records that are not officially transferred as described in paragraph (a) of this section, but that originated in an agency that has ceased to exist and for which there is no successor agency, each agency in possession of such records shall be deemed to be the originating agency for purposes of this order. Such records may be declassified or downgraded by the agency in possession of the records after consultation with any other agency that has an interest in the subject matter of the records.

(c) Classified records accessioned into the National Archives shall be declassified or downgraded by the Archivist in accordance with this order, the directives issued pursuant to this order, agency declassification guides, and any existing procedural agreement between the Archivist and the relevant agency head.

(d) The originating agency shall take all reasonable steps to declassify classified information contained in records determined to have permanent historical value before they are accessioned into the National Archives. However, the Archivist may require that classified records be accessioned into the National Archives when necessary to comply with the provisions of the Federal Records Act. This provision does not apply to records transferred to the Archivist pursuant to section 2203 of title 44, United States Code, or records for which the National Archives serves as the custodian of the records of an agency or organization that has gone out of existence.

(e) To the extent practicable, agencies shall adopt a system of records management that will facilitate the public release of documents at the time such documents are declassified pursuant to the provisions for automatic declassification in section 3.3 of this order.

Sec. 3.3 *Automatic Declassification.*

(a) Subject to paragraphs (b)–(d) and (g)–(j) of this section, all classified records that (1) are more than 25 years old and (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed. All classified records shall be automatically declassified on December 31 of the year that is 25 years from the date of origin, except as provided in paragraphs (b)–(d) and (g)–(j) of this section. If the date of origin of an individual record cannot be readily determined, the date of original classification shall be used instead.

(b) An agency head may exempt from automatic declassification under paragraph (a) of this section specific information, the release of which should clearly and demonstrably be expected to:

(1) reveal the identity of a confidential human source, a human intelligence source, a relationship with an intelligence or security service of a foreign

government or international organization, or a nonhuman intelligence source; or impair the effectiveness of an intelligence method currently in use, available for use, or under development;

(2) reveal information that would assist in the development, production, or use of weapons of mass destruction;

(3) reveal information that would impair U.S. cryptologic systems or activities;

(4) reveal information that would impair the application of state-of-the-art technology within a U.S. weapon system;

(5) reveal formally named or numbered U.S. military war plans that remain in effect, or reveal operational or tactical elements of prior plans that are contained in such active plans;

(6) reveal information, including foreign government information, that would cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States;

(7) reveal information that would impair the current ability of United States Government officials to protect the President, Vice President, and other protectees for whom protection services, in the interest of the national security, are authorized;

(8) reveal information that would seriously impair current national security emergency preparedness plans or reveal current vulnerabilities of systems, installations, or infrastructures relating to the national security; or

(9) violate a statute, treaty, or international agreement that does not permit the automatic or unilateral declassification of information at 25 years.

(c)(1) An agency head shall notify the Panel of any specific file series of records for which a review or assessment has determined that the information within that file series almost invariably falls within one or more of the exemption categories listed in paragraph (b) of this section and that the agency proposes to exempt from automatic declassification at 25 years.

(2) The notification shall include:

(A) a description of the file series;

(B) an explanation of why the information within the file series is almost invariably exempt from automatic declassification and why the information must remain classified for a longer period of time; and

(C) except when the information within the file series almost invariably identifies a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, a specific date or event for declassification of the information, not to exceed December 31 of the year that is 50 years from the date of origin of the records.

(3) The Panel may direct the agency not to exempt a designated file series or to declassify the information within that series at an earlier date than recommended. The agency head may appeal such a decision to the President through the National Security Advisor.

(4) File series exemptions approved by the President prior to December 31, 2008, shall remain valid without any additional agency action pending Panel review by the later of December 31, 2010, or December 31 of the year that is 10 years from the date of previous approval.

(d) The following provisions shall apply to the onset of automatic declassification:

(1) Classified records within an integral file block, as defined in this order, that are otherwise subject to automatic declassification under this section shall not be automatically declassified until December 31 of the year that is 25 years from the date of the most recent record within the file block.

(2) After consultation with the Director of the National Declassification Center (the Center) established by section 3.7 of this order and before the records are subject to automatic declassification, an agency head or senior agency official may delay automatic declassification for up to five additional years for classified information contained in media that make a review for possible declassification exemptions more difficult or costly.

(3) Other than for records that are properly exempted from automatic declassification, records containing classified information that originated with other agencies or the disclosure of which would affect the interests or activities of other agencies with respect to the classified information and could reasonably be expected to fall under one or more of the exemptions in paragraph (b) of this section shall be identified prior to the onset of automatic declassification for later referral to those agencies.

(A) The information of concern shall be referred by the Center established by section 3.7 of this order, or by the centralized facilities referred to in section 3.7(e) of this order, in a prioritized and scheduled manner determined by the Center.

(B) If an agency fails to provide a final determination on a referral made by the Center within 1 year of referral, or by the centralized facilities referred to in section 3.7(e) of this order within 3 years of referral, its equities in the referred records shall be automatically declassified.

(C) If any disagreement arises between affected agencies and the Center regarding the referral review period, the Director of the Information Security Oversight Office shall determine the appropriate period of review of referred records.

(D) Referrals identified prior to the establishment of the Center by section 3.7 of this order shall be subject to automatic declassification only in accordance with subparagraphs (d)(3)(A)–(C) of this section.

(4) After consultation with the Director of the Information Security Oversight Office, an agency head may delay automatic declassification for up to 3 years from the date of discovery of classified records that were inadvertently not reviewed prior to the effective date of automatic declassification.

(e) Information exempted from automatic declassification under this section shall remain subject to the mandatory and systematic declassification review provisions of this order.

(f) The Secretary of State shall determine when the United States should commence negotiations with the appropriate officials of a foreign government or international organization of governments to modify any treaty or international agreement that requires the classification of information contained in records affected by this section for a period longer than 25 years from the date of its creation, unless the treaty or international agreement pertains to information that may otherwise remain classified beyond 25 years under this section.

(g) The Secretary of Energy shall determine when information concerning foreign nuclear programs that was removed from the Restricted Data category in order to carry out provisions of the National Security Act of 1947, as amended, may be declassified. Unless otherwise determined, such information shall be declassified when comparable information concerning the United States nuclear program is declassified.

(h) Not later than 3 years from the effective date of this order, all records exempted from automatic declassification under paragraphs (b) and (c) of this section shall be automatically declassified on December 31 of a year that is no more than 50 years from the date of origin, subject to the following:

(1) Records that contain information the release of which should clearly and demonstrably be expected to reveal the following are exempt from automatic declassification at 50 years:

(A) the identity of a confidential human source or a human intelligence source; or

(B) key design concepts of weapons of mass destruction.

(2) In extraordinary cases, agency heads may, within 5 years of the onset of automatic declassification, propose to exempt additional specific information from declassification at 50 years.

(3) Records exempted from automatic declassification under this paragraph shall be automatically declassified on December 31 of a year that is no more than 75 years from the date of origin unless an agency head, within 5 years of that date, proposes to exempt specific information from declassification at 75 years and the proposal is formally approved by the Panel.

(i) Specific records exempted from automatic declassification prior to the establishment of the Center described in section 3.7 of this order shall be subject to the provisions of paragraph (h) of this section in a scheduled and prioritized manner determined by the Center.

(j) At least 1 year before information is subject to automatic declassification under this section, an agency head or senior agency official shall notify the Director of the Information Security Oversight Office, serving as Executive Secretary of the Panel, of any specific information that the agency proposes to exempt from automatic declassification under paragraphs (b) and (h) of this section.

(1) The notification shall include:

(A) a detailed description of the information, either by reference to information in specific records or in the form of a declassification guide;

(B) an explanation of why the information should be exempt from automatic declassification and must remain classified for a longer period of time; and

(C) a specific date or a specific and independently verifiable event for automatic declassification of specific records that contain the information proposed for exemption.

(2) The Panel may direct the agency not to exempt the information or to declassify it at an earlier date than recommended. An agency head may appeal such a decision to the President through the National Security Advisor. The information will remain classified while such an appeal is pending.

(k) For information in a file series of records determined not to have permanent historical value, the duration of classification beyond 25 years shall be the same as the disposition (destruction) date of those records in each Agency Records Control Schedule or General Records Schedule, although the duration of classification shall be extended if the record has been retained for business reasons beyond the scheduled disposition date.

Sec. 3.4. *Systematic Declassification Review.*

(a) Each agency that has originated classified information under this order or its predecessors shall establish and conduct a program for systematic declassification review for records of permanent historical value exempted from automatic declassification under section 3.3 of this order. Agencies shall prioritize their review of such records in accordance with priorities established by the Center.

(b) The Archivist shall conduct a systematic declassification review program for classified records:

(1) accessioned into the National Archives; (2) transferred to the Archivist pursuant to 44 U.S.C. 2203; and (3) for which the National Archives serves as the custodian for an agency or organization that has gone out of existence.

Sec. 3.5. *Mandatory Declassification Review.*

(a) Except as provided in paragraph (b) of this section, all information classified under this order or predecessor orders shall be subject to a review for declassification by the originating agency if:

(1) the request for a review describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort;

(2) the document or material containing the information responsive to the request is not contained within an operational file exempted from search and review, publication, and disclosure under 5 U.S.C. 552 in accordance with law; and

(3) the information is not the subject of pending litigation.

(b) Information originated by the incumbent President or the incumbent Vice President; the incumbent President's White House Staff or the incumbent Vice President's Staff; committees, commissions, or boards appointed by the incumbent President; or other entities within the Executive Office of the President that solely advise and assist the incumbent President is exempted from the provisions of paragraph (a) of this section. However, the Archivist shall have the authority to review, downgrade, and declassify papers or records of former Presidents and Vice Presidents under the control of the Archivist pursuant to 44 U.S.C. 2107, 2111, 2111 note, or 2203. Review procedures developed by the Archivist shall provide for consultation with agencies having primary subject matter interest and shall be consistent with the provisions of applicable laws or lawful agreements that pertain to the respective Presidential papers or records. Agencies with primary subject matter interest shall be notified promptly of the Archivist's decision. Any final decision by the Archivist may be appealed by the requester or an agency to the Panel. The information shall remain classified pending a prompt decision on the appeal.

(c) Agencies conducting a mandatory review for declassification shall declassify information that no longer meets the standards for classification under this order. They shall release this information unless withholding is otherwise authorized and warranted under applicable law.

(d) If an agency has reviewed the requested information for declassification within the past 2 years, the agency need not conduct another review and may instead inform the requester of this fact and the prior review decision and advise the requester of appeal rights provided under subsection (e) of this section.

(e) In accordance with directives issued pursuant to this order, agency heads shall develop procedures to process requests for the mandatory review of classified information. These procedures shall apply to information classified under this or predecessor orders. They also shall provide a means for administratively appealing a denial of a mandatory review request, and for notifying the requester of the right to appeal a final agency decision to the Panel.

(f) After consultation with affected agencies, the Secretary of Defense shall develop special procedures for the review of cryptologic information; the Director of National Intelligence shall develop special procedures for the review of information pertaining to intelligence sources, methods, and activities; and the Archivist shall develop special procedures for the review of information accessioned into the National Archives.

(g) Documents required to be submitted for prepublication review or other administrative process pursuant to an approved nondisclosure agreement are not covered by this section.

(h) This section shall not apply to any request for a review made to an element of the Intelligence Community that is made by a person other than an individual as that term is defined by 5 U.S.C. 552a(a)(2), or by a foreign government entity or any representative thereof.

Sec. 3.6. *Processing Requests and Reviews.* Notwithstanding section 4.1(i) of this order, in response to a request for information under the Freedom of Information Act, the Presidential Records Act, the Privacy Act of 1974, or the mandatory review provisions of this order:

(a) An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.

(b) When an agency receives any request for documents in its custody that contain classified information that originated with other agencies or the disclosure of which would affect the interests or activities of other agencies with respect to the classified information, or identifies such documents in the process of implementing sections 3.3 or 3.4 of this order, it shall refer copies of any request and the pertinent documents to the originating agency for processing and may, after consultation with the originating agency, inform any requester of the referral unless such association is itself classified under this order or its predecessors. In cases in which the originating agency determines in writing that a response under paragraph (a) of this section is required, the referring agency shall respond to the requester in accordance with that paragraph.

(c) Agencies may extend the classification of information in records determined not to have permanent historical value or nonrecord materials, including artifacts, beyond the time frames established in sections 1.5(b) and 2.2(f) of this order, provided:

(1) the specific information has been approved pursuant to section 3.3(j) of this order for exemption from automatic declassification; and

(2) the extension does not exceed the date established in section 3.3(j) of this order.

Sec. 3.7. *National Declassification Center.* (a) There is established within the National Archives a National Declassification Center to streamline declassification processes, facilitate quality-assurance measures, and implement standardized training regarding the declassification of records determined to have permanent historical value. There shall be a Director of the Center who shall be appointed or removed by the Archivist in consultation with the Secretaries of State, Defense, Energy, and Homeland Security, the Attorney General, and the Director of National Intelligence.

(b) Under the administration of the Director, the Center shall coordinate:

(1) timely and appropriate processing of referrals in accordance with section 3.3(d)(3) of this order for accessioned Federal records and transferred presidential records.

(2) general interagency declassification activities necessary to fulfill the requirements of sections 3.3 and 3.4 of this order;

(3) the exchange among agencies of detailed declassification guidance to enable the referral of records in accordance with section 3.3(d)(3) of this order;

(4) the development of effective, transparent, and standard declassification work processes, training, and quality assurance measures;

(5) the development of solutions to declassification challenges posed by electronic records, special media, and emerging technologies;

(6) the linkage and effective utilization of existing agency databases and the use of new technologies to document and make public declassification review decisions and support declassification activities under the purview of the Center; and

(7) storage and related services, on a reimbursable basis, for Federal records containing classified national security information.

(c) Agency heads shall fully cooperate with the Archivist in the activities of the Center and shall:

(1) provide the Director with adequate and current declassification guidance to enable the referral of records in accordance with section 3.3(d)(3) of this order; and

(2) upon request of the Archivist, assign agency personnel to the Center who shall be delegated authority by the agency head to review and exempt

or declassify information originated by their agency contained in records accessioned into the National Archives, after consultation with subject-matter experts as necessary.

(d) The Archivist, in consultation with representatives of the participants in the Center and after input from the general public, shall develop priorities for declassification activities under the purview of the Center that take into account the degree of researcher interest and the likelihood of declassification.

(e) Agency heads may establish such centralized facilities and internal operations to conduct internal declassification reviews as appropriate to achieve optimized records management and declassification business processes. Once established, all referral processing of accessioned records shall take place at the Center, and such agency facilities and operations shall be coordinated with the Center to ensure the maximum degree of consistency in policies and procedures that relate to records determined to have permanent historical value.

(f) Agency heads may exempt from automatic declassification or continue the classification of their own originally classified information under section 3.3(a) of this order except that in the case of the Director of National Intelligence, the Director shall also retain such authority with respect to the Intelligence Community.

(g) The Archivist shall, in consultation with the Secretaries of State, Defense, Energy, and Homeland Security, the Attorney General, the Director of National Intelligence, the Director of the Central Intelligence Agency, and the Director of the Information Security Oversight Office, provide the National Security Advisor with a detailed concept of operations for the Center and a proposed implementing directive under section 5.1 of this order that reflects the coordinated views of the aforementioned agencies.

PART 4—SAFEGUARDING

Sec. 4.1. *General Restrictions on Access.*

(a) A person may have access to classified information provided that:

(1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee;

(2) the person has signed an approved nondisclosure agreement; and

(3) the person has a need-to-know the information.

(b) Every person who has met the standards for access to classified information in paragraph (a) of this section shall receive contemporaneous training on the proper safeguarding of classified information and on the criminal, civil, and administrative sanctions that may be imposed on an individual who fails to protect classified information from unauthorized disclosure.

(c) An official or employee leaving agency service may not remove classified information from the agency's control or direct that information be declassified in order to remove it from agency control.

(d) Classified information may not be removed from official premises without proper authorization.

(e) Persons authorized to disseminate classified information outside the executive branch shall ensure the protection of the information in a manner equivalent to that provided within the executive branch.

(f) Consistent with law, executive orders, directives, and regulations, an agency head or senior agency official or, with respect to the Intelligence Community, the Director of National Intelligence, shall establish uniform procedures to ensure that automated information systems, including networks and telecommunications systems, that collect, create, communicate, compute, disseminate, process, or store classified information:

(1) prevent access by unauthorized persons;

(2) ensure the integrity of the information; and

(3) to the maximum extent practicable, use:

(A) common information technology standards, protocols, and interfaces that maximize the availability of, and access to, the information in a form and manner that facilitates its authorized use; and

(B) standardized electronic formats to maximize the accessibility of information to persons who meet the criteria set forth in section 4.1(a) of this order.

(g) Consistent with law, executive orders, directives, and regulations, each agency head or senior agency official, or with respect to the Intelligence Community, the Director of National Intelligence, shall establish controls to ensure that classified information is used, processed, stored, reproduced, transmitted, and destroyed under conditions that provide adequate protection and prevent access by unauthorized persons.

(h) Consistent with directives issued pursuant to this order, an agency shall safeguard foreign government information under standards that provide a degree of protection at least equivalent to that required by the government or international organization of governments that furnished the information. When adequate to achieve equivalency, these standards may be less restrictive than the safeguarding standards that ordinarily apply to U.S. ''Confidential'' information, including modified handling and transmission and allowing access to individuals with a need-to-know who have not otherwise been cleared for access to classified information or executed an approved nondisclosure agreement.

(i)(1) Classified information originating in one agency may be disseminated to another agency or U.S. entity by any agency to which it has been made available without the consent of the originating agency, as long as the criteria for access under section 4.1(a) of this order are met, unless the originating agency has determined that prior authorization is required for such dissemination and has marked or indicated such requirement on the medium containing the classified information in accordance with implementing directives issued pursuant to this order.

(2) Classified information originating in one agency may be disseminated by any other agency to which it has been made available to a foreign government in accordance with statute, this order, directives implementing this order, direction of the President, or with the consent of the originating agency. For the purposes of this section, ''foreign government'' includes any element of a foreign government, or an international organization of governments, or any element thereof.

(3) Documents created prior to the effective date of this order shall not be disseminated outside any other agency to which they have been made available without the consent of the originating agency. An agency head or senior agency official may waive this requirement for specific information that originated within that agency.

(4) For purposes of this section, the Department of Defense shall be considered one agency, except that any dissemination of information regarding intelligence sources, methods, or activities shall be consistent with directives issued pursuant tosection 6.2(b) of this order.

(5) Prior consent of the originating agency is not required when referring records for declassification review that contain information originating in more than one agency.

Sec. 4.2 *Distribution Controls.*

(a) The head of each agency shall establish procedures in accordance with applicable law and consistent with directives issued pursuant to this order to ensure that classified information is accessible to the maximum extent possible by individuals who meet the criteria set forth in section 4.1(a) of this order.

(b) In an emergency, when necessary to respond to an imminent threat to life or in defense of the homeland, the agency head or any designee

may authorize the disclosure of classified information (including information marked pursuant to section 4.1(i)(1) of this order) to an individual or individuals who are otherwise not eligible for access. Such actions shall be taken only in accordance with directives implementing this order and any procedure issued by agencies governing the classified information, which shall be designed to minimize the classified information that is disclosed under these circumstances and the number of individuals who receive it. Information disclosed under this provision or implementing directives and procedures shall not be deemed declassified as a result of such disclosure or subsequent use by a recipient. Such disclosures shall be reported promptly to the originator of the classified information. For purposes of this section, the Director of National Intelligence may issue an implementing directive governing the emergency disclosure of classified intelligence information.

(c) Each agency shall update, at least annually, the automatic, routine, or recurring distribution mechanism for classified information that it distributes. Recipients shall cooperate fully with distributors who are updating distribution lists and shall notify distributors whenever a relevant change in status occurs.

Sec. 4.3. *Special Access Programs.* (a) Establishment of special access programs. Unless otherwise authorized by the President, only the Secretaries of State, Defense, Energy, and Homeland Security, the Attorney General, and the Director of National Intelligence, or the principal deputy of each, may create a special access program. For special access programs pertaining to intelligence sources, methods, and activities (but not including military operational, strategic, and tactical programs), this function shall be exercised by the Director of National Intelligence. These officials shall keep the number of these programs at an absolute minimum, and shall establish them only when the program is required by statute or upon a specific finding that:

(1) the vulnerability of, or threat to, specific information is exceptional; and

(2) the normal criteria for determining eligibility for access applicable to information classified at the same level are not deemed sufficient to protect the information from unauthorized disclosure.

(b) Requirements and limitations.

(1) Special access programs shall be limited to programs in which the number of persons who ordinarily will have access will be reasonably small and commensurate with the objective of providing enhanced protection for the information involved.

(2) Each agency head shall establish and maintain a system of accounting for special access programs consistent with directives issued pursuant to this order.

(3) Special access programs shall be subject to the oversight program established under section 5.4(d) of this order. In addition, the Director of the Information Security Oversight Office shall be afforded access to these programs, in accordance with the security requirements of each program, in order to perform the functions assigned to the Information Security Oversight Office under this order. An agency head may limit access to a special access program to the Director of the Information Security Oversight Office and no more than one other employee of the Information Security Oversight Office or, for special access programs that are extraordinarily sensitive and vulnerable, to the Director only.

(4) The agency head or principal deputy shall review annually each special access program to determine whether it continues to meet the requirements of this order.

(5) Upon request, an agency head shall brief the National Security Advisor, or a designee, on any or all of the agency's special access programs.

(6) For the purposes of this section, the term ''agency head'' refers only to the Secretaries of State, Defense, Energy, and Homeland Security, the

Attorney General, and the Director of National Intelligence, or the principal deputy of each.

(c) Nothing in this order shall supersede any requirement made by or under 10 U.S.C. 119.

Sec. 4.4. *Access by Historical Researchers and Certain Former Government Personnel.*

(a) The requirement in section 4.1(a)(3) of this order that access to classified information may be granted only to individuals who have a need-to-know the information may be waived for persons who:

(1) are engaged in historical research projects;

(2) previously have occupied senior policy-making positions to which they were appointed or designated by the President or the Vice President; or

(3) served as President or Vice President.

(b) Waivers under this section may be granted only if the agency head or senior agency official of the originating agency:

(1) determines in writing that access is consistent with the interest of the national security;

(2) takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is safeguarded in a manner consistent with this order; and

(3) limits the access granted to former Presidential appointees or designees and Vice Presidential appointees or designees to items that the person originated, reviewed, signed, or received while serving as a Presidential or Vice Presidential appointee or designee.

PART 5—IMPLEMENTATION AND REVIEW

Sec. 5.1. *Program Direction.* (a) The Director of the Information Security Oversight Office, under the direction of the Archivist and in consultation with the National Security Advisor, shall issue such directives as are necessary to implement this order. These directives shall be binding on the agencies. Directives issued by the Director of the Information Security Oversight Office shall establish standards for:

(1) classification, declassification, and marking principles;

(2) safeguarding classified information, which shall pertain to the handling, storage, distribution, transmittal, and destruction of and accounting for classified information;

(3) agency security education and training programs;

(4) agency self-inspection programs; and

(5) classification and declassification guides.

(b) The Archivist shall delegate the implementation and monitoring functions of this program to the Director of the Information Security Oversight Office.

(c) The Director of National Intelligence, after consultation with the heads of affected agencies and the Director of the Information Security Oversight Office, may issue directives to implement this order with respect to the protection of intelligence sources, methods, and activities. Such directives shall be consistent with this order and directives issued under paragraph (a) of this section.

Sec. 5.2. *Information Security Oversight Office.* (a) There is established within the National Archives an Information Security Oversight Office. The Archivist shall appoint the Director of the Information Security Oversight Office, subject to the approval of the President.

(b) Under the direction of the Archivist, acting in consultation with the National Security Advisor, the Director of the Information Security Oversight Office shall:

(1) develop directives for the implementation of this order;

(2) oversee agency actions to ensure compliance with this order and its implementing directives;

(3) review and approve agency implementing regulations prior to their issuance to ensure their consistency with this order and directives issued under section 5.1(a) of this order;

(4) have the authority to conduct on-site reviews of each agency's program established under this order, and to require of each agency those reports and information and other cooperation that may be necessary to fulfill its responsibilities. If granting access to specific categories of classified information would pose an exceptional national security risk, the affected agency head or the senior agency official shall submit a written justification recommending the denial of access to the President through the National Security Advisor within 60 days of the request for access. Access shall be denied pending the response;

(5) review requests for original classification authority from agencies or officials not granted original classification authority and, if deemed appropriate, recommend Presidential approval through the National Security Advisor;

(6) consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the program established under this order;

(7) have the authority to prescribe, after consultation with affected agencies, standardization of forms or procedures that will promote the implementation of the program established under this order;

(8) report at least annually to the President on the implementation of this order; and

(9) convene and chair interagency meetings to discuss matters pertaining to the program established by this order.

Sec. 5.3. *Interagency Security Classification Appeals Panel.*

(a) Establishment and administration.

(1) There is established an Interagency Security Classification Appeals Panel. The Departments of State, Defense, and Justice, the National Archives, the Office of the Director of National Intelligence, and the National Security Advisor shall each be represented by a senior-level representative who is a full-time or permanent part-time Federal officer or employee designated to serve as a member of the Panel by the respective agency head. The President shall designate a Chair from among the members of the Panel.

(2) Additionally, the Director of the Central Intelligence Agency may appoint a temporary representative who meets the criteria in paragraph (a)(1) of this section to participate as a voting member in all Panel deliberations and associated support activities concerning classified information originated by the Central Intelligence Agency.

(3) A vacancy on the Panel shall be filled as quickly as possible as provided in paragraph (a)(1) of this section.

(4) The Director of the Information Security Oversight Office shall serve as the Executive Secretary of the Panel. The staff of the Information Security Oversight Office shall provide program and administrative support for the Panel.

(5) The members and staff of the Panel shall be required to meet eligibility for access standards in order to fulfill the Panel's functions.

(6) The Panel shall meet at the call of the Chair. The Chair shall schedule meetings as may be necessary for the Panel to fulfill its functions in a timely manner.

(7) The Information Security Oversight Office shall include in its reports to the President a summary of the Panel's activities.

(b) Functions. The Panel shall:

(1) decide on appeals by persons who have filed classification challenges under section 1.8 of this order;

(2) approve, deny, or amend agency exemptions from automatic declassification as provided in section 3.3 of this order;

(3) decide on appeals by persons or entities who have filed requests for mandatory declassification review under section 3.5 of this order; and

(4) appropriately inform senior agency officials and the public of final Panel decisions on appeals under sections 1.8 and 3.5 of this order.

(c) Rules and procedures. The Panel shall issue bylaws, which shall be published in the *Federal Register*. The bylaws shall establish the rules and procedures that the Panel will follow in accepting, considering, and issuing decisions on appeals. The rules and procedures of the Panel shall provide that the Panel will consider appeals only on actions in which:

(1) the appellant has exhausted his or her administrative remedies within the responsible agency;

(2) there is no current action pending on the issue within the Federal courts; and

(3) the information has not been the subject of review by the Federal courts or the Panel within the past 2 years.

(d) Agency heads shall cooperate fully with the Panel so that it can fulfill its functions in a timely and fully informed manner. The Panel shall report to the President through the National Security Advisor any instance in which it believes that an agency head is not cooperating fully with the Panel.

(e) The Panel is established for the sole purpose of advising and assisting the President in the discharge of his constitutional and discretionary authority to protect the national security of the United States. Panel decisions are committed to the discretion of the Panel, unless changed by the President.

(f) An agency head may appeal a decision of the Panel to the President through the National Security Advisor. The information shall remain classified pending a decision on the appeal.

Sec. 5.4. *General Responsibilities.* Heads of agencies that originate or handle classified information shall:

(a) demonstrate personal commitment and commit senior management to the successful implementation of the program established under this order;

(b) commit necessary resources to the effective implementation of the program established under this order;

(c) ensure that agency records systems are designed and maintained to optimize the appropriate sharing and safeguarding of classified information, and to facilitate its declassification under the terms of this order when it no longer meets the standards for continued classification; and

(d) designate a senior agency official to direct and administer the program, whose responsibilities shall include:

(1) overseeing the agency's program established under this order, provided an agency head may designate a separate official to oversee special access programs authorized under this order. This official shall provide a full accounting of the agency's special access programs at least annually;

(2) promulgating implementing regulations, which shall be published in the *Federal Register* to the extent that they affect members of the public;

(3) establishing and maintaining security education and training programs;

(4) establishing and maintaining an ongoing self-inspection program, which shall include the regular reviews of representative samples of the agency's

original and derivative classification actions, and shall authorize appropriate agency officials to correct misclassification actions not covered by sections 1.7(c) and 1.7(d) of this order; and reporting annually to the Director of the Information Security Oversight Office on the agency's self-inspection program;

(5) establishing procedures consistent with directives issued pursuant to this order to prevent unnecessary access to classified information, including procedures that:

(A) require that a need for access to classified information be established before initiating administrative clearance procedures; and

(B) ensure that the number of persons granted access to classified information meets the mission needs of the agency while also satisfying operational and security requirements and needs;

(6) developing special contingency plans for the safeguarding of classified information used in or near hostile or potentially hostile areas;

(7) ensuring that the performance contract or other system used to rate civilian or military personnel performance includes the designation and management of classified information as a critical element or item to be evaluated in the rating of:

(A) original classification authorities;

(B) security managers or security specialists; and

(C) all other personnel whose duties significantly involve the creation or handling of classified information, including personnel who regularly apply derivative classification markings;

(8) accounting for the costs associated with the implementation of this order, which shall be reported to the Director of the Information Security Oversight Office for publication;

(9) assigning in a prompt manner agency personnel to respond to any request, appeal, challenge, complaint, or suggestion arising out of this order that pertains to classified information that originated in a component of the agency that no longer exists and for which there is no clear successor in function; and

(10) establishing a secure capability to receive information, allegations, or complaints regarding over-classification or incorrect classification within the agency and to provide guidance to personnel on proper classification as needed.

Sec. 5.5. *Sanctions.* (a) If the Director of the Information Security Oversight Office finds that a violation of this order or its implementing directives has occurred, the Director shall make a report to the head of the agency or to the senior agency official so that corrective steps, if appropriate, may be taken.

(b) Officers and employees of the United States Government, and its contractors, licensees, certificate holders, and grantees shall be subject to appropriate sanctions if they knowingly, willfully, or negligently:

(1) disclose to unauthorized persons information properly classified under this order or predecessor orders;

(2) classify or continue the classification of information in violation of this order or any implementing directive;

(3) create or continue a special access program contrary to the requirements of this order; or

(4) contravene any other provision of this order or its implementing directives.

(c) Sanctions may include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation.

(d) The agency head, senior agency official, or other supervisory official shall, at a minimum, promptly remove the classification authority of any individual who demonstrates reckless disregard or a pattern of error in applying the classification standards of this order.

(e) The agency head or senior agency official shall:

(1) take appropriate and prompt corrective action when a violation or infraction under paragraph (b) of this section occurs; and

(2) notify the Director of the Information Security Oversight Office when a violation under paragraph (b)(1), (2), or (3) of this section occurs.

PART 6—GENERAL PROVISIONS

Sec. 6.1. *Definitions.* For purposes of this order:

(a) ''Access'' means the ability or opportunity to gain knowledge of classified information.

(b) ''Agency'' means any ''Executive agency,'' as defined in 5 U.S.C. 105; any ''Military department'' as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into the possession of classified information.

(c) ''Authorized holder'' of classified information means anyone who satisfies the conditions for access stated in section 4.1(a) of this order.

(d) ''Automated information system'' means an assembly of computer hardware, software, or firmware configured to collect, create, communicate, compute, disseminate, process, store, or control data or information.

(e) ''Automatic declassification'' means the declassification of information based solely upon:

(1) the occurrence of a specific date or event as determined by the original classification authority; or

(2) the expiration of a maximum time frame for duration of classification established under this order.

(f) ''Classification'' means the act or process by which information is determined to be classified information.

(g) ''Classification guidance'' means any instruction or source that prescribes the classification of specific information.

(h) ''Classification guide'' means a documentary form of classification guidance issued by an original classification authority that identifies the elements of information regarding a specific subject that must be classified and establishes the level and duration of classification for each such element.

(i) ''Classified national security information'' or ''classified information'' means information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

(j) ''Compilation'' means an aggregation of preexisting unclassified items of information.

(k) ''Confidential source'' means any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation that the information or relationship, or both, are to be held in confidence.

(l) ''Damage to the national security'' means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information.

(m) ''Declassification'' means the authorized change in the status of information from classified information to unclassified information.

(n) ''Declassification guide'' means written instructions issued by a declassification authority that describes the elements of information regarding

a specific subject that may be declassified and the elements that must remain classified.

(o) ''Derivative classification'' means the incorporating, paraphrasing, restating, or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information. Derivative classification includes the classification of information based on classification guidance. The duplication or reproduction of existing classified information is not derivative classification.

(p) ''Document'' means any recorded information, regardless of the nature of the medium or the method or circumstances of recording.

(q) ''Downgrading'' means a determination by a declassification authority that information classified and safeguarded at a specified level shall be classified and safeguarded at a lower level.

(r) ''File series'' means file units or documents arranged according to a filing system or kept together because they relate to a particular subject or function, result from the same activity, document a specific kind of transaction, take a particular physical form, or have some other relationship arising out of their creation, receipt, or use, such as restrictions on access or use.

(s) ''Foreign government information'' means:

(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) information produced by the United States Government pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence; or

(3) information received and treated as ''foreign government information'' under the terms of a predecessor order.

(t) ''Information'' means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, is produced by or for, or is under the control of the United States Government.

(u) ''Infraction'' means any knowing, willful, or negligent action contrary to the requirements of this order or its implementing directives that does not constitute a ''violation,'' as defined below.

(v) ''Integral file block'' means a distinct component of a file series, as defined in this section, that should be maintained as a separate unit in order to ensure the integrity of the records. An integral file block may consist of a set of records covering either a specific topic or a range of time, such as a Presidential administration or a 5-year retirement schedule within a specific file series that is retired from active use as a group. For purposes of automatic declassification, integral file blocks shall contain only records dated within 10 years of the oldest record in the file block.

(w) ''Integrity'' means the state that exists when information is unchanged from its source and has not been accidentally or intentionally modified, altered, or destroyed.

(x) ''Intelligence'' includes foreign intelligence and counterintelligence as defined by Executive Order 12333 of December 4, 1981, as amended, or by a successor order.

(y) ''Intelligence activities'' means all activities that elements of the Intelligence Community are authorized to conduct pursuant to law or Executive Order 12333, as amended, or a successor order.

(z) ''Intelligence Community'' means an element or agency of the U.S. Government identified in or designated pursuant to section 3(4) of the National Security Act of 1947, as amended, or section 3.5(h) of Executive Order 12333, as amended.

(aa) ''Mandatory declassification review'' means the review for declassification of classified information in response to a request for declassification that meets the requirements under section 3.5 of this order.

(bb) ''Multiple sources'' means two or more source documents, classification guides, or a combination of both.

(cc) ''National security'' means the national defense or foreign relations of the United States.

(dd) ''Need-to-know'' means a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

(ee) ''Network'' means a system of two or more computers that can exchange data or information.

(ff) ''Original classification'' means an initial determination that information requires, in the interest of the national security, protection against unauthorized disclosure.

(gg) ''Original classification authority'' means an individual authorized in writing, either by the President, the Vice President, or by agency heads or other officials designated by the President, to classify information in the first instance.

(hh) ''Records'' means the records of an agency and Presidential papers or Presidential records, as those terms are defined in title 44, United States Code, including those created or maintained by a government contractor, licensee, certificate holder, or grantee that are subject to the sponsoring agency's control under the terms of the contract, license, certificate, or grant.

(ii) ''Records having permanent historical value'' means Presidential papers or Presidential records and the records of an agency that the Archivist has determined should be maintained permanently in accordance with title 44, United States Code.

(jj) ''Records management'' means the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations.

(kk) ''Safeguarding'' means measures and controls that are prescribed to protect classified information.

(ll) ''Self-inspection'' means the internal review and evaluation of individual agency activities and the agency as a whole with respect to the implementation of the program established under this order and its implementing directives.

(mm) ''Senior agency official'' means the official designated by the agency head under section 5.4(d) of this order to direct and administer the agency's program under which information is classified, safeguarded, and declassified.

(nn) ''Source document'' means an existing document that contains classified information that is incorporated, paraphrased, restated, or generated in new form into a new document.

(oo) ''Special access program'' means a program established for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

(pp) ''Systematic declassification review'' means the review for declassification of classified information contained in records that have been determined by the Archivist to have permanent historical value in accordance with title 44, United States Code.

(qq) ''Telecommunications'' means the preparation, transmission, or communication of information by electronic means.

(rr) ''Unauthorized disclosure'' means a communication or physical transfer of classified information to an unauthorized recipient.

(ss) ''U.S. entity'' includes:

(1) State, local, or tribal governments;

(2) State, local, and tribal law enforcement and firefighting entities;

(3) public health and medical entities;

(4) regional, state, local, and tribal emergency management entities, including State Adjutants General and other appropriate public safety entities; or

(5) private sector entities serving as part of the nation's Critical Infrastructure/Key Resources.

(tt) ''Violation'' means:

(1) any knowing, willful, or negligent action that could reasonably be expected to result in an unauthorized disclosure of classified information;

(2) any knowing, willful, or negligent action to classify or continue the classification of information contrary to the requirements of this order or its implementing directives; or

(3) any knowing, willful, or negligent action to create or continue a special access program contrary to the requirements of this order.

(uu) ''Weapons of mass destruction'' means any weapon of mass destruction as defined in 50 U.S.C. 1801(p).

Sec. 6.2. *General Provisions.* (a) Nothing in this order shall supersede any requirement made by or under the Atomic Energy Act of 1954, as amended, or the National Security Act of 1947, as amended. ''Restricted Data'' and ''Formerly Restricted Data'' shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and regulations issued under that Act.

(b) The Director of National Intelligence may, with respect to the Intelligence Community and after consultation with the heads of affected departments and agencies, issue such policy directives and guidelines as the Director of National Intelligence deems necessary to implement this order with respect to the classification and declassification of all intelligence and intelligence-related information, and for access to and dissemination of all intelligence and intelligence-related information, both in its final form and in the form when initially gathered. Procedures or other guidance issued by Intelligence Community element heads shall be in accordance with such policy directives or guidelines issued by the Director of National Intelligence. Any such policy directives or guidelines issued by the Director of National Intelligence shall be in accordance with directives issued by the Director of the Information Security Oversight Office under section 5.1(a) of this order.

(c) The Attorney General, upon request by the head of an agency or the Director of the Information Security Oversight Office, shall render an interpretation of this order with respect to any question arising in the course of its administration.

(d) Nothing in this order limits the protection afforded any information by other provisions of law, including the Constitution, Freedom of Information Act exemptions, the Privacy Act of 1974, and the National Security Act of 1947, as amended. This order is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law

by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. The foregoing is in addition to the specific provisos set forth in sections 1.1(b), 3.1(c) and 5.3(e) of this order.

(e) Nothing in this order shall be construed to obligate action or otherwise affect functions by the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(f) This order shall be implemented subject to the availability of appropriations.

(g) Executive Order 12958 of April 17, 1995, and amendments thereto, including Executive Order 13292 of March 25, 2003, are hereby revoked as of the effective date of this order.

Sec. 6.3. *Effective Date.* This order is effective 180 days from the date of this order, except for sections 1.7, 3.3, and 3.7, which are effective immediately.

Sec. 6.4. *Publication.* The Archivist of the United States shall publish this Executive Order in the *Federal Register*.

THE WHITE HOUSE,
December 29, 2010.

[FR Doc. E9–31418
Filed 1–4–10; 11:15 am]
Billing code 7515–01–P

EXHIBIT D

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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245 Murray Lane LW
STOP-0655
Washington, D.C. 20528-0655

June 6, 2017

Via FOIAOnline

RE: FREEDOM OF INFORMATION ACT APPEAL, FOIA Request No. CBP-2017-049451

Dear FOIA Appeals Officer,

This letter constitutes an administrative appeal under the federal Freedom of Information Act ("FOIA" or the "Act"), 5 U.S.C. § 552, and is submitted on behalf of the Reporters Committee for Freedom of the Press (the "Reporters Committee") to the Privacy Office of the United States Department of Homeland Security ("DHS") regarding the failure of Custom & Border Protection ("CBP"), a division of DHS, to respond to the Reporters Committee's FOIA request.

I. Factual and Procedural History

On April 17, 2017, Jennifer A. Nelson submitted a FOIA request on behalf of the Reporters Committee to DHS via FOIAOnline (hereinafter, the "Request"). A true and correct copy of the Request and e-mail confirming receipt of the Request is attached hereto, collectively, as Exhibit A.

The Request sought certain categories of records regarding demands from CBP and/or DHS that Twitter, Inc. ("Twitter") release information to identify the

one or more persons using the Twitter account @ALT_uscis. Specifically, the Request sought the following:

1) All records, including but not limited to opinions, memoranda, directives, guidelines, checklists, or criteria, from January 1, 2017, that mention one or more of the following terms:

    a. @ALT_uscis;
    b. @ALT_USCIS
    c. "ALT Immigration"; or
    d. "ALT_uscis";

2) All e-mail communications to or from Special Agent Adam Hoffman from January 1, 2017, including communications on which Mr. Hoffman was carbon copied ("CC'd") or blind carbon copied ("BCC'd"), that mention one or more of the following terms:

    a. @ALT_uscis;
    b. @ALT_USCIS;
    c. "ALT Immigration"; or
    d. "ALT_uscis"; or
    e. "Twitter account"

3) All e-mail communications to or from Special Agent in Charge Stephen P. Caruso from January 1, 2017, including communications on which Mr. Caruso was CC'd or BCC'd, that mention one or more of the following terms:

    a. @ALT_uscis;
    b. @ALT_USCIS;
    c. "ALT Immigration";
    d. "ALT_uscis"; or
    e. "Twitter account"

4) All records, including but not limited to opinions, memoranda, directives, guidelines, checklists, or criteria, discussing applicable authority (including but not limited to 19 U.S.C. § 1509), from January 1, 2016, used by CBP to compel the production of records to unmask the identity of persons using databases, social media programs, and other software.

5) All records, including but not limited to opinions, memoranda, directives, guidelines, checklists, or criteria, from January 1, 2016, discussing applicable authority for a recipient of a summons notice issued by CBP pursuant to 19 U.S.C. § 1509 to object to compliance with such summons.

Ex. A at 4-5. The Request included a request for a fee benefit as a representative of the news media, as well as a request for a fee waiver. Ex. A at 5.

Ms. Nelson received a confirmation e-mail containing the content of the Request on April 17, 2017. Ex. A at 1. The confirmation e-mail assigned the Request tracking number CBP-2017-049451. *Id.*

Ms. Nelson has received two automated e-mail communications from CBPFOIA@cbp.dhs.gov since submitting the Request. True and correct copies of these e-mail communications are attached, collectively, as Exhibit B. On April 18, 2017, Ms. Nelson received an e-mail indicating that the Request tracking number was changed from CBP-2017-04951 to CBP-OIT-2017-049451. Ex. B at 1. The e-mail contained boilerplate stated that such an action "is normally due to the request being transferred to another agency (for example, EPA to Dept. of Commerce) or to a sub-agency to process it." *Id.* On April 27, 2017, Ms. Nelson received a second e-mail communication which indicated that the Request tracking number had been changed *back* to CBP-2017-049451 from CBP-OIT-2017-049451. Ex. B at 2. The second e-mail communication contained the same language as the first e-mail communication, and provided no further explanation for the tracking number change. Ex. B at 2.

As of the date of this appeal, 50 days after Ms. Nelson submitted the Request on behalf of the Reporters Committee, no further communication from DHS and/or CBP has been received, no determination has been made with respect to the Request, and no responsive records have been produced.

II. Argument

Under FOIA, an agency is required to make a "determination" with regard to a request within twenty business days of its receipt. 5 U.S.C. § 552(a)(6)(A)(i). To satisfy this

requirement, the agency "must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the 'determination' is adverse." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013) ("*CREW*"). FOIA allows an agency to extend the date by which it may make a determination by no more than "ten working days" in "unusual circumstances," 5 U.S.C. § 552(a)(6)(B)(i), including "the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein," *id.* § 552(a)(6)(B)(iii)(III).

In this case, DHS and/or its division, CBP, has failed to make a "determination" concerning the Reporters Committee's Request within twenty business days, or even thirty business days, assuming *arguendo* that the requests involve "unusual circumstances" as defined by FOIA. CBP confirmed, by email, receipt of the Request on April 17, 2017. Accordingly, the agency received the Request fifty days ago, and has clearly violated FOIA's statutory deadline. *See* 5 U.S.C. § 552(a)(6)(A)(i); *id.* § 552(a)(6)(B)(i); *id.* § 552(a)(6)(B)(iii)(III). Further, the agency has not provided an estimated date of completion for the Request, despite its legal obligation to do so. 5 U.S.C. § 552(a)(7)(B).

DHS and/or CBP have not communicated the scope of the documents it intends to produce and withhold, communicated any reasons for the withholding of any documents, or produced *any* documents in response to the Request. Accordingly, the agency is in violation of its statutory duties under FOIA. *See* 5 U.S.C. § 552(a)(6)(A)(i); *id.* § 552(a)(6)(B)(i); *id.* § 552(a)(6)(B)(iii)(III); *CREW*, 711 F.3d at 188.

In addition, as a representative of the news media, Reporters Committee reiterates its request for a fee benefit for the Request which would require it to pay only for the direct cost of duplication after the first 100 pages of responsive records. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Reporters Committee also reiterates its request for a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) because disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." *Id.*; *see also* 6 C.F.R. § 5.11 (k)(i)-(ii). Release of the information sought is in the public interest because it will shed light on CBP's operations and procedures vis-à-vis unmasking anonymous social media users and, in particular, CBP's effort to unmask the anonymous user(s) behind the @ALT_uscis Twitter account, an incident that prompted Twitter to file a complaint against the agency.

III. Conclusion

By failing to provide a determination with respect to Reporters Committee's Request within the statutory deadline, DHS is in violation of its obligations under FOIA. The Reporters Committee respectfully requests that you direct the agency to make a determination with respect to the Request as soon as possible, but in any case no more than twenty business days from the date this administrative appeal is acted upon.

If you have any questions regarding this appeal, please do not hesitate to call me at (202) 795-9312 or email me at jnelson@rcfp.org. I look forward to your determination with respect to this appeal within twenty business days. 5 U.S.C. § 552(a)(6)(A)(ii).

Sincerely,

Jennifer A. Nelson
Stanton Foundation Media Litigation Fellow
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Enclosure(s)

cc: Katie Townsend
Litigation Director

Adam A. Marshall
Knight Foundation Litigation Attorney

THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

EXHIBIT A

Tuesday, June 6, 2017 at 5:51:38 PM Eastern Daylight Time

Subject: FOIA Request CBP-2017-049451 Submitted
Date: Monday, April 17, 2017 at 2:47:37 PM Eastern Daylight Time
From: CBPFOIA@cbp.dhs.gov
To: jnelson@rcfp.org

This message is to confirm your request submission to the FOIAonline application: View Request. Request information is as follows:

- Tracking Number: CBP-2017-049451
- Requester Name: Jennifer A. Nelson
- Date Submitted: 04/17/2017
- Request Status: Submitted
- Description: 1) All records, including but not limited to opinions, memoranda, directives, guidelines, checklists, or criteria, from January 1, 2017, that mention one or more of the following terms: a. @ALT_uscis; b. @ALT_USCIS c. "ALT Immigration"; or d. "ALT_uscis"; 2) All e-mail communications to or from Special Agent Adam Hoffman from January 1, 2017, including communications on which Mr. Hoffman was carbon copied ("CC'd") or blind carbon copied ("BCC'd"), that mention one or more of the following terms: a. @ALT_uscis; b. @ALT_USCIS; c. "ALT Immigration"; or d. "ALT_uscis"; or e. "Twitter account" 3) All e-mail communications to or from Special Agent in Charge Stephen P. Caruso from January 1, 2017, including communications on which Mr. Caruso was CC'd or BCC'd, that mention one or more of the following terms: a. @ALT_uscis; b. @ALT_USCIS; c. "ALT Immigration"; d. "ALT_uscis"; or e. "Twitter account" 4) All records, including but not limited to opinions, memoranda, directives, guidelines, checklists, or criteria, discussing applicable authority (including but not limited to 19 U.S.C. § 1509), from January 1, 2016, used by CBP to compel the production of records to unmask the identity of persons using databases, social media programs, and other software. 5) All records, including but not limited to opinions, memoranda, directives, guidelines, checklists, or criteria, from January 1, 2016, discussing applicable authority for a recipient of a summons notice issued by CBP pursuant to 19 U.S.C. § 1509 to object to compliance with such summons.

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Jonathan Cantor
Acting Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, D.C. 20528-0655

April 17, 2017

Via FOIAonline

Re: FREEDOM OF INFORMATION ACT REQUEST
Fee benefit and fee waiver requested

Dear Mr. Cantor,

The Reporters Committee for Freedom of the Press ("RCFP" or "Reporters Committee") submits this expedited request pursuant to the Freedom of Information Act ("FOIA" or the "Act"), 5 U.S.C. § 552 and agency regulations[1] for records from Customs and Border Protection ("CBP"), a division of the Department of Homeland Security ("DHS"). RCFP seeks information regarding demands from CBP and/or DHS that Twitter, Inc. ("Twitter") release information to identify the one or more persons using the Twitter account @ALT_uscis.

Since the inauguration of President Donald J. Trump, a number of so-called "alternative agency" accounts have arisen on Twitter's online platform.[2] These accounts, controlled by speakers who purport to be current or former employees of federal agencies or other individuals familiar with the agencies, provide commentary in opposition to the official actions and policies of the Trump Administration.[3] These accounts have challenged views of the Administration and its policies and, since their origin, have

[1] 6 C.F.R. § 5 is the regulation pertaining to the processing of the agency's records.

[2] Kayla Epstein and Darryl Fears, *Rogue Twitter accounts spring up to fight Donald Trump on climate change*, THE WASHINGTON POST, Jan. 25, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/01/25/rogue-pro-science-protest-sites-are-sticking-up-for-federal-research/.

[3] *Id.*

amassed audiences of Twitter users ("followers") numbering in the tens of thousands or more.[4]

Like many social media platforms, Twitter allows users to choose whether to identify themselves publicly; users who wish to remain anonymous select a user name using a pseudonym that does not disclose the speaker's true identity. Pseudonymity of the speaker(s) is a hallmark of these "alternative agency" accounts; these users are motivated to preserve their anonymity to ensure that they may speak freely without fear of the negative consequences that could follow if identified as the source of critical commentary concerning the Administration and/or specific agencies.[5] Such motivation is likely to be especially significant for users who are currently employed by the very agency targeted by the "alternative" commentary, as these users could face retaliation, harassment, and even the loss of their employment if their identities are revealed.[6]

One of these "alternative agency" accounts, @ALT_uscis, has amassed more than 194,000 followers and drafted more than 9,000 tweets since its creation in January 2017.[7] The commentary published by @ALT_uscis has criticized immigration policies with which the user(s) disagree, including President Trump's immigration Executive Order and his proposal to build a wall along the U.S.-Mexico border.[8] In addition, the @ALT_uscis account has highlighted what the user(s) view as a history of mismanagement at the agency, and has regularly leveled criticism at CBP's practices.[9]

On March 17, 2017, an agent within CBP transmitted to Twitter by fax a summons ("CBP Summons," attached as Exhibit A) ordering it to produce certain records pertaining to the @ALT_uscis account, including "[u]ser names, account login, phone numbers, mailing addresses, and I.P. addresses."[10] The CBP Summons invoked as authority 19 U.S.C. § 1509, an administrative provision of the Tariff Act of 1930 which authorizes the agency to compel production of a narrow class of records related to the importation of merchandise.[11]

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[4] *See, e.g.* @RogueNASA, TWITTER (Apr. 13, 2017, 2:37 PM), https://twitter.com/roguenasa (903K followers as of Apr. 13, 2017); @AltNatParkSer, TWITTER (Apr. 13, 2017, 2:38 PM), https://twitter.com/altnatparkser (89K followers as of Apr. 13, 2017); @Alt_NIH, TWITTER (Apr. 13, 2017, 2:40 PM), https://twitter.com/alt_nih (224K followers as of Apr. 13, 2017).

[5] Alleen Brown, *Rogue Twitter Accounts Fight To Preserve The Voice Of Government Science*, THE INTERCEPT, Mar. 11, 2017, https://theintercept.com/2017/03/11/rogue-twitter-accounts-fight-to-preserve-the-voice-of-government-science/ (noting that several "alternative agency" accounts are administered by current agency employees who wish to preserve their anonymity "out of fear of workplace retaliation and pressure to shut down their accounts").

[6] *Id.*

[7] *See* @ALT_uscis, TWITTER (Apr. 13, 2017, 3:10 PM), https://twitter.com/alt_uscis (194K followers as of Apr. 13, 2017).

[8] *Id.*

[9] *See id.* (Feb. 3, 2017 tweet alleging that CBP agents were "walking public area of [airport] terminals approaching brown people mentioning they look like a suspect").

[10] *See* Exhibit A at 3.

[11] *See* 19 U.S.C. § 1509.

Twitter filed suit against CBP and DHS on April 6, 2017, arguing that the First Amendment barred the CBP Summons.[12] The next day, CBP withdrew its summons, and Twitter voluntarily dismissed its claims without prejudice.[13]

I. Requested Records

Pursuant to the FOIA, I, on behalf of RCFP, request copies of the following:

1) All records, including but not limited to opinions, memoranda, directives, guidelines, checklists, or criteria, from January 1, 2017, that mention one or more of the following terms:

    a. @ALT_uscis;
    b. @ALT_USCIS
    c. "ALT Immigration"; or
    d. "ALT_uscis";

2) All e-mail communications to or from Special Agent Adam Hoffman from January 1, 2017, including communications on which Mr. Hoffman was carbon copied ("CC'd") or blind carbon copied ("BCC'd"), that mention one or more of the following terms:

    a. @ALT_uscis;
    b. @ALT_USCIS;
    c. "ALT Immigration"; or
    d. "ALT_uscis"; or
    e. "Twitter account"

3) All e-mail communications to or from Special Agent in Charge Stephen P. Caruso from January 1, 2017, including communications on which Mr. Caruso was CC'd or BCC'd, that mention one or more of the following terms:

    a. @ALT_uscis;
    b. @ALT_USCIS;
    c. "ALT Immigration";
    d. "ALT_uscis"; or
    e. "Twitter account"

4) All records, including but not limited to opinions, memoranda, directives, guidelines, checklists, or criteria, discussing applicable authority (including but not limited to 19 U.S.C. § 1509), from January 1, 2016, used by CBP to

[12] Complaint, *Twitter, Inc. v. U.S. Dep't of Homeland Security, et al.*, No. 3:17-cv-01916 (N.D. Cal. Apr. 6, 2017).
[13] Mike Isaac, *U.S. Blinks in Clash With Twitter; Drops Order to Unmask Anti-Trump Account*, N.Y. TIMES, Apr. 7, 2017, https://www.nytimes.com/2017/04/07/technology/us-blinks-in-clash-with-twitter-drops-order-to-unmask-anti-trump-account.html.

compel the production of records to unmask the identity of persons using databases, social media programs, and other software.

5) All records, including but not limited to opinions, memoranda, directives, guidelines, checklists, or criteria, from January 1, 2016, discussing applicable authority for a recipient of a summons notice issued by CBP pursuant to 19 U.S.C. § 1509 to object to compliance with such summons.

I would like to receive the information in electronic form, preferably PDFs. If possible, please also provide PDFs that have been subjected to optical character recognition ("OCR") or are otherwise electronically searchable, in order to facilitate public access to the content of the information.

II. Fee Benefit and Fee Waiver Requested

As a representative of the news media, RCFP requests a fee benefit which would require it to pay only for the direct cost of duplication after the first 100 pages of responsive records. 5 U.S.C. § 552(a)(4)(A)(ii)(II). In the event that records responsive to this request exceed 100 pages, I am willing to pay up to $50.00 in duplication fees. Please inform me if fees will exceed that amount before proceeding.

RCFP also seeks a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) because disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." *Id.*; *see also* 6 C.F.R. § 5.11 (k)(i)-(ii) (stating fees will be waived where disclosure is in the public interest and not primarily in the commercial interest of the requester).

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii), disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government" within the meaning of the statute because the Reporters Committee is a nonprofit association of news reporters and editors that publishes information to educate the public about the state of the press. In addition to regularly obtaining information about government activities that touch and concern members of the press and the First Amendment, RCFP also engages in analyzing and publishing that information.[14] For instance, RCFP routinely posts articles on its website[15] and on its social media accounts,[16] emails out newsletters, and publishes a quarterly magazine, *The News Media*

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[14] *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" is "primarily engaged in disseminating information") (citation omitted).

[15] REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, https://www.rcfp.org/ (last visited Apr. 13, 2017).

[16] *See* @rcfp, TWITTER (Apr. 13, 2017, 12:14 PM), https://twitter.com/rcfp (7,712 followers as of Apr. 13, 2017); The Reporters Committee for Freedom of the Press, FACEBOOK (Apr. 13, 2017), https://www.facebook.com/ReportersCommittee/ (6,393 "likes" as of Apr. 13, 2017).

& The Law.[17] RCFP intends to analyze and disseminate information obtained through this Request to the general public via these publications.

Further, the records sought are "likely to contribute significantly to public understanding" of the "operations or activities of the government" because they will shed light on CBP's operations and procedures vis-à-vis unmasking anonymous social media users and, in particular, CBP's effort to unmask the anonymous user(s) behind the @ALT_uscis Twitter account, an incident that prompted Twitter to file a complaint against the agency.

Additionally, the records requested are not sought for commercial use. RCFP is a nonprofit public interest organization. *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'") (citation omitted). This information is being sought on behalf of the Reporters Committee for free dissemination to the general public through its multiple publishing avenues.[18]

III. Conclusion

If this request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I expect you to release all segregable portions of otherwise exempt material.

If you have any questions regarding this request, please do not hesitate to email at jnelson@rcfp.org.

I look forward to your determination regarding my request for expedited processing within twenty (20) calendar days.

Thank you in advance for your assistance in this matter.

Sincerely,

Jennifer A. Nelson
Stanton Foundation Litigation Fellow
Reporters Committee for Freedom of the Press

cc: Katie Townsend
Litigation Director
Reporters Committee for Freedom of the Press

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[17] The News Media and The Law Archive, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/magazine-archive (last visited Apr. 13, 2017).
[18] *See supra* nn. 20-22.

Barbara W. Wall
Vice President
Associate General Counsel

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February 10, 2009

VIA FIRST-CLASS MAIL

Manager, Disclosure Services and Administrative Operations
Communications Division
Mail Stop 3-2
Office of the Comptroller of the Currency
Washington, DC 20219

Re: Freedom of Information Act request denial

To Whom It May Concern:

I represent USA TODAY, and I write to appeal your Jan. 16, 2009 partial denial of reporter Kathy Chu's Nov. 13, 2008 Freedom of Information Act request. USA TODAY appeals both the redaction of identifying information from written correspondence and the withholding of documents related to the retail sweep program.

Releasing the information is both appropriate and expedient, given President Obama's unmistakable instruction that government err on the side of openness. As you know, the President has directed that the FOIA "be administered with a clear presumption: In the face of doubt, openness prevails." Memorandum on the Freedom of Information Act, 74 Fed. Reg. 15, 4683 (Jan. 26, 2009). This instruction is unambiguous: "All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." *Id.* Your partial denial was contrary to the spirit of open government described in the President's directive. You cited numerous FOIA exemptions as sufficient reason for withholding information, yet you failed to provide *any* analysis as to why these exemptions apply.

In redacting the banks' identifying information from the written correspondence and withholding unspecified documents, you cited three FOIA exemptions: 5 U.S.C. 552(b)(4), which pertains to trade secrets or commercial financial information, furnished in confidence, that relates to the business, personal, or financial affairs of any person; 5 U.S.C. 552(b)(5), which relates to an intra-agency or interagency memorandum or letter not routinely available by law to a private party in litigation; and 5 U.S.C. 552(b)(8), which relates to examination, operating, or condition reports prepared by agencies that regulate financial institutions. Your letter utterly fails to demonstrate how any of these three exemptions require the redaction of bank names.

The letters that your office provided, with the identifying information redacted, do not contain trade secrets or commercial financial information provided by a person that would be covered under 552(b)(4). The letters involve routine information about government regulation. They do

7950 Jones Branch • McLean, VA 22107 • 703-854-6951 • FAX: 703-854-2031
bwall@gannett.com

not contain financial information provided by the banks. *See Philadelphia Newspapers, Inc. v. Dep't of Health & Human Servs.,* 69 F. Supp. 2d 63, 67 (audit documents created by HHS not financial information "obtained from a person"); *Maydak v. Dep't of Justice.*, 254 F. Supp. 2d 23, 49 (D.D.C. 2003) (agency staff member's meeting notes do not fall within exemption because that exemption does not apply to information generated by government that is not "obtained from a person"). The documents requested by USA TODAY are related to government supervision and regulation, not confidential, commercial information. Your agency has failed to demonstrate how supervision of a government program in any way involves the sort of trade secrets covered by this exemption.

You also did not explain how 552(b)(5)'s exemption for inter-agency memorandums or inter-agency memorandums applies to this information. This correspondence is between the Comptroller's office and individual financial institutions. Nothing in the plain language of the statute indicates that this exemption applies to communications between an agency and an outside party. *See Federal Open Mkt. Comm v. Merrill*, 443 U.S. 340, 352 (1979) ("Exemption 5 was intended to allow an agency to withhold *intra-agency memoranda* which would not routinely be disclosed to a private party through the discovery process in litigation with the agency) (emphasis added, citation and internal quotation marks omitted).

Nor is redaction required by 552(b)(8). The narrow exemption applies only to information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." *See, e.g., Gregory v. FDIC*, 631 F.2d 896 (D.C. Cir. 1980) (FDIC bank examiner report covered by Exemption 8). The letters in this FOIA request do not involve routine bank examination, regulation, or inspections, for which this exemption is intended. They involve government retail sweep programs.

You have not provided a single reason as to why any of this very basic information should be redacted and withheld under the three FOIA exemptions. Because you are unable to do so, you should immediately provide the documents that you withheld and copies of the letters without redaction.

Further, even if your agency is unwilling to reconsider its position, I ask that you provide an index of those records deemed exempt. Your agency denied access to responsive records without providing so much as a general characterization of what those records are. I therefore request that you provide a written index of the documents that the Comptroller has deemed exempt from disclosure, as required under *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Such an index must "describe each document or portion thereof withheld." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

I look forward to your prompt reply.

Sincerely,

Barbara W. Wall

Cc: Kathy Chu
Jeff Kosseff

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**Pro Hac Vice Forthcoming*

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
MISSOULA DIVISION

AMERICAN CIVIL LIBERTIES UNION 125 Broad Street—18th Floor New York, NY 10004, AMERICAN CIVIL LIBERTIES UNION FOUNDATION 125 Broad Street—18th Floor New York, NY 10004, AMERICAN CIVIL LIBERTIES UNION OF MONTANA FOUNDATION, Inc. P.O. Box 9138 Missoula, MT 59807, *Plaintiffs*, v. DEPARTMENT OF DEFENSE 1400 Defense Pentagon Washington, DC 20301, DEPARTMENT OF HOMELAND SECURITY Washington, DC 20528 DEPARTMENT OF THE INTERIOR 1849 C Street, N.W. Washington, DC 20240 DEPARTMENT OF JUSTICE 950 Pennsylvania Avenue, N.W. Washington, DC 20530, *Defendants*.	Civil Action No. __ **COMPLAINT FOR INJUNCTIVE RELIEF**

Introduction

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for injunctive and other appropriate relief. Plaintiffs American Civil Liberties Union, the American Civil Liberties Union Foundation (together, the "ACLU"), and the ACLU of Montana Foundation, Inc. ("ACLU-MT") seek the immediate release of records pertaining to cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for anticipated protests against the Keystone XL Pipeline.

2. In March 2017, President Donald Trump announced that he had formally approved construction of the Keystone XL Pipeline, a decision which generated intense public controversy and debate. The approval triggered calls for protest of the oil pipeline, similar to Standing Rock protests against the Dakota Access Pipeline in 2016. The Dakota Access Pipeline protests were met with a sustained response from law enforcement to shut down protest encampments, surveil protest activity, and prosecute protestors. Of particular note, as documented by *The Intercept*, this law enforcement response involved collaboration between federal and state or local law enforcement entities, and between governmental entities and private security companies.

3. With a new wave of environmental and Indigenous protests expected in response to Keystone XL, similar law enforcement coordination is anticipated in response to these protests. For example, on April 11, 2017, the *Omaha World Herald* reported that Morton County, North Dakota Sheriff Kyle Kirchmeier, whose department was involved in responding to the Dakota Access Pipeline protests, has been in communication with other states over how to respond to oil pipeline protestors.

4. Plaintiffs have obtained, through Right-to-Know requests to state and local entities, documentation that demonstrates coordination and collaboration with federal agencies, including, but not limited to, the following:

a. In collaboration with the Montana Highway Patrol, the U.S. Department of Justice ("DOJ") presented a Social Networking and Cyber Awareness training in Circle, MT.

b. DOJ hosted an "anti-terrorism" training in Fort Harrison.

c. The Bureau of Land Management ("BLM") hosted a "Large Incident Planning Meeting" in Miles City, MT on June 12, 2018.

d. The Federal Emergency Management Agency ("FEMA") hosted "Field Force Operations" trainings in Sidney, MT and Glendive, MT.

e. The Department of Homeland Security ("DHS") and FEMA conducted a "Field Force Operations" training in Billings, MT on October 2–4, 2016.

f. DOJ conducted a "law enforcement sensitive briefing about…criminal activity and protest activity" in January 2018.

5. These highly coordinated law enforcement responses to environmental and Indigenous protests raise questions about the Defendants' level of collaboration with state and local governments and with private security companies in anticipation of Keystone XL protests. Governmental surveillance of protests, and undue scrutiny of political speech, is a matter of great public concern.

6. Despite this public concern, little is currently known about the level of collaboration between federal, state, local, and private entities in preparation for Keystone XL protests. Limited publicly available evidence, in the form of memoranda and email correspondence, suggests that federal agencies are already preparing for these protests. But this evidence is sparse, and Plaintiffs seek wider disclosure of information about law enforcement coordination and collaboration.

7. Plaintiffs believe that public agencies are involved in pre-emptive planning and coordination with private, local, and federal entities to assist in efforts to further suppress Indigenous rights and environmental justice activism.

8. Disclosure of the records Plaintiffs seek through this action would greatly benefit the public. It would contribute significantly to the public's understanding of how deeply the federal government is involved in supporting state law enforcement efforts in response to environmental and Indigenous protest; how extensively law enforcement entities delegate responsibilities to private security contractors; and how comprehensively law enforcement entities have surveilled activists in anticipation of protests.

Jurisdiction and Venue

9. This Court has both subject-matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

10. Venue is proper in this District under 5 U.S.C. § 552(a)(4)(B).

11. Venue is proper in this Division under Local Rule 3.2(b) and Mont. Code Ann. § 25–2–125, as Missoula County is where Plaintiff American Civil Liberties Union of Montana's primary office is located.

Parties

12. Plaintiff American Civil Liberties Union is a nationwide, non-profit, nonpartisan 26 U.S.C. § 501(c)(4) organization with more than 2 million members

dedicated to the constitutional principles of liberty and equality. The American Civil Liberties Union is committed to ensuring that the American government acts in compliance with the Constitution and the law. The American Civil Liberties Union is also committed to principles of transparency and accountability in government, and seeks to ensure that the American public is informed about the conduct of its government in matters that affect civil liberties. Obtaining information about governmental activity, analyzing that information, and widely publishing and disseminating it to the press and the public (in both its raw and analyzed forms) is a critical and substantial component of the American Civil Liberties Union's work and one of its primary activities.

13. Plaintiff American Civil Liberties Union Foundation is a separate § 501(c)(3) organization that educates the public about civil liberties and employs lawyers who provide legal representation free of charge in cases involving civil liberties.

14. Plaintiff ACLU of Montana Foundation, Inc. ("ACLU-MT") is a Montana non-profit corporation, established under the laws of the state of Montana with its primary office in Missoula, Montana. ACLU-MT is an organization that promotes and safeguards civil rights and civil liberties. As part of its mission, it is seeking public records from the Defendants that are relevant to its work, and will be disseminated to the general public.

15. Defendants Department of Defense ("DOD"), Department of Homeland Security ("DHS"), Department of the Interior ("DOI"), and Department of Justice ("DOJ") are departments of the executive branch of the U.S. government and are agencies within the meaning of 5 U.S.C. § 552(f)(1). The U.S. Army Corps of Engineers ("USACE") is a component of the Department of the Army ("Army") and a subcomponent of DOD. The Federal Emergency Management Agency ("FEMA"), the Office of Intelligence and Analysis ("I&A"), and the Transportation Security Administration ("TSA") are components of DHS. The Bureau of Land Management ("BLM") is a component of DOI. The Federal Bureau of Investigation ("FBI") and the Office of Legal Counsel ("OLC") are components of DOJ.

Facts

The Requested Records

16. On January 23, 2018, Plaintiffs submitted identical FOIA requests (the "Request") to the FBI, OLC, OSD/JS, DHS, USACE, and BLM. On March 8, 2018, Plaintiffs submitted the Request, modified to remove DOD-specific requests, to TSA. On April 2, 2018, upon notice from the FBI that the January 23 submission had been unsuccessful due to a defunct online portal for FBI FOIA requests, Plaintiffs submitted the Request, modified to remove DOD-specific requests, to the FBI.

17. With respect to all agencies listed above, the Request seeks "records created since January 27, 2017, concerning (1) Legal and policy analyses and recommendations related to law enforcement funding for and staffing around oil pipeline protests. Such recommendations may include, but are not limited to, declarations of a state of emergency by state and local entities in order to marshal additional funds, and requests by state or local entities for federal agencies to provide funding or personnel for counter-protest operations; (2) Travel of federal employees to speaking engagements, private and public meetings, panels, and conferences on the subject of preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; (3) Meeting agendas, pamphlets, and other distributed matter at speaking engagements, private and public meetings, panels, and conferences where federal employees are present to discuss preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and (4) Communications between federal employees and state or local law enforcement entities or employees thereof, and between federal employees and private security companies or employees thereof, discussing cooperation in preparation for oil pipeline protests."

18. Plaintiffs sought a waiver of search, review, and duplication fees on the ground that disclosure of the requested records is "in the public interest" and because it is "likely to contribute significantly to public understanding of the

operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

19. Plaintiffs also sought a limitation of fees on the ground that Plaintiffs qualify as "representative[s] of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

20. Plaintiffs requested expedited processing of the Request on the basis of a "compelling need" for the requested records as defined in 5 U.S.C. § 552(a)(6)(E)(v)(II).

Agency Responses

USACE

21. By email dated February 12, 2018, USACE acknowledged receipt of the Request and assigned it reference number FP-18-009115.

22. On July 17, 2018, Plaintiffs received a final response from USACE, disclosing seven pages of redacted emails, Ex. A, and withholding "one email consisting of five pages" in its entirety. Ex. B at 1. USACE claims Exemption 6 of the FOIA for the redacted emails, and Exemptions 5, 6, and 7(A) for the withheld email.

23. On August 3, 2018, Plaintiffs appealed USACE's Final Response on the grounds of inadequate search, improper withholding, and improper redaction. Plaintiffs have received no further correspondence from USACE.

24. Plaintiffs have exhausted all administrative remedies because USACE failed to respond to Plaintiffs' appeal within the time required by statute.

DHS

25. By letter dated January 25, 2018, DHS acknowledged receipt of the Request and assigned it reference number 2018-HQFQ-00539. DHS noted that it had forwarded the Request to component agencies FEMA, I&A, and the Federal Law Enforcement Training Centers (FLETC) to determine whether those offices had any equity in the request.

26. By email dated February 16, 2018, DHS confirmed that "I & A advised that they will be searching for records for your request (FEMA too)."

FEMA

27. By letter dated January 26, 2018, FEMA acknowledged receipt of the Request and assigned it reference number 2018-FEFO-00405. FEMA denied Plaintiffs' request for expedited processing, and conditionally granted Plaintiffs' request for a fee waiver. FEMA noted it had queried the appropriate FEMA subcomponent organizations for responsive records.

28. By letter dated March 23, 2018, FEMA stated that it had conducted a comprehensive search of files within FEMA's Region VIII for responsive records, and was unable to identify any responsive records.

29. On June 14, 2018, Plaintiffs timely filed an administrative appeal of FEMA's determination that it has no records responsive to the Request. Plaintiffs alleged that FEMA had not engaged in an adequate search for these records. FEMA acknowledged Plaintiffs' appeal by letter on June 21, 2018, and denied it by letter on August 31, 2018.

30. Plaintiffs have exhausted all administrative remedies because FEMA failed to respond to Plaintiffs' appeal relating to the adequacy of FEMA's search within the time required by statute.

I&A

31. By letter dated February 16, 2018, I&A acknowledged receipt of the Request and assigned it reference number 2018-IAFO-00149. I&A stated it would search for items two, three, and four of the Request. I&A granted expedited processing and did not communicate any decision regarding Plaintiffs' requests for a fee waiver and a limitation of fees.

32. By email dated March 27, 2018, Plaintiffs contacted I&A inquiring about the status of the Request. Plaintiffs also provided I&A with a May 2017 Field Analysis Report, on which I&A collaborated, as an example of the type of record Plaintiffs were seeking in the Request. Ex. C & Ex. D.

33. By email dated June 22, 2018, I&A issued a final response to Plaintiffs' Request, providing no documents other than a redacted version of the

same, unclassified document Requesters had offered to I&A on March 27—nearly three months prior—as an example of the type of document that Requesters were seeking. Ex. E.

34. On June 28, 2018, Plaintiffs appealed the adequacy of I&A's search, as well as its redactions of an already unclassified, unredacted letter which Plaintiffs themselves had first provided to I&A. I&A acknowledged Plaintiffs' appeal by letter on July 2, 2018. Plaintiffs have received no further correspondence from I&A.

35. Plaintiffs have exhausted all administrative remedies because I&A failed to respond to Plaintiffs' appeal relating to the adequacy of I&A's search within the time required by statute.

TSA

36. By letter dated March 12, 2018, TSA acknowledged receipt of the Request and assigned it reference number 2018-TSFO-00198. TSA did not communicate any decision regarding Plaintiffs' requests for expedited processing, a fee waiver, and a limitation of fees.

37. By letter dated May 24, 2018, TSA stated that it had conducted a search and no records responsive to Plaintiffs' request were located.

38. On June 14, 2018, Plaintiffs timely filed an administrative appeal of TSA's determination that it has no records responsive to the Request. Plaintiffs

alleged that TSA had not engaged in an adequate search for these records. Plaintiffs have received no further correspondence from TSA.

39. Plaintiffs have exhausted all administrative remedies because TSA failed to respond to Plaintiffs' appeal relating to the adequacy of TSA's search within the time required by statute.

BLM

40. By letter dated January 29, 2018, BLM acknowledged receipt of the Request and assigned it reference number 2018-00388. BLM granted Plaintiffs' fee waiver request, and did not communicate a decision regarding Plaintiffs' request for expedited processing. BLM did, however, note that it had placed the Request into its "Exceptional/Voluminous" track, which it noted would require more than sixty workdays for processing.

41. Plaintiffs have received no further correspondence from BLM. No records responsive to the Request have been released by BLM.

42. Plaintiffs have exhausted all administrative remedies because BLM has failed to comply with the time limit for responding to FOIA requests.

FBI

43. By letter dated April 6, 2018, the FBI acknowledged receipt of the Request and assigned it reference number 1401682-000. The FBI classified Plaintiffs as an "educational institution, noncommercial scientific institution or

representative of the news media," and stated that Plaintiff' request for public interest fee waiver was under consideration. The FBI did not communicate a decision regarding Plaintiffs' request for expedited processing. However, by separate letter also dated April 6, 2018, the FBI stated that "unusual circumstances" applied to the Request. The FBI informed Plaintiffs it could reduce the scope of its request in order to seek a determination on the request within 20 days.

44. By letter dated April 24, 2018, the FBI denied Plaintiffs' request for expedited processing, stating that Plaintiffs had not articulated an urgency to inform the public as it relates to this subject matter.

45. Plaintiffs have received no further correspondence from the FBI. No records responsive to the Request have been released by the FBI.

46. Plaintiffs have exhausted all administrative remedies because the FBI has failed to comply with the time limit for responding to FOIA requests.

OLC

47. By letter dated January 31, 2018, OLC acknowledged receipt of the Request and assigned it reference number FY18-058. OLC denied Plaintiffs' request for expedited processing, and noted it would make a determination concerning Plaintiffs' request for a fee waiver after determining whether fees would be assessed for the request.

48. Plaintiffs contacted OLC by phone on April 10, 2018, requesting an update on the status of the Request. An OLC representative responded that the agency was "extremely behind."

49. On April 25, 2018, Plaintiffs timely filed an administrative appeal from OLC's denial of the request for expedited processing. By letter dated May 11, 2018, OLC affirmed its denial of Plaintiffs' request for expedited processing.

50. Plaintiffs contacted OLC by phone on May 11, 2018, requesting an update on the status of the Request. An OLC representative responded that the Request had been placed in "final review" and that the agency would have a decision on the Request by the end of the following week.

51. Plaintiffs have received no further correspondence from OLC. No records responsive to the Request have been released by OLC.

52. Plaintiffs have exhausted all administrative remedies because OLC has failed to comply with the time limit for responding to FOIA request, and because OLC has affirmed the denial of Plaintiffs' request for expedited processing.

Causes of Action

53. Defendants' failure to promptly make available the records sought by the Request violates FOIA, 5 U.S.C. § 552(a)(3)(A), and Defendants' corresponding regulations.

54. Defendants' failure to make an adequate search for records responsive to the Request violates FOIA, 5 U.S.C. § 552(a)(3)(C), (D), and Defendants' corresponding regulations.

55. Defendants' denials of Plaintiffs' requests for expedited processing violate FOIA, 5 U.S.C. § 552(a)(6)(E), and Defendants' corresponding regulations.

56. Defendants' denials of Plaintiffs' requests for fee waivers violate FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and Defendants' corresponding regulations.

Prayer for Relief

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Order Defendants immediately to release to Plaintiffs the records sought in the Request;
2. Enjoin Defendants from charging Plaintiffs search, review, or duplication fees for the processing of the Request;
3. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action; and
4. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/ *Alex Rate*

Alex Rate

AMERICAN CIVIL LIBERTIES
UNION OF MONTANA
FOUNDATION, Inc.
P.O. Box 9138
Missoula, MT 59807

Counsel for plaintiffs

September 4, 2018

EXHIBIT A

From: Thurn, Linda
To: Gabriella Torres; Jon Raby; Jackson, Donald E Jr MG USARMY CEHQ (US); O"Sullivan, Ian P MAJ USARMY CEHQ (US); Michael Anderson; Ryan Sklar; Sara A Sorensen; Willi m V n H ten; William Van Houten; Fletcher, Matthew M CPT USARMY CEHQ (US); HassellMD@state.gov
Subject: [Non-DoD Source] Agenda for Keystone Meeting on May 18 at 4:00 pm (Eastern Time)
Date: Monday, May 15, 2017 10:53:34 AM
Attachments: 5.18.17 Meeting Agenda.docx

Good morning,

Please see the attached agenda for the upcoming Keystone Meeting on Thursday.

Thank you,

Linda Thurn

Executive Assistant

Bureau of Land Management

202-208-3801

From:
To:
Subject: RE: [Non-DoD Source] Keystone XL -- status update
Date: Thursday, June 1, 2017 9:27:31 AM

I am the right guy for now - but definitely my office.

Thanks

v/r,

Chief, Operational Protection Division
Directorate of Contingency Operations
Headquarters, U.S. Army Corps of Engineers
441. G. Street NW
Washington, DC 20314-1000
NIPR
SIPR:
Office: 202-761-5824
DSN: 312-763-5824
BB:

-----Ori_inal Messa_e-----
From:
Sent: Thursday, June 01, 2017 9:25 AM
To:

Subject: FW: [Non-DoD Source] Keystone XL -- status update

See below. We agreed to start having some discussion on security for Keystone pipeline. When MG Jackson and I attended the last meeting, we thought you would be the right guy, but I will defer to you if you think otherwise.

Otherwise, I will send Ryan your contact info as they start planning this.

Deputy Chief, Northwestern and Pacific Ocean
Divisions-Regional Integration Team
Headquarters, US Army Corps of Engineers
202 761-4527 office

-----Original Message-----
From: Sklar, Ryan [mailto:ryan.sklar@sol.doi.gov]
Sent: Thursday, June 01, 2017 8:21 AM
To
Subject: [Non-DoD Source] Keystone XL -- status update

Hi

It's been a couple of weeks since our meeting so I thought it would be helpful to check in on the status of USACE's Section 408 review. Is the technical review complete and has USACE identified any concerns in addition to those we have previously discussed (i.e., those related to the scour analysis, horizontal drilling directional plan, and cultural resource information provided by TransCanada)? In addition, is USACE still waiting on any follow-up information from TransCanada? As of the May 18 meeting, TransCanada had provided most, but not all, of the requested information. I wanted to see if those gaps have been filled.

Finally, at the May 18 meeting, we discussed putting together an interagency team that would plan for safety and security concerns related to project approval and construction. Can you please provide names of the people from USACE who will be participating in that effort. We would like to stand up that team as soon as possible.

Thanks, and please let me know if there's any information you need from BLM.

Ryan

--

Ryan Sklar
Acting Senior Litigation Specialist
Bureau of Land Management
U.S. Department of the Interior
202-208-4695

From: Sklar, Ryan
To:
Subject: Re: Non-DoD ource Keystone XL -- status up ate
Date: Thursday, June 8, 2017 12:01:56 PM

Thanks for the quick reply. We do not yet have a formal charter or business rules for the interagency team. The team is still in the formative stages, be we expect that there will be an incident command structure and that the state of Montana will take the lead. We will have more details once we get the names of the appropriate participants and get a little farther in the planning process.

Just to confirm, will you be sending me the names of the potentially affected Division and District security managers in the near future or should will you be the only USACE point of contact for now?

Thanks,
Ryan

On Thu, Jun 8, 2017 at 9:26 AM CIV USARMY CEHQ (US) > wrote:

Ryan,

For now lets use me as the Primary POC. My Law Enforcement Chief doesn't come on board until 1 July and we can make a potential transition from there. For now based on my experience with DAPL I prefer to stay the lead.

When it comes to any Field Offices I will gather the names of the potentially affected Division and District security managers.

Can you give me an idea of the Charter or Business Rules will be for this interagency team? How often they will meet, where, etc.?

Thanks

v/r,

Chief, Operational Protection Division
Directorate of Contingency Operations
Headquarters, U.S. Army Corps of Engineers
441. G. Street NW
Washington, DC 20314-1000
NIPR:
SIPR:
Office: 202-761-5824
DSN: 312-763-5824
BB

-----Original Message-----
From: Sklar, Ryan [mailto:ryan.sklar@sol.doi.gov <mailto:ryan.sklar@sol.doi.gov>]
Sent: Thursday, June 08, 2017 8:53 AM

Subject: Fwd: [Non-DoD Source] Keystone XL -- status update

Hi

I wanted to follow up on my email, originally communicated to asking who from USACE should participate in the interagency team we're putting together to deal with safety and security concerns related to the Keystone XL project. Can you please let me know who from HQUSACE and the relevant USACE field offices should participate? The team will also be comprised of members of the Bureau of Land Management, the State Department, and state and local law enforcement agencies.

Thank you,
Ryan

--------- Forwarded message ---------

Date: Thu, Jun 1, 2017 at 9:33 AM
Subject: RE: [Non-DoD Source] Keystone XL -- status update
To: "Sklar, R an" <r an.sklar sol.doi. ov <mailto:r an.sklar sol.doi. ov> >

<Blockedhttp://army.mil <Blockedhttp://army.mil> > >

Ryan,

At the moment, I do not know of any new issues other than those three we discussed, and as our initial review has completed, I don't expect any additional ones. Let me touch base with our field folks on the new information. Also, our folks are looking at the PCN submissions for the Section 404 permit, and we are on track to get an initial read within 30 days.

For Security is our security lead for HQUSACE, and also works with our security folks in the field as well. His contact info is: (202) 761-5824, and

I am looping him into this conversation, as he may want to send a few of his folks.

Deputy Chief, Northwestern and Pacific Ocean
Divisions-Regional Integration Team
Headquarters, US Army Corps of Engineers
(202) 761-4527 (office)

-----Original Message-----
From: Sklar, Ryan [mailto:ryan.sklar@sol.doi.gov <mailto:ryan.sklar@sol.doi.gov>
<mailto:ryan.sklar@sol.doi.gov > >]

Sent: Thursday, June 01, 2017 8:21 AM

To:
<mailto:
Subject: [Non-DoD Source] Keystone XL -- status update

Hi

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Finally, at the May 18 meeting, we discussed putting together an interagency team that would plan for safety and security concerns related to project approval and construction. Can you please provide names of the people from USACE who will be participating in that effort. We would like to stand up that team as soon as possible.

Thanks, and please let me know if there's any information you need from BLM.

Ryan

--

Ryan Sklar
Acting Senior Litigation Specialist
Bureau of Land Management
U.S. Department of the Interior
202-208-4695

--

Ryan Sklar
Attorney-Advisor
Office of the Solicitor
U.S. Department of the Interior
202-208-3039

--

Ryan Sklar
Attorney-Advisor
Office of the Solicitor
U.S. Department of the Interior
202-208-3039

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EXHIBIT B

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
HUMPHREYS ENGINEER CENTER SUPPORT ACTIVITY
7701 TELEGRAPH ROAD
ALEXANDRIA, VA 22315-3860

July 16, 2018

Office of Counsel

Mr. Jacob Hutt
ACLU
125 Broad Street, 18th Floor
New York, New York 10004

Dear Mr. Hutt,

This is in response to your Freedom of Information Act (FOIA) request, dated January 23, 2018, for information records pertaining to cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for anticipated protests against the Keystone XL pipeline. By email dated February 12, 2018, Ms. Mary Alice Smith confirmed receipt of your FOIA request and assigned tracking number FP-18-009115.

I have coordinated with our Headquarters Operational Protection Division and received 12 pages of emails that were considered responsive to your request. One email consisting of five pages is being withheld in its entirety pursuant to Exemptions 5, 6, and 7(A) of the FOIA as discussed below. The remaining seven pages are provided in redacted form pursuant to Exemption 6 of the FOIA.

Exemption 5 of the FOIA addresses "inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." See: 5 U.S.C. § 552(b)(5). The applicable privilege recognized by Exemption 5 is the Deliberative Process Privilege. The Deliberative Process Privilege protects "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149. The information that has been characterized as deliberative includes an email between HQUSACE and the Department of Justice. That email, and its attachment contains information, and discussions concerning potential protest activity and protestor targeting of USACE leadership. This material embodies the purpose for the Deliberative Process Privilege which exists to encourage open and frank discussions between government agencies and officials, to protect against premature disclosure of proposed polices before they're finally adopted, and to protect against public confusion that could result from disclosure of rationales that are not ultimately adopted as an agency decision. Kidd v. U.S. Department of Justice, 362 F. Supp. 2d 291, 296 (D.D.C. 2005) (protecting documents on basis that disclosure would "inhibit drafters from freely exchanging ideas, language choice, and comments in drafting documents"). The potential disclosure of any and every comment in a policy discussion would surely chill the climate of open communication between government personnel.

Exemption 6 protects information that if released, would constitute a clearly unwarranted invasion of privacy. 5 U.S.C. § 552(b)(6). In applying Exemption 6, an individual privacy interest must be weighed against the public interest in that information. If the privacy interest outweighs the public interest, the information should be withheld. Since the terrorist attacks of September 11, 2001, there has been a heightened interest in protecting the security and privacy of DOD personnel. In the current world security climate, DOD personnel and their families are particularly vulnerable to harassment and attack from terrorists and others wishing to do them harm. See: Department of Defense Director for Administration and Management Memorandum 1-2 (Nov. 9, 2001). In this instance, the information that has been redacted includes names and email addresses of certain Army Employees. I have determined that the privacy interests at stake are greater than the public's interest in the personal contact information of individuals involved in the requested correspondence.

Exemption 7 of the FOIA protects from disclosure "records or information compiled for law enforcement purposes…" 5 U.S.C. §552(b)(7)(2006). The applicable Exemption 7 subpart is 7(A) which protects information that, if released, could reasonably be expected to interfere with enforcement proceedings. As previously stated, the email withheld pursuant to Exemption 7(A) is an email between a Department of Justice Intelligence Specialist and the USACE Operational Protection Division concerning potential protest activity and protestor targeting of USACE leadership. Release of this type of material may impact federal agencies' ability to anticipate and respond to certain threats thereby interfering with prevention of the same and law enforcement proceedings in response thereto.

For any further assistance and to discuss any aspect of your request, you have the right to contact the USACE FOIA Public Liaison at foia-liaison@usace.army.mil or by calling (202) 761-4791. Additionally, you have the right to contact the Office of Government Information Services (OGIS) to inquire about the FOIA mediation services they offer. The contact information for OGIS is: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-36001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Finally, if you are not satisfied with this response, you have the right to appeal my determination to the Secretary of the Army. Your appeal package should bear the notation "Freedom of Information Act Appeal" and should be emailed to foia@usace.army.mil or sent to me at the address depicted on the letterhead above. Your appeal must be postmarked or electronically transmitted within 90 days of the date of this response.

Sincerely,

For Damon Roberts
HECSA Counsel

EXHIBIT C

From: Jacob Hutt
To: Nicola Morrow
Subject: Fw: Acknowledgment of request 2018-IAFO-00149
Date: Thursday, August 30, 2018 12:25:51 PM
Attachments: image004.png
image005.png
May-2017-Field-Analysis-Report.pdf
image006.png

From: Jacob Hutt
Sent: Tuesday, March 27, 2018 2:35 PM
To: Henry, Brendan
Cc: I&AFOIA
Subject: RE: Acknowledgment of request 2018-IAFO-00149

Dear Mr. Henry,

I hope you're well. I'm writing for two reasons.

First, I would like to inquire on the status of the ACLU's request 2018-IAFO-00149. Three weeks ago, on March 6, you wrote that our request had been bumped to the front of the line for processing. If you could provide an update, I'd appreciate it.

Second, I thought I would pass along a document connected to I&A to show you one type of document we are seeking. It is an May 2017 Field Analysis Report entitled, "TTPs Used in Recent US Pipeline Attacks by Suspected Environmental Rights Extremists." Of course, our requests encompass more than field analysis reports, but I thought this may give your researchers a better sense of what records we'd like. The report is attached.

I look forward to hearing from you soon.

Thank you,

Jacob Hutt
Brennan Fellow | Speech, Privacy & Technology Project
American Civil Liberties Union
125 Broad St., 18th Floor, New York, NY 10004
(212) 519-7809
aclu.org

From: Jacob Hutt
Sent: Thursday, March 08, 2018 2:12 PM
To: 'Henry, Brendan'
Cc: I&AFOIA
Subject: RE: Acknowledgment of request 2018-IAFO-00149

Dear Mr. Henry,

Thank you for confirming I&A's search for the first four records in our request.

Warmly,

Jacob Hutt
Brennan Fellow | Speech, Privacy & Technology Project
American Civil Liberties Union
125 Broad St., 18th Floor, New York, NY 10004
(212) 519-7809
aclu.org

From: Henry, Brendan [mailto:brendan.henry@hq.dhs.gov]
Sent: Thursday, March 08, 2018 2:08 PM
To: Jacob Hutt
Cc: I&AFOIA
Subject: RE: Acknowledgment of request 2018-IAFO-00149

Good morning Mr. Hutt,

Thank you for your email. I reviewed the request file and discussed it with staff. It appears that the portion of your request that is relevant to I&A is found on page 6 and states as follows:

With respect to **all agencies** listed above, the ACLU seeks the release of all records19 created

since January 27, 2017, concerning:
(1) Legal and policy analyses and recommendations related to law enforcement funding for and staffing around oil pipeline protests. Such recommendations may include, but are not limited to, declarations of a state of emergency by state and local entities in order to marshal additional funds, and requests by state or local entities for federal agencies to provide funding or personnel for counter-protest operations; and
(2) Travel of federal employees to speaking engagements, private and public meetings, panels, and conferences on the subject of preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and
(3) Meeting agendas, pamphlets, and other distributed matter at speaking engagements, private and public meetings, panels, and conferences where federal employees are present to discuss preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and
(4) Communications between federal employees and state or local law enforcement entities or employees thereof, and between federal employees and private security companies or employees thereof, discussing cooperation in preparation for oil pipeline protests.

Our search is based on the above four items, as written in your request. I apologize if the paraphrasing used in the acknowledgment letters confused matters.

Sincerely,

Brendan Henry
Deputy Privacy Officer/FOIA Officer
Office of Intelligence & Analysis
Department of Homeland Security
(202) 447-3783
Brendan.henry@hq.dhs.gov

From: Jacob Hutt [mailto:jhutt@aclu.org]
Sent: Wednesday, March 7, 2018 11:13 AM
To: Henry, Brendan <brendan.henry@hq.dhs.gov>
Cc: I&AFOIA <I&AFOIA@HQ.DHS.GOV>
Subject: RE: Acknowledgment of request 2018-IAFO-00149

Mr. Henry,

Thanks for your message. I have two questions in response to your acknowledgment letter:

1. Was our first record request denied? It requests “all records created since 1/27/2017 concerning legal and policy analyses and recommendations related to law

enforcement funding for and staffing around oil pipeline protests. Such recommendations may include, but are not limited to, declarations of a state of emergency by state and local entities in order to marshal additional funds, and requests by state or local entities for federal agencies to provide funding or personnel for counter-protest operations." **You do not acknowledge this request in your letter**. Please confirm if you will be searching for these records.

2. I just want to confirm that you will be using the original language of our records request, rather than the paraphrased version in your letter, as you conduct these searches.

Thank you for granting expedited processing and I hope to hear from you soon.

Jacob Hutt
Brennan Fellow | Speech, Privacy & Technology Project
American Civil Liberties Union
125 Broad St., 18th Floor, New York, NY 10004
(212) 519-7809
aclu.org

From: Henry, Brendan [mailto:brendan.henry@hq.dhs.gov]
Sent: Tuesday, March 06, 2018 5:30 PM
To: Jacob Hutt
Cc: I&AFOIA
Subject: FW: Acknowledgment of request 2018-IAFO-00149

Dear Mr. Hutt:

Thank you for your call earlier today inquiring about your FOIA request concerning speaking engagements, meetings, etc. concerning preparation for oil pipeline protests.. HDS HQ did transfer it to the Office of Intelligence & Analysis s for processing. DHS has a decentralized FOIA process, and each component/office assigns its own tracking number. Your tracking number for I&A is 2018-IAFO-00149. Reviewing our files, I see that we sent you an acknowledgment letter on February 16, 2018, which granted your expedited processing request. Please see attached.

Accordingly, at that time, your request was bumped to the front of the line for processing. We have tasked the search and are awaiting responses.

Please let me know if you have any questions or concerns.

Brendan Henry
Deputy Privacy Officer/FOIA Officer
Office of Intelligence & Analysis
Department of Homeland Security
(202) 447-3783
Brendan.henry@hq.dhs.gov

From: I&AFOIA
Sent: Friday, February 16, 2018 3:42 PM
To: jhutt@aclu.org
Cc: I&AFOIA <I&AFOIA@HQ.DHS.GOV>
Subject: Acknowledgment of request 2018-IAFO-00149

Good afternoon Mr. Hutt:

Please find attached an acknowledgment of your request 2018-IAFO-00149.

FOIA Officer
Department of Homeland Security Office of Intelligence and Analysis (I&A)
I&AFOIA@hq.dhs.gov
(202) 447-3783

EXHIBIT D

FIELD ANALYSIS REPORT

Regional Analysis with National Perspective

2 May 2017

(U//FOUO) TTPs Used in Recent US Pipeline Attacks by Suspected Environmental Rights Extremists

(U//FOUO) Prepared by the Montana Analysis and Technical Information Center (MATIC), Minnesota Fusion Center (MNFC), North Dakota State and Local Intelligence Center (NDSLIC), South Dakota Fusion Center (SDFC), Washington State Fusion Center (WSFC), the Illinois Statewide Terrorism & Intelligence Center (STIC), and the Iowa Division of Intelligence and Fusion Center (DOI/FC) jointly with the DHS Office of Intelligence and Analysis (I&A) and coordinated with Transportation Security Administration (TSA).

(U) ***Scope:*** *This* Field Analysis Report (FAR) *highlights recent criminal disruptions and violent incidents against pipeline projects in the Midwestern and Western United States in 2016, and shows how activities at these events compare with larger environmental rights extremist strategic trends—including those related to targeting, tactics and procedures (TTPs).*[*,†] *This product is intended to assist government and law enforcement security partners in identifying, deterring, preventing, and responding to potential threats against pipelines and related entities. It includes a discussion of drivers possibly affecting the future threat of pipeline-related violence from environmental rights extremist violence.*

(U) Key Judgments

- (U//FOUO) We assess the October 2016 valve shutoff attacks against five pipelines along the US–Canada border by suspected environmental rights extremists showed a high level of pre-operational planning.
- (U//LES) We assess suspected environmental rights extremists exploited Native American causes in furtherance of their own violent agenda during a campaign to halt construction of the Dakota Access Pipeline (DAPL) in the Midwest and Western United States in 2016.[‡]
- (U//FOUO) We assess that while some characteristics of a series of arsons against Iowa pipeline construction sites in 2016 could be indicative of an environmental rights extremist attack, other factors could reasonably suggest a possible non-ideological motive. This assessment is subject to change if new information emerges. Additionally, environmental rights extremism is a plausible motivation behind multiple attacks against construction equipment in North Dakota during the same period.
- (U//LES) The TTPs observed during the 2016 incidents included but were not limited to: destroying property; using small teams for attacks; choosing remote and lightly guarded targets; wearing disguises; starting simple fires to create barricades; "doxing" government officials; using drones; using small improvised explosive devices (IEDs); and throwing projectiles and Molotov cocktails at officers.[§]

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[*] (U//FOUO) DHS defines **environmental rights extremists** as groups or individuals who facilitate or engage in acts of unlawful violence against people, businesses, or government entities perceived to be destroying, degrading, or exploiting the natural environment.

[†] (U//FOUO) DHS defines **terrorism** as any activity that involves an act that is dangerous to human life or potentially destructive to critical infrastructure or key resources, and is a violation of the criminal laws of the United States or of any state or other subdivision of the United States and appears to be intended to intimidate or coerce a civilian population to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping.

[‡] (U) For background information on DAPL, see Appendix A.

[§] (U) **Doxing** attacks often include posting on websites targeting individuals' personal background, associates or family, place of employment, home address, or contact information.

- (U//FOUO) We assess environmental rights extremists are likely to use some of these same criminal and violent tactics in attempts to disrupt other energy projects elsewhere in the United States—including those related to pipeline construction—in the coming year.

(U) Significant Incidents in 2016

(U//FOUO) Pipelines and associated construction projects in the Midwestern and Western United States in 2016 were targeted with multiple criminal and violent acts designed to disrupt fossil fuel transportation infrastructure and impede or injure law enforcement. These include valve shutoffs along the northern border, destruction of construction equipment, and arson attacks against Iowa pipeline construction sites.

(U) Valve Shutoffs along Northern Border

(U//FOUO) We assess the October 2016 valve shutoff attacks against five pipelines along the US–Canada border by suspected environmental rights extremists showed a high level of pre-operational planning. Multiple teams—comprised of individuals who traveled from across the United States—conducted simultaneous attacks against remote valve sites, wore disguises, and executed contingency plans.[7–12] The apparent ease with which these valve shutoff attacks were carried out and the heavy media coverage they attracted lead us to be concerned that other environmental rights extremists could also pursue coordinated attacks against the energy sector. Although these valve attacks did not result in any loss of life, manually shutting pipeline valves carries an inherent risk of death or serious injury if a pipeline ruptures.

(U) Environmental Rights Extremists

(U//LES) Environmental rights extremists have a long history of committing violent acts across the United States against entities they perceive are damaging the environment. Since the movement's inception in the 1980s, adherents have been responsible for many criminal acts and threats of violence, such as arson, as well as hundreds of other criminal acts resulting in damages in the tens of millions of dollars to targeted corporations and businesses, including energy and transportation industry targets.[1,*,†] Motivations for violence tend to mirror those of the larger nonviolent environmentalist movement and include such factors as anger over perceived environmental destruction during the oil-drilling method known as "fracking," perceived environmental and habitat destruction during mining of Canadian tar sands oil that is shipped to the United States via pipelines, and by fears of contamination to water supplies in the event of future pipeline leaks.[2,3,4] Environmental rights extremists often consider themselves to be nonviolent because their attacks tend to be against property and are intended to only inflict economic damage. However, the use of some tactics—such as shutting off pipeline valves or committing arson to construction equipment used in building pipelines—carry an inherent risk of death or serious injury, regardless of intent. For example, pipelines can rupture as a result of tampering, and fires started by arson can inadvertently spread to non-targeted areas and result in serious injuries. Although some recent and historical environmental rights extremist attacks and disrupted plots have involved use of IEDs, bombing attacks from the movement are uncommon.[5,6]

- (U//LES) On 11 October 2016, suspected environmental rights extremists shut down five pipelines along the US–Canadian border in Minnesota, Montana, North Dakota, and Washington for over seven hours, resulting in estimated financial losses in the hundreds of thousands of dollars, according to DHS, court documents, law enforcement information, and press reporting.[13–18] Nine individuals were subsequently arrested on charges related to tampering with pipeline valves and preventing the transportation of petroleum. The subjects claimed to have targeted the pipelines to show solidarity with actions against DAPL. They also called on the President to use emergency powers to keep the pipelines closed and requested a total ban on new fossil fuel extractions and an immediate end to use of tar sands and

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* (U//FOUO) DHS recognizes that individuals associated with various groups and movements participated in criminal and violent acts against pipelines in 2016. For the purposes of this paper, these individuals are referred to as environmental rights extremists, as these campaigns were fundamentally about protecting the environment—whether that is opposing oil pipeline construction projects or protecting the indigenous water supply from pollution.

† (U) For other examples of environmental rights extremists attacks against the energy sector, see Appendix B.

coal, according to DHS reporting and an online press release from a group representing the individuals.[19,20,*]

(U) OBSERVATIONS/TTPS

(U//LES) ***Small Teams Used for Attacks:*** In each of the valve shutoff incidents, there were at least three participants—one initiating the shutdown and the other two filming the event, according to US Department of Energy and law enforcement reporting.[21,22,23,24]

(U//LES) ***Many Attackers Traveled from Outside of State:*** Many of the attackers were from outside the area—some from as far away as Vermont and New York, according to court documents and law enforcement reporting.[26,27,28] One female participants arrested for filming the shutdown of one of the pipelines in North Dakota claimed to have little knowledge of the other attackers' plans to commit simultaneous pipeline attacks in the region. She, however, later admitted to law enforcement she had traveled by train from New York City with one of the individuals who planned to disrupt pipelines in Minnesota and stayed in the same motel with the two other individuals who disrupted another pipeline in North Dakota.[29]

(U) Figure 1. Alleged pipeline attackers wore hard hats and reflective vests as disguises during the attacks. They used bolt cutters to bypass chain link fences surrounding pipeline property and to remove chains keeping valves from being turned off.[25]

(U//LES) ***Lightly Guarded Targets Selected:*** Pipeline valve sites—such as those targeted in the attack—are typically located every 10 to 15 miles along a pipeline and have minimal security, according to law enforcement reporting.[30]

(U//LES) ***Attackers Gave Advance Notice to Pipeline Companies:*** Attackers made phone calls to pipeline operators in North Dakota and Minnesota to give advanced notice that a valve closure was imminent, according to media reporting.[31,32]

(U//LES) ***Disguises Worn During Attacks:*** Pictures posted to websites supportive of the valve attackers indicate they disguised themselves as pipeline employees to carry out their attacks, donning hard hats and reflective safety vests.[33] According to law enforcement reporting, the hard hats and reflective vests had a red "X" on them—a known symbol of their campaign to halt fossil fuel production.[34]

(U//LES) ***Unsophisticated, Easily Acquired Tools Used During Attacks:*** The subjects used bolt cutters to gain access to the aboveground maintenance facilities and removed chains protecting the valves from being turned off, according to websites supportive of the valve shutoff

[*] (U) For background information on tar sands, see Appendix C.

action. The individuals then prevented others from regaining control of the valve by attaching their own locks.[35,36,37]

(U//FOUO) ***Contingency Plans Made:*** During one of the attacks against the pipelines, the attackers were unable to close a valve and instead simply chained themselves to the pipeline, according to US Department of Energy reporting.[38]

(U) Escalation to Violence at DAPL Occupation in North Dakota

(U//LES) We assess that starting in the summer of 2016, suspected environmental rights extremists exploited Native American anti-DAPL protests to attract new members to their movement, gain public sympathy, and justify their criminal and violent acts.[39,40] Native American tribes claim the pipeline route crosses sacred sites and burial places, and they are concerned a future pipeline rupture could pollute tribal drinking water.[41] We assess the significant media attention and public sympathy gained by the environmental rights extremists from this new alliance with Native American tribes makes it likely environmental rights extremists will attempt to exploit indigenous causes for their own ideological purposes in future environment-related events.[42-47]

- (U//LES) Since August 2016, suspected environmental rights extremists have engaged in multiple violent incidents in North Dakota at illegal encampments on DAPL and US Army Corps of Engineers property in an effort to halt pipeline construction, according to law enforcement reporting.[48,*] The occupation, which ended on 24 March 2017, resulted in 761 arrests for various crimes—primarily on charges of criminal trespassing and engaging in a riot with individuals who traveled to the region from California, representing the largest number of arrests at 115, or 15.1 percent, according to law enforcement reporting.[49,50] Individuals have engaged in physical assault and threats of physical assault, as well as use of Molotov cocktails and IEDs.

(U) OBSERVATIONS/TTPS:

(U//LES) ***Use of Potentially Lethal Devices:*** On 27 October 2016, during law enforcement clearing of an encampment, an individual shot a firearm at law enforcement officers who had confronted her while taking her into custody, according to law enforcement. No injuries were reported in that incident.[55] That same day, individuals threw three Molotov cocktails at officers during clearing operations, according to media reporting.[56] On 21 November 2016, an individual female involved in violent clashes with law enforcement threw small IEDs at officers, resulting in near amputation of her arm after one of the IEDs exploded prematurely, according to

* (U) The Dakota Access Pipeline is sometimes referred to as the Bakken Oil Pipeline.

law enforcement and DHS reporting.[57] From 3 to 5 December, individuals, including suspected environmental rights extremists, plotted, but did not execute, a coordinated attack on a DAPL drill site from all directions. The individuals claimed they would stop the pipeline at all costs and were not opposed to using firearms.[58,59,60]

(U//LES) ***Suspicious Drone Use:*** On 07 September 2016, three suspected environmental rights extremists in Bismarck approached the front gate of the Fraine Barracks—which houses several emergency services agencies, the National Guard, and the NDSLIC—stating they had crashed a drone on the property, according to law enforcement. After being informed they could not access the site, they asked questions about the barracks before leaving the area.[61] On 23 October 2016, according to law enforcement, a suspected environmental rights extremist used an 18-inch-by-18 inch drone to disrupt law enforcement air operations by flying it within 50 feet of a law enforcement helicopter. The same drone was later encountered by law enforcement when it flew towards officers approximately 20–30 yards off the ground and then started hovering above them. Law enforcement, which attempted to disable the drone with nonlethal and lethal munitions due to officer safety concerns, believed the drone was surveilling them, according to DHS reporting. We judge this was likely an effort designed to provide advanced notice of enforcement operations protecting DAPL construction.[62,63]

(U//LES) ***Surveillance and Doxing***: Since the beginning of the anti-DAPL campaign in August 2016, there have been several incidents of suspected environmental rights extremists surveilling law enforcement facilities in cities near encampments. We judge these incidents—including reports of individuals being photographed entering and exiting a law enforcement facility in Mandan and officers being surveilled at their residences and followed by suspicious vehicles—were likely an attempt to intimidate officers for their role in protecting DAPL construction efforts.[64] Personal contact information for a senior North Dakota Emergency Services (NDDES) official accused of removing water from encampments was posted online on 24 August 2016, resulting in a sharp increase in harassing phone calls to the NDSLIC against the NDDES employee, according to law enforcement.[65] A private security guard for DAPL had her personal phone number and e-mail address posted on social media by supporters of the anti-DAPL campaign, apparently in reaction to a previous incident in which she used dogs against an aggressive crowd, according to law enforcement sources. Another security guard's children were identified on social media, and law enforcement officers reported their home addresses had also been posted online.[66]

(U//LES) ***Travel from Outside the State:*** On 08 September 2016, members of Canadian indigenous tribes took multiple buses from three reservations/territories to participate in the US campaign to stop DAPL construction. Suspected violent extremists on these buses reportedly carried weapons and riot gear, according to law enforcement, indicating likely intent to commit violent acts.[67,68] Indigenous travel from Canada has been confirmed by Canadian law enforcement.[69] As of 24 March 2017, only 51 of the 761 persons arrested for politically motivated criminal acts in opposition to DAPL were from North Dakota, according to law enforcement.[70]

(U//LES) ***Call to Arms from Hacking Movements:*** An individual associating himself or herself with the hacking collective Anonymous posted a call for support online, listing the North Dakota Highway Patrol and National Guard as possible targets. However, there has been no evidence of unusual activity on their networks, according to law enforcement.[71] Additionally, a movement called the "Anon Resistance Movement" posted a video on social media advocating for violence in solidarity with the anti-DAPL campaign, including further sabotage of pipelines and railroads.[72]

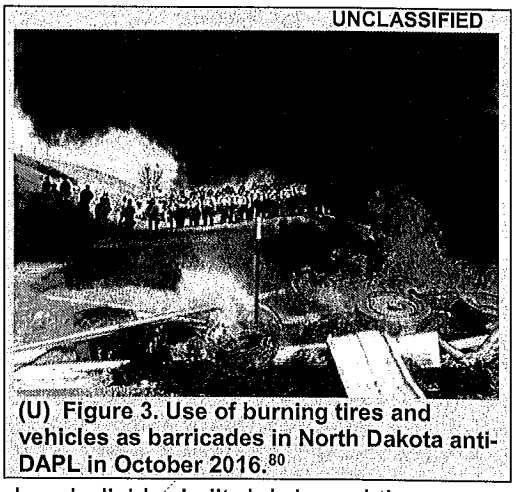
(U//LES) ***Possible Pre-Operational Surveillance:*** On 14 November 2016, law enforcement received information regarding two suspicious subjects who were encountered twice by law enforcement on 11 November 2016 near DAPL drill sites in Patoka and Meredosia, Illinois. The individuals claimed to be birdwatchers looking for a local wildlife refuge, and stated they would either find a hotel or camp, although officers said they had no camping equipment and appeared to be surveilling the drill site. The individuals also appeared to be recording the encounter with the officer, and one of them had a mapping application open on a cellphone, possibly pinning their locations on the map.[73]

(U//FOUO) ***Vandalism against DAPL Financiers and Vague Online Threats:*** On 18 November 2016, a suspected environmental rights extremist indicated the movement's intent to disrupt the financial operations of DAPL by posting a communiqué on an anarchist website claiming credit for vandalizing and "smashing" all the windows of a US bank in Chicago because it was "a key investor in the Dakota Access Pipeline." The individual warned other financiers with the threat that "it will remain open season on [their] offices, homes, and projects" unless they withdraw financial support for DAPL.[74] On 23 November, a suspected environmental rights extremist posted a statement to an anarchist website claiming credit for vandalism against a second branch of the Chicago bank in retaliation for "atrocities committed against" protestors in North Dakota, and blamed the bank for the loss of their "comrade's arm." The individual called for vandalism of the bank's branch offices, ATMs, security cameras, and signs, and then demanded that the bank and other DAPL supporters withdraw their support immediately, "otherwise you may expect a long night before the dawn."[75,76]

(U//LES) ***Disruption to Rail Transportation:*** On 15 November, suspected environmental rights extremists placed debris and abandoned a vehicle with an accelerant-soaked rag hanging out of its gas tank on rail tracks near Mandan. Twenty-six individuals were arrested in relation to the incident. Delays from this attack cost the rail company $2,071.94. On 09 January 2017, rail employees found jumper cables connected to tracks that were painted white and hidden under snow. The cables created a signal interruption to the conductor, causing delays that cost the business $3,544.52. There have been no arrests. The affected rail line is one of two non-passenger lines that transport Bakken Oil out of North Dakota.[78,79] Environmental rights extremist attacks against railways are typically designed to cause disruption rather than inflict mass casualties. However, such activity does introduce safety hazards that create the risk of injuries on the affected line.

(U) Figure 2. Use of jumper cables to disrupt rail signals in North Dakota in January 2017.[77]

(U//LES) **Directed-Energy Weapon:** In early to mid-November, suspected environmental rights extremists attempted to construct at least one directed-energy device designed to disrupt or shut down radio frequencies used by law enforcement, according to law enforcement sources. If properly configured and pointed at a communication network's antenna or repeater, such a device could disrupt transmissions or cause the system to reset itself, temporarily disrupting communications. If aimed at a communication network long enough, it could destroy internal components or cause them to catch fire. In addition to posing a threat to a communication network's antenna or repeater, handheld radio and vehicular units are also susceptible to electromagnetic interference from such a device.[81]



(U) Figure 3. Use of burning tires and vehicles as barricades in North Dakota anti-DAPL in October 2016.[80]

(U) ***Use of Fire to Create Barricades*:** As law enforcement was breaking up encampments on 27 October, individuals lit debris and tires on fire to create barricades, according to media reporting.[82]

(U) Construction Equipment and Pipelines Targeted in Iowa and the Dakotas

(U//FOUO) We assess that a series of arsons against Iowa pipeline construction sites in 2016 could be indicative of an environmental rights extremist attack—due to the targets' proximity and relationship with DAPL and because the use of arson attacks targeting construction sites is an established tactic of the movement. However, other factors—including a lack of graffiti at the crime scene, no claims of responsibility, a lack of historical activity in the region, and public controversy over the project's use of eminent domain—suggest a non-ideological motive.[83] This assessment is subject to change if new information emerges. Additionally, environmental rights extremism is a plausible motivation behind multiple attacks against construction equipment in North Dakota during the same period, as well as a series of attacks puncturing pipelines in Iowa and South Dakota in late February and March 2017.

- (U//LES) On 14 September, employees of a construction company reported an unknown individual(s) used firearms to shoot several rounds of ammunition into a portable toilet and a backhoe at a pipeline construction site near Alexander, North Dakota. According to law enforcement, two of the rounds were fired at, but did not penetrate, the backhoe's fuel tank, which could have sparked a fire. There were no injuries, and there have been no arrests or claims of responsibility for the attacks.[84]

- (U//LES) On 13 September, law enforcement arrested individuals for criminal mischief and trespassing after they allegedly sabotaged an under-construction pipeline at a site near New Salem, North Dakota by placing a crate of miscellaneous items in the pipe. According to the pipeline's lead safety inspector, had the crate gone undetected, it could have made the pipeline into a "pipe bomb" capable of killing bystanders once a "pig" is run through the pipeline.* The individuals also broke the keys off in the ignition of machinery and spray-painted the messages "WATER IS LIFE," "NO DAPL," and "RISE UP!!! ILLINOIS + IOWA NO DAPL."[85] The individuals are awaiting trial.

* (U) A "pig" is a device used to check for pipeline leaks.

- (U//LES) On 6 September, an unknown number of individuals damaged electrical wires of construction equipment at an oil pipeline construction site near St. Anthony, North Dakota, creating a threat to worker safety. Additionally, the attackers cut hoses, punctured a tire, filled a radiator with fire extinguisher suppressant, and filled fuel tanks with dirt. There have been no arrests or claims of responsibility for the attacks.[86]

- (U//LES) During the early morning hours of 31 July, 1 August, and 15 October, an unknown individual(s) set fires targeting heavy machinery at three construction sites associated with DAPL in Mahaska and Jasper Counties, Iowa, resulting in over $3 million in damage.[87] There have been no arrests or claims of responsibility for the attacks.[88,89,90,91]

- (U//LES) On 09 November, an unknown number of individuals set fire to four pieces of heavy construction equipment in Buena Vista County, Iowa. According to law enforcement, two additional pieces of equipment were prepped for burning but not set on fire. There have been no claims of responsibility for the attack.[92]

- (U//LES) Between 24 and 25 September, unidentified environmental extremists sabotaged five pieces of heavy equipment at DAPL site near Winfred, South Dakota. The sabotage included cutting brakes and electrical wiring, causing a potential threat to worker safety. Additionally, dirt was found in the motor, and rocks and gravel were found in swing boxes. Estimated damages are over $50,000. Two individuals were identified as suspects and provisionally charged with first degree vandalism pending arrest.[93]

(U) OBSERVATIONS/TTPS:

(U//LES) ***Sabotaging Heavy Equipment:*** The attackers targeted construction equipment at multiple sites—including bulldozers, a track hoe, excavators, and side-booms, according to law enforcement reporting.[94,95] Some of the fires originated in the vehicles' cab compartments.[96]

(U//LES) ***Use of Simple Fires:*** In all cases, the arsons committed against construction equipment did not involve use of complex improvised incendiary devices, such as those that employ a time-delay mechanism to initiate a fire, according to law enforcement.[97,98]

(U//LES) ***Possible Pre-Operational Surveillance:*** A few days prior to the Mahaska County attack, construction workers reported seeing an individual in a vehicle slowly driving past one of the construction sites and taking photographs, according to law enforcement.[99]

(U//FOUO) ***Puncturing Pipelines:*** Between 28 February and 17 March 2017, an unknown number of individuals at multiple DAPL-related aboveground valve stations in Iowa and South Dakota used a welding torch or similar tool to pierce segments of pipeline filled with nitrogen gas, which is pumped into pipelines to test for leaks. While nitrogen gas is non-flammable and poses no physical danger to the public, the hissing sound of gas escaping through puncture holes could lead to panic.[100,101,102] Additionally, at an Iowa site that received a similar puncture attack, graffiti spray-painted on the control building declared "UR Children Need Water," "Oil is Death," and "Mni Wiconi"—a phrase that has recently become popular among opponents of DAPL campaign that means "water is life" in the Lakota Indian tribe language.[103]

(U//FOUO) Outlook: Tactics and Drivers of Pipeline-Related Violence in Near Term

(U//FOUO) We assess environmental rights extremists are likely to use some of these same criminal and violent tactics in attempts to disrupt other US energy projects for the remainder of 2017. Most of these tactics, which are available online for all to see, are relatively easy to carry out have perceived utility among environmental rights extremists in the larger effort to halt DAPL construction.

(U//FOUO) We further assess the following developments, if observed, could lead to an *increased threat* of violence in the coming months from environmental rights extremists against pipeline-related entities in the Midwest and Western United States:

- (U//FOUO) High-profile instances or allegations of excessive use of force during law enforcement actions related to pipeline construction;
- (U//FOUO) Death or serious injury to occupiers at the hands of law enforcement, making "martyrs" for the cause; and
- (U//FOUO) New Canadian pipelines are constructed—such as the Canadian Trans Mountain pipeline—potentially creating new grievances and resulting in enhanced sharing of violent TTPs between US and Canadian environmental rights extremists.

(U//FOUO) We assess the following developments, if observed, could lead to a *decreased threat* of violence:

- (U//FOUO) Law enforcement blockades prevent resupply of remaining occupiers; and
- (U//FOUO) Indigenous leaders involved in anti-pipeline campaigns ask remaining occupiers to leave out of concerns about the impending spring floods along the Missouri River and tributaries.

(U) Intelligence Gaps

- (U//FOUO) Which camps house individuals who have an interest in using lethal weapons such as IEDs against law enforcement or pipeline entities in the future?
- (U//FOUO) Were training camps established to teach violent tactics to environmental rights extremists prior to their arrival in the region?
- (U//FOUO) Why are individuals conducting surveillance on law enforcement personnel and member of their family?
- (U//FOUO) What coordinated resourcing and funding is available to environmental rights extremists?

(U//FOUO) Comments, requests, or shareable intelligence may be directed to: STIC at 877-455-7842 or STIC@isp.state.il.us; DOI/FC at 515-725-6310 or intca@dps.state.ia.us; MNFC at 651-793-3730 or mn.fc@state,mn.us; MATIC at 406-444-1330 or dojintel@mt.gov; NDSLIC at 701-328-8172 or ndslic@nd.gov; *SDFC* at 866-466-5263 or sdfusioncenter@state.sd.us; WSFC at 877-843-9522 or intake@wsfc.wa.gov.

(U) Source Summary Statement

(U) The information used in this *FAR* is drawn from open source reporting, court documents, and DHS and other law enforcement intelligence reports. We have **high confidence** in the information obtained from DHS, court, other US Government and law enforcement agencies. We have **medium confidence** in the information obtained from open sources, which includes reports from the news media, NGOs, and Internet websites whose information is credibly sourced and plausible but may contain biases or unintentional inaccuracies. When possible, open source information has been corroborated through other law enforcement and government sources.

(U//FOUO) We have **medium confidence** in our assessment that the October 2016 simultaneous valve shutoff attacks against five pipelines along the US–Canada border by suspected environmental rights extremists showed a higher level of coordination than members of the movement typically exhibit, as our judgment is based on our review of TTPs used in historical environmental rights extremist attacks.

(U//LES) We have **high confidence** in our assessment that suspected environmental rights extremists exploited Native American causes in furtherance of their own violent agenda during a campaign to halt construction of the DAPL in the Midwest and Western United States in 2016. Our judgment is based on press reporting indicating alliances by the larger environmental movement and indigenous entities, as well as by environmental rights extremists issuing communiqués in support of indigenous causes.

(U//FOUO) We have **low-to-medium confidence** in our assessment that while some characteristics of 2016 arsons against Iowa pipeline construction could be indicative of an environmental rights extremist attack, other factors could reasonably suggest a possible non-ideological motive. Our assessment is influenced by the following factors: the targets' proximity and relationship with DAPL; arson attacks targeting construction sites are an established tactic of the movement; a lack of graffiti and communiqués claiming responsibility for the attack; and a lack of attacks from the movement in Iowa. Our confidence in this assessment is lessened by the possibility that new information emerges related to the incident.

(U//FOUO) We have **medium confidence** in our assessment that environmental rights extremists are likely to use some of these same criminal and violent tactics in attempts to disrupt other US energy projects in the coming year. Our judgment is based on the fact that most of these tactics being easy to carry out, widely available online, and their perceived utility in halting DAPL construction efforts in the remainder of 2017.

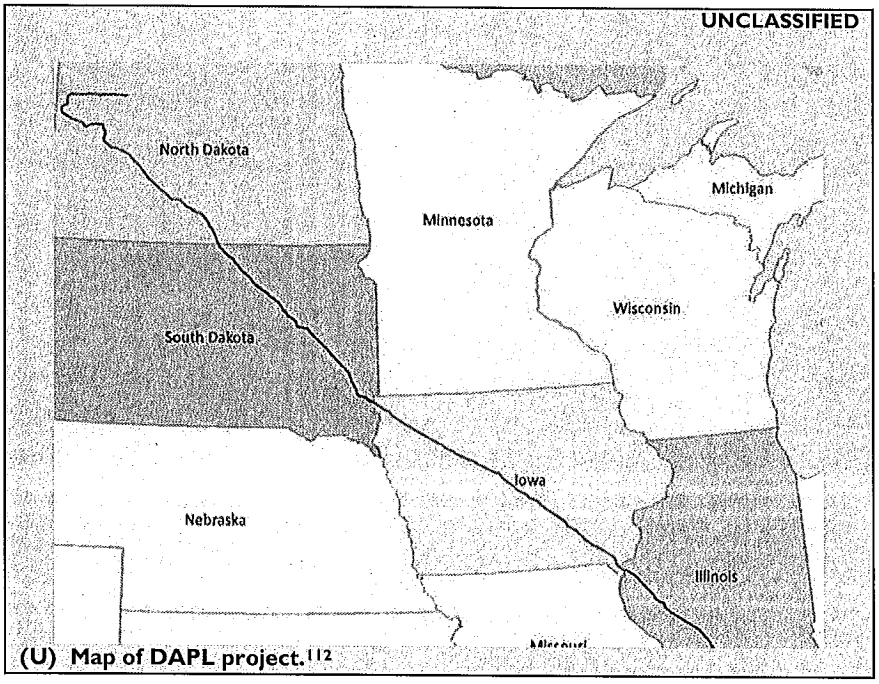
(U) Report Suspicious Activity

(U) To report suspicious activity, law enforcement, Fire-EMS, private security personnel, and emergency managers should follow established protocols; all other personnel should call 911 or contact local law enforcement. Suspicious activity reports (SARs) will be forwarded to the appropriate fusion center and FBI Joint Terrorism Task Force for further action. For more information on the Nationwide SAR Initiative, visit http://nsi.ncirc.gov/resources.aspx.

(U//LES) Tracked by: PIR-IA-CVE.2.2.2; PIR-IA-CVE.2.2.3 DHS-NFCA-2016/17-KIQ-24 HSEC-8.1, HSEC 8.2; HSEC-8.3; HSEC-8.5; HSEC-8.6; HSEC-8.8; HSEC-8.10' HSEC-10.1; HSEC-10.2' HSEC-10.5' HSEC-10.6; HSEC-10.8; HSEC-10.10; IADOIFC–17–IRT1; IADOIFC–17–IRK1; IADOIFC–17–IRV6; MATIC-05.5.2015; MN01.3; MN07.1; ND-HSEC 8.1; ND-HSEC 8.2; ND-HSEC 8.3; ND-HSEC 8.5; ND-HSEC 8.6; ND-HSEC 8.8; ND-HSEC 8.10; ND-HSEC 10.1; ND-HSEC10.2; ND-HSEC 10.5; ND-HSEC 10.6; ND-HSEC 10.8; ND-HSEC 10.10; HSEC-02-02000-P1-SD-2010; HSEC-02-03000-P1-SD-2010; STIC-SIN-8.1; STIC-SIN-12.1; STIC-SIN-12.7; STIC-SIN-12.11; WSFC-1.1l WSFC-1.3.1; WSFC-1.5; WSFC-1.6; WSFC-1.8.1; WSFC-1.8.2; WSFC-1.8.3; WSFC-1.9.5; WSFC-1.10.1.

(U) Appendix A: The Dakota Access Pipeline

(U//LES) The Dakota Access Pipeline project is an underway $3.78 billion construction project to build a 1,172-mile, 30-inch diameter pipeline for transporting US light sweet crude oil from the Bakken and Three Forks production areas of North Dakota to existing pipelines in Patoka, Illinois for further distribution to refining markets.[104] DAPL construction attracted controversy as a result of a North Dakota-based indigenous tribe's claims that pipeline leaks would contaminate the water supply of their reservation.[105] In July 2016, the tribe filed a lawsuit against the US Army Corps of Engineers for its role in granting permits to build the pipeline.[106] The lawsuit spurred a series of protests and demonstrations near the reservation.[107] Members of other Indian tribes—as well as environmental rights extremists who share the tribes' underlying goal of halting construction of the pipeline—have traveled from across the United States and Canada to join the occupation.[108,109] Since August 2016, there have been hundreds of arrests for criminal and violent incidents at encampments set up by anti-pipeline groups and nearby DAPL-related sites in an effort to stymie construction efforts.[110,111]



(U) Map of DAPL project.[112]

(U) Appendix B: Prior Energy Sector Attacks by Environmental Rights Extremists

(U//FOUO) The pipeline attacks in the Midwest and Western United States in the latter half of 2016 were the first significant environmental rights extremist attacks targeting the transportation and energy sectors since September 2015. The last known attack specifically targeting a pipeline occurred in Texas in 2012.

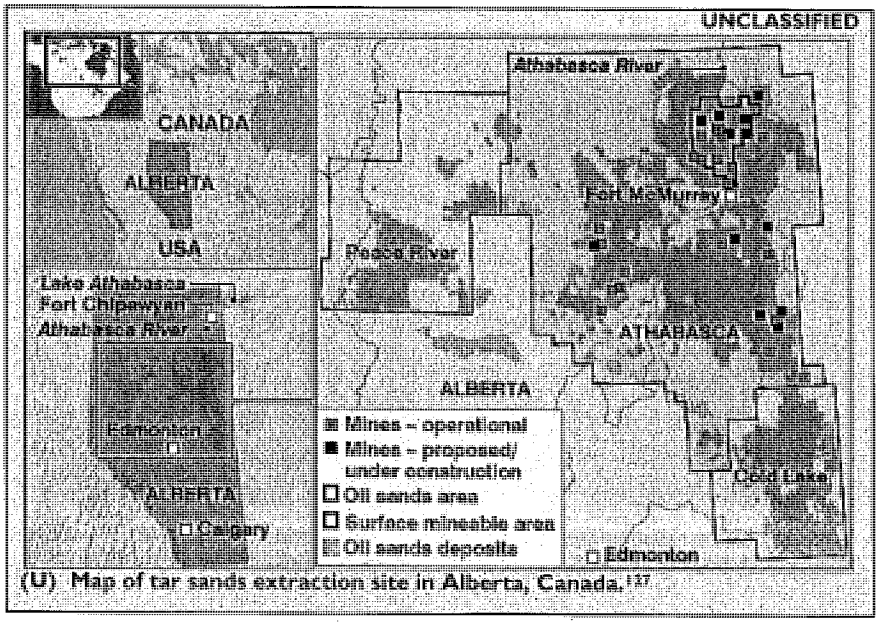
- (U//LES) On 16 September 2015, environmental rights extremist Rory Lynn Gunderman exchanged gunfire with South Dakota law enforcement officers and then fatally shot himself. Subsequently, law enforcement officers located Gunderman's remote campsite in Custer County, South Dakota, where they discovered a stolen weapon, digital media, and the components necessary to manufacture numerous IEDs.[113] According to recovered evidence, Gunderman purchased numerous IED components in Spearfish, South Dakota on 8 September 2015.[114] Analysis of digital media in Gunderman's possession revealed recently accessed copies of al-Qa'ida in the Arabian Peninsula's *Inspire* magazine, including editions 1, 10, and 12.[115] Though the exact targets and timing of Gunderman's plot remain unknown, his behavior and statements indicated a fixation on the energy sector.[116] Gunderman additionally claimed membership in the Crescent City, California-based Deep Green Resistance[USPER]. Though the group maintains it only engages in nonviolent activities, the organization promotes the belief that a separate "underground" is needed to conduct violent "direct action" in order to save humanity and other life on earth from environmental disaster. This violent direct ation would include attacks against critical infrastructure "to disrupt and dismantle industrial civilization."[117]

- (U//LES) In September 2014, a suspected environmental rights extremist(s) in Washington stole a bulldozer and drove it into the base of a US Department of Energy 500-kilovolt powerline tower in an apparent attempt to knock the tower down. The incident did not result in any significant damage. Graffiti associated with anti-capitalism and environmental rights extremism was spray-painted at the scene and on nearby structures. Graffiti included the phrase "#killcap" ("Kill Capitalism"), "Corrupt Society," and "ELF," the acronym for the environmental rights extremist movement Earth Liberation Front. The case is currently under investigation.[118,119]

- (U) From 17 to 18 June 2012, environmental rights extremist Anson Chi[USPER] set off a series of explosive devices on top of an Atmos[USPER] gas pipeline in Plano, Texas. Chi intended to damage the pipeline and disrupt natural gas flow. He was sentenced to 20 years in prison without parole on 30 June 2014.[120,121] Chi pled guilty to a charge of attempting to destroy a natural gas pipeline used in interstate commerce, and to a charge of possessing an explosive device not registered with the National Firearms Registration and Transfer Record.[122] Chi also contacted well known convicted bomber Theodore Kaczynski[USPER] to be a mentor; Kaczynski eventually broke off contact and told Chi to seek professional help.[123]

(U) Appendix C: Tar Sands

(U) Several pipelines along the US–Canadian border carry crude oil into the United States for refinement and distribution.[124] Alberta, Canada has one of the world's largest deposits of a particularly thick and heavy form of crude oil known as tar sands oil. Tar sands oil is controversial because of perceived negative impacts to the environment that occur during mining, processing, and transporting the oil—such as large CO_2 emissions contributing to climate change, contamination of groundwater during extraction, and destruction of natural resources used by indigenous tribes.[125] In October 2016, US environmental rights extremists engaged in coordinated attacks to disrupt five border pipelines perceived to be transporting tar sands oil from Canada into the United States.[126]



(U) Map of tar sands extraction site in Alberta, Canada.[127]

(U//FOUO) Appendix D: Behavioral Indicators of Planned Criminal or Violent Activities Targeting Pipelines

(U//FOUO) There are a number of potential behaviors and indicators of planned criminal or violent activities targeting pipelines and associated entities. Some of these behavioral indicators may be constitutionally protected activities and should be supported by additional facts to justify increased suspicions.

- (U//FOUO) Planning of violent activities related to major protests on message boards, social networking sites, or in Internet chat rooms;
- (U//FOUO) Reports of rhetoric indicating a desire to manually close pipeline valves or engage in violence targeting pipelines and associated entitities;
- (U//FOUO) Possession of bolt cutters to cut security fencing or locks and homemade devices to chain oneself to pipeline valves or construction equipment;
- (U//FOUO) Reports of graffiti threatening violence related to a pipeline;
- (U//FOUO) Threatening phone calls or e-mails to corportate executives, businesses, or contractors associated with pipeline construction efforts;
- (U//FOUO) Signs of trespassing or suspicious persons in construction areas—possibly indicating pre-incident surveillance;
- (U//FOUO) Reports of individuals wearing all dark or black clothing and masks or bandanas without a reasonable explanation;
- (U//FOUO) Possession of sharp or blunt objects (knives, axes, machetes, dowels, tire irons) or illegal firearms during protests;
- (U//FOUO) Reports of attacks on opposition vehicles, possibly involving lighting them on fire or using them as roadblocks;
- (U//FOUO) Reports of individuals acquiring materials that could be used to build improvised incendiary devices (e.g., propane gas canisters) or IEDs without a reasonable explanation;
- (U//FOUO) Reports of individuals moving heavy materials (e.g., fences, tires, trashcans, or dumpsters) to make barricades during protests, possibly with the intention to light them on fire;
- (U//FOUO) Reports of individuals pilfering bricks, rebar, or pipes from construction sites for use as potential projectiles;
- (U//FOUO) Pre-staging of bricks, rocks, or debris near protest sites for possible use as weapons;
- (U//FOUO) Reports of individuals carpooling from other locations to engage in planned criminal or violent acts during protests; and
- (U//FOUO) Reports of drivers not obeying law enforcement directions at traffic control checkpoints.

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EXHIBIT E

FIELD ANALYSIS REPORT

(U//FOUO) TTPs Used in Recent US Pipeline Attacks by Suspected Environmental Rights Extremists

per DHS I&A

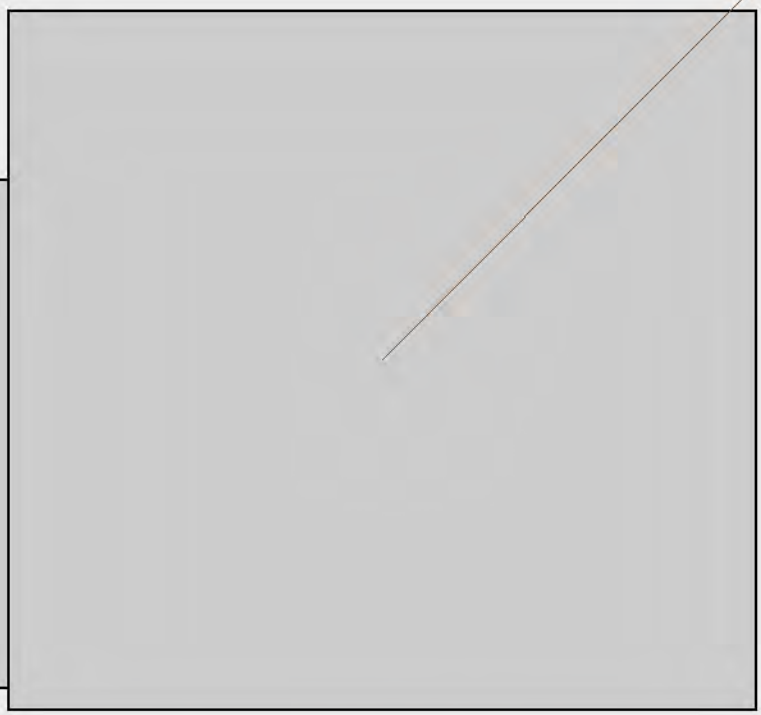
(b)(7)(E)

2 May 2017

per DHS I&A

(b)(7)(E)

Homeland Security



Office of Intelligence and Analysis

(b)(7)(E)

per DHS I&A

FIELD ANALYSIS REPORT

Regional Analysis with National Perspective.

2 May 2017

(U//FOUO) TTPs Used in Recent US Pipeline Attacks by Suspected Environmental Rights Extremists

(b)(7)(E)

(b)(7)(E)

(U//FOUO) Prepared by the

*(U) **Scope:** This* Field Analysis Report (FAR) *highlights recent criminal disruptions and violent incidents against pipeline projects in the Midwestern and Western United States in 2016, and* (b)(7)(E);(b)(3):50 U.S.C. § 3024(i);(b)(3):6 U.S.C. § 121(d)(11) per DHS I&A

(b)(7)(E);(b)(3):50 U.S.C. § 3024(i);(b)(3):6 U.S.C. § 121(d)(11)

This product is intended to assist government and law enforcement security partners in identifying, deterring, preventing, and responding to potential threats against pipelines and related entities. It includes a discussion of drivers possibly affecting the future threat of pipeline-related violence from environmental rights extremist violence.

(b)(7)(E);(b)(3):50 U.S.C. §

(U) Key Judgments

per DHS I&A

(b)(7)(E);(b)(3):50 U.S.C. §

- (U//FOUO)

per DHS I&A

(b)(7)(E);(b)(3):50 U.S.C. §

- (U//LES)

per DHS I&A

(b)(7)(E);(b)(3):50 U.S.C. §

- (U//FOUO)

per DHS I&A

(b)(7)(E);(b)(3):50 U.S.C. §

- (U//LES)

per DHS I&A

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* (U//FOUO) DHS defines **environmental rights extremists** as groups or individuals who facilitate or engage in acts of unlawful violence against people, businesses, or government entities perceived to be destroying, degrading, or exploiting the natural environment.

† (U//FOUO) DHS defines **terrorism** as any activity that involves an act that is dangerous to human life or potentially destructive to critical infrastructure or key resources, and is a violation of the criminal laws of the United States or of any state or other subdivision of the United States and appears to be intended to intimidate or coerce a civilian population to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping.

‡ (U) For background information on DAPL, see Appendix A.

§ (U) **Doxing** attacks often include posting on websites targeting individuals' personal background, associates or family, place of employment, home address, or contact information.

(b)(7)(E);(b)(3):50 USC §

(b)(7)(E);(b)(3):50 USC §

- (U//FOUO)

per DHS I&A

(b)(7)(E);(b)(3):50 USC §

(b)(7)(E);(b)(3):50 USC §

(U) Significant Incidents in 2016

(U//FOUO)

per DHS I&A

(U) Environmental Rights Extremists

(U//LES) Environmental rights extremists have a long history of committing violent acts across the United States against entities they perceive are damaging the environment. Since the movement's inception in the 1980s, adherents have been responsible for many criminal acts and threats of violence, such as arson, as well as hundreds of other criminal acts resulting in damages in the tens of millions of dollars to targeted corporations and businesses, including energy and transportation industry targets.[1],*,†

(b)(7)(E);(b)(3):50 USC §

(b)(7)(E);(b)(3):50 USC §

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(b)(7)(E);(b)(3):50 USC §

(b)(7)(E);(b)(3):50 USC §

(U) Valve Shutoffs along Northern Border

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(b)(7)(E);(b)(3):50 USC §

(b)(7)(E);(b)(3):50 USC §

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* (U//FOUO) DHS recognizes that individuals associated with various groups and movements participated in criminal and violent acts against pipelines in 2016. For the purposes of this paper, these individuals are referred to as environmental rights extremists, as these campaigns were fundamentally about protecting the environment—whether that is opposing oil pipeline construction projects or protecting the indigenous water supply from pollution.

† (U) For other examples of environmental rights extremists attacks against the energy sector, see Appendix B.

per DHS I&A

(b)(7)(E);(b)(3):50 U.S.C. §

(U) OBSERVATIONS/TTPS

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(U//LES) (b)(7)(E);(b)(3):50 U.S.C. § 3024(i);(b)(3):6 U.S.C. § 121(d)(11)

(b)(7)(E);(b)(3):50 U.S.C. § 3024(i);(b)(3):6 U.S.C. § 121(d)(11)

per DHS I&A

per DHS I&A

(U) Figure 1. Alleged pipeline a

(b)(7)(E);(b)(3):50 U.S.C. §

(U//LES)

(b)(7)(E);(b)(3):50 U.S.C. § 3024(i);(b)(3):6 U.S.C. § 121(d)(11)

(b)(7)(E);(b)(3):50 U.S.C. §

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(b)(7)(E);(b)(3):50 U.S.C. § 3024(i);(b)(3):6 U.S.C. § 121(d)(11)

(b)(7)(E);(b)(3):50 U.S.C. §

(U//LES)

* (U) For background information on tar sands, see Appendix C.

(b)(7)(E);(b)(3):50 U.S.C. §

(b)(7)(E);(b)(3):50 U.S.C. §

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(b)(7)(E);(b)(3):50 U.S.C. §

(b)(7)(E);(b)(3):50 U.S.C. §

(U) Escalation to Violence at DAPL Occupation in North Dakota

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(b)(7)(E);(b)(3):50 U.S.C. §

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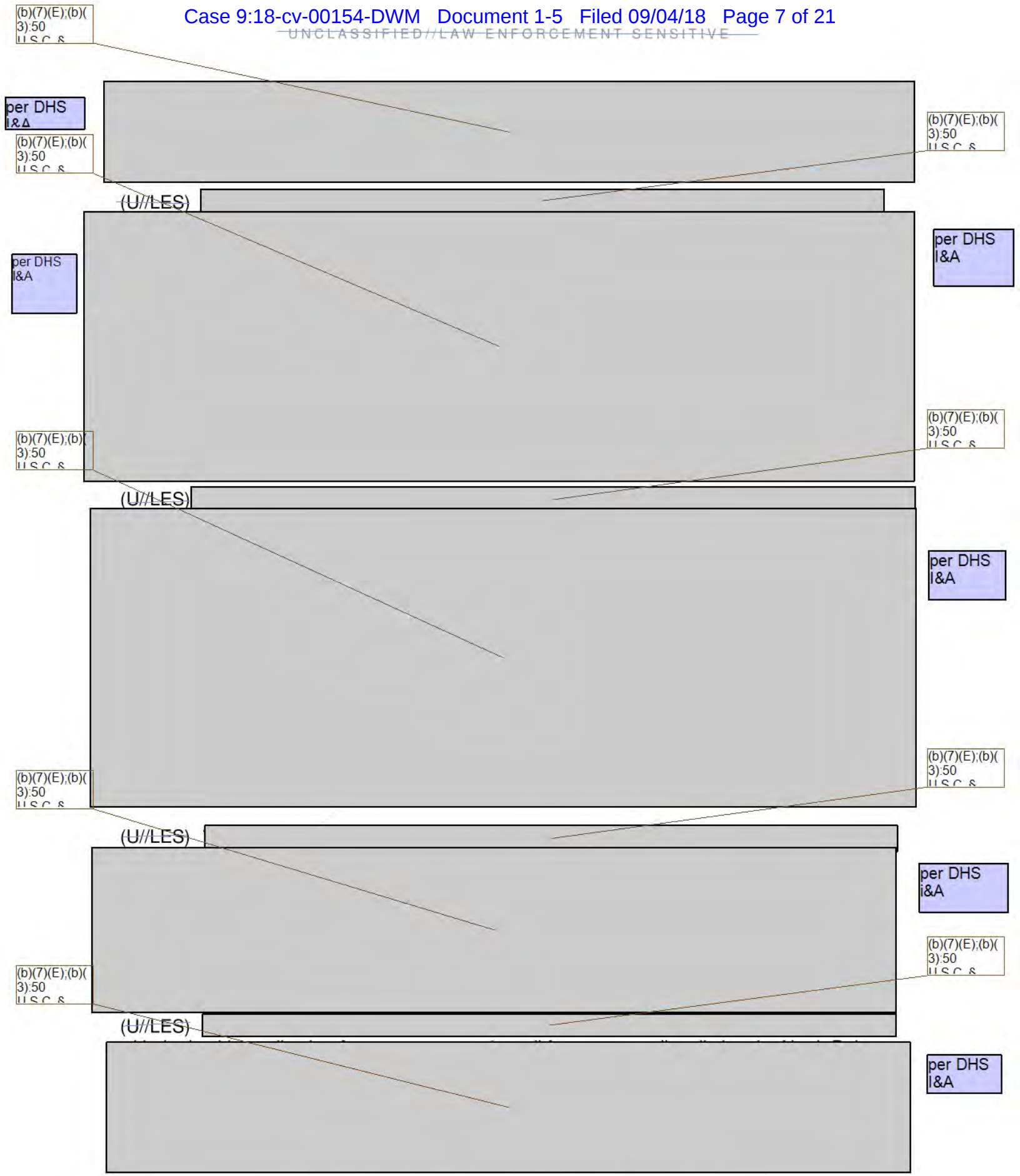
* (U) The Dakota Access Pipeline is sometimes referred to as the Bakken Oil Pipeline.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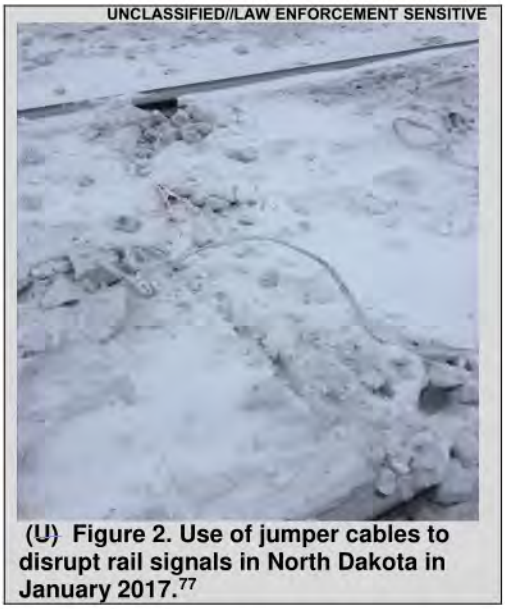

(U) Figure 2. Use of jumper cables to disrupt rail signals in North Dakota in January 2017.[77]

(b)(7)(E);(b)(3):50 U.S.C. §

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(U) Figure 3. Use of burning tires and vehicles as barricades in North Dakota anti-DAPL in October 2016.[80]

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* (U) A "pig" is a device used to check for pipeline leaks.

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(U//FOUO) Outlook: Tactics and Drivers of Pipeline-Related Violence in Near Term

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(U//FOUO) We assess the following developments, if observed, could lead to a *decreased threat* of violence:

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(U) Intelligence Gaps

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(U//FOUO) Comments, requests, or shareable intelligence may be directed to: or

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(U) Source Summary Statement

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(U) The information used in this *FAR* is drawn from open source reporting, court documents, and DHS and other law enforcement intelligence reports. We have **high confidence** in the information obtained from DHS, court, other US Government and law enforcement agencies. We have **medium confidence** in the information obtained from open sources, which includes reports from the news media, NGOs, and Internet websites whose information is credibly sourced and plausible but may contain biases or unintentional inaccuracies. When possible, open source information has been corroborated through other law enforcement and government sources.

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(U) Report Suspicious Activity

(U) To report suspicious activity, law enforcement, Fire-EMS, private security personnel, and emergency managers should follow established protocols; all other personnel should call 911 or contact local law enforcement. Suspicious activity reports (SARs) will be forwarded to the appropriate fusion center and FBI Joint Terrorism Task Force for further action. For more information on the Nationwide SAR Initiative, visit http://nsi.ncirc.gov/resources.aspx.

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(U) Appendix A: The Dakota Access Pipeline

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(b)(7)(E);(b)(3):50 U.S.C. §

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(U//LES) The Dakota Access Pipeline project is an underway $3.78 billion construction project to build a 1,172-mile, 30-inch diameter pipeline for transporting US light sweet crude oil from the Bakken and Three Forks production areas of North Dakota to existing pipelines in Patoka, Illinois for further distribution to refining markets.[104]

In July 2016, the tribe filed a lawsuit against the US Army Corps of Engineers for its role in granting permits to build the pipeline.[106] The lawsuit spurred a series of protests and demonstrations near the reservation.[107]

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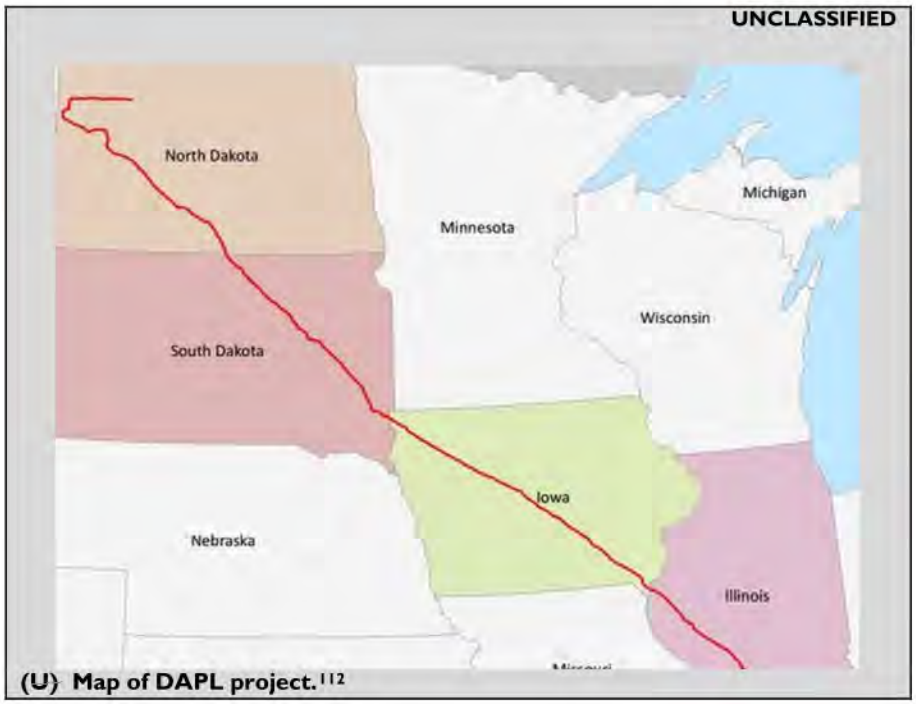

(U) Map of DAPL project.[112]

(U) Appendix B: Prior Energy Sector Attacks by Environmental Rights Extremists

(U//FOUO) The pipeline attacks in the Midwest and Western United States in the latter half of 2016 were the first significant environmental rights extremist attacks targeting the transportation and energy sectors since September 2015. The last known attack specifically targeting a pipeline occurred in Texas in 2012.

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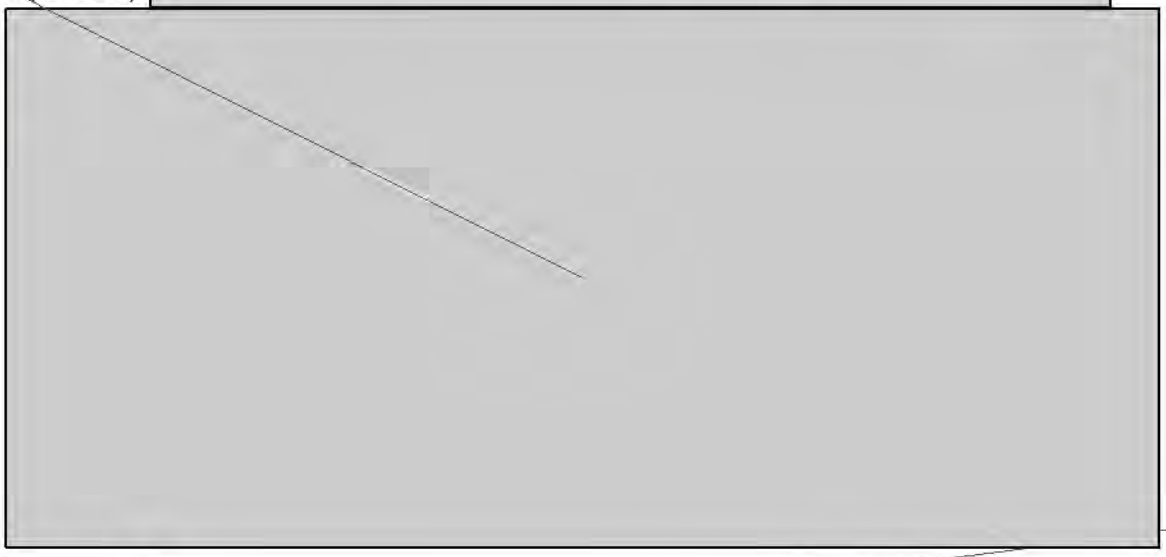

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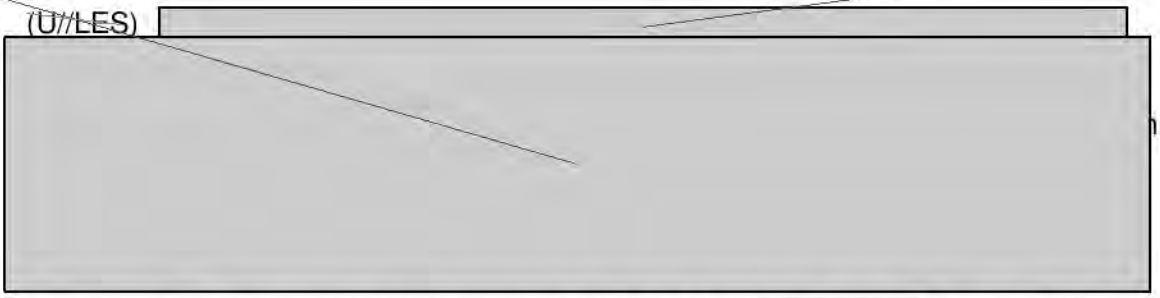
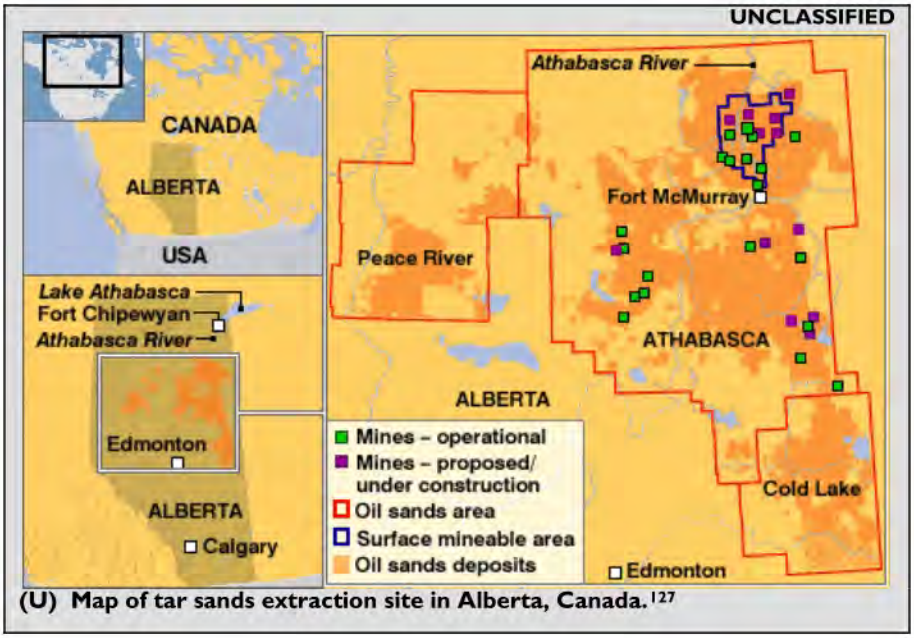


- (U) From 17 to 18 June 2012, environmental rights extremist Anson Chi[USPER] set off a series of explosive devices on top of an Atmos[USPER] gas pipeline in Plano, Texas. Chi intended to damage the pipeline and disrupt natural gas flow. He was sentenced to 20 years in prison without parole on 30 June 2014.[120,121] Chi pled guilty to a charge of attempting to destroy a natural gas pipeline used in interstate commerce, and to a charge of possessing an explosive device not registered with the National Firearms Registration and Transfer Record.[122] Chi also contacted well known convicted bomber Theodore Kaczynski[USPER] to be a mentor; Kaczynski eventually broke off contact and told Chi to seek professional help.[123]

(U) Appendix C: Tar Sands

(U) Several pipelines along the US–Canadian border carry crude oil into the United States for refinement and distribution.[124] Alberta, Canada has one of the world's largest deposits of a particularly thick and heavy form of crude oil known as tar sands oil. Tar sands oil is controversial because of perceived negative impacts to the environment that occur during mining, processing, and transporting the oil—such as large CO_2 emissions contributing to climate change, contamination of groundwater during extraction, and destruction of natural resources used by indigenous tribes.[125] In October 2016, US environmental rights extremists engaged in coordinated attacks to disrupt five border pipelines perceived to be transporting tar sands oil from Canada into the United States.[126]



(U) Map of tar sands extraction site in Alberta, Canada.[127]

per DHS I&A

(U//FOUO) Appendix D: Behavioral Indicators of Planned Criminal or Violent Activities Targeting Pipelines

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(U//FOUO) There are a number of potential behaviors and indicators of planned criminal or violent activities targeting pipelines and associated entities. Some of these behavioral indicators may be constitutionally protected activities and should be supported by additional facts to justify increased suspicions.

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Page 16 of 20

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of the Freedom of Information and Privacy Act

Page 17 of 20

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of the Freedom of Information and Privacy Act

Page 18 of 20

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of the Freedom of Information and Privacy Act

Page 19 of 20

Withheld pursuant to exemption

(b)(7)(E);(b)(3):50 U.S.C. § 3024(i);(b)(3):6 U.S.C. § 121(d)(11)

of the Freedom of Information and Privacy Act

Homeland Security

Office of Intelligence and Analysis

Customer Feedback Form

Product Title: (U//FOUO) TTPs Used in Recent US Pipeline Attacks by Suspected Environmental Rights Extremists

All survey responses are completely anonymous. No personally identifiable information is captured unless you voluntarily offer personal or contact information in any of the comment fields. Additionally, your responses are combined with those of many others and summarized in a report to further protect your anonymity.

1. Please select partner type: Select One **and function:** Select One

2. What is the highest level of intelligence information that you receive? Select One

3. Please complete the following sentence: "I focus most of my time on:" Select One

4. Please rate your satisfaction with each of the following:

	Very Satisfied	Somewhat Satisfied	Neither Satisfied nor Dissatisfied	Somewhat Dissatisfied	Very Dissatisfied	N/A
Product's overall usefulness	○	○	○	○	○	○
Product's relevance to your mission	○	○	○	○	○	○
Product's timeliness	○	○	○	○	○	○
Product's responsiveness to your intelligence needs	○	○	○	○	○	○

5. How do you plan to use this product in support of your mission? ***(Check all that apply.)***

- ☐ Drive planning and preparedness efforts, training, and/or emergency response operations
- ☐ Observe, identify, and/or disrupt threats
- ☐ Share with partners
- ☐ Allocate resources (e.g. equipment and personnel)
- ☐ Reprioritize organizational focus
- ☐ Author or adjust policies and guidelines
- ☐ Initiate a law enforcement investigation
- ☐ Intiate your own regional-specific analysis
- ☐ Intiate your own topic-specific analysis
- ☐ Develop long-term homeland security strategies
- ☐ Do not plan to use
- ☐ Other:

6. To further understand your response to question #5, please provide specific details about situations in which you might use this product.

7. What did this product *not* address that you anticipated it would?

8. To what extent do you agree with the following two statements?

	Strongly Agree	Agree	Neither Agree nor Disagree	Disagree	Strongly Disgree	N/A
This product will enable me to make better decisions regarding this topic.	○	○	○	○	○	○
This product provided me with intelligence information I did not find elsewhere.	○	○	○	○	○	○

9. How did you obtain this product? Select One

10. Would you be willing to participate in a follow-up conversation about your feedback? Yes

To help us understand more about your organization so we can better tailor future products, please provide:

Name:		*Position:*	
Organization:		*State:*	
Contact Number:		*Email:*	

Submit Feedback

Privacy Act Statement

Combating Government Secrecy Through Freedom of Information

FOIA

A Best Practices Guide to FOIA Collaboration

About Open the Government (OTG)

Open the Government is an inclusive, nonpartisan coalition that works to strengthen our democracy and empower the public by advancing policies that create a more open, accountable, and responsive government.

Author

Jesse Franzblau is a policy analyst and freedom of information advocate specializing in the use of transparency laws to document U.S. national security, surveillance and domestic law enforcement policies.

Acknowledgements

Open the Government expresses appreciation for its coalition partners and all of the organizations that appeared in this guide for providing a model on how to best use FOIA to advance the public's right to know. We would also like to give special thanks to all the FOIA advocates, litigators, and journalists for sharing their insight and expertise during the writing of this report.

The author is especially grateful for the tremendous support and contributions from the Open the Government team: Lisa Rosenberg, Executive Director; Wayne Besen, Communications Director; and Emily Manna, Policy Analyst.

I. INTRODUCTION

The right to information is a powerful counterweight to government secrecy, vital to protecting the public from government overreach, waste, and abuse. For over 50 years, the federal law that has secured this right in the United States is the Freedom of Information Act (FOIA) – used by journalists, advocates, and the public to shine light on government actions carried out in our name, but without our knowledge. FOIA is a pivotal gateway to government transparency and is used extensively by organizations in the Open the Government (OTG) coalition to fuel advocacy campaigns and advance openness policies.

As new secrecy challenges have emerged with the advent of the Trump Administration,[1] public interest groups are increasingly looking to FOIA as an avenue to access government information.[2] FOIA requesters, however, face constant obstacles that include long delays, abused FOIA exemptions, and heavily censored documents. There are myriad ways agencies impede access to information, and understanding the contours of the law can help overcome these hurdles. FOIA works best when requesters are not only armed with knowledge of the inner-workings of FOIA, but also look towards collaboration as an avenue to overcoming the many challenges to access.

The growth in FOIA use provides new opportunities for cross-sector coordination on openness initiatives. Collaboration helps maximize the power of the law by linking experts doing FOIA work across policy areas to facilitate more strategic and effective requesting, resulting in stronger demands for information and greater overall transparency. Coordination is also critical to reduce redundancy and excess requests that bog down FOIA offices, and to ensure requesters exhaust all avenues to obtain the desired information and choose strategically when bringing FOIA lawsuits.

OTG brings together groups to facilitate coordination between advocates and open government experts on ways to increase access to information and best utilize FOIA.[3] This guide highlights successful collaborative approaches to FOIA identified during coalition strategy meetings and roundtable discussions and provides recommendations to help plan productive FOIA efforts.

The Guide

The guide presents a collection of case studies of FOIA initiatives that have led to important information disclosures. The examples identify best practices in collaborative FOIA efforts and investigative work involving openness advocates, journalists, litigators and grassroots organizations working on a range of

policy issues. Recommendations based on the lessons learned from the collection of successful FOIA efforts follow the case studies.[4]

This study emphasizes the need for additional examples of successful FOIA cases to help guide FOIA work. The project is being coordinated with the Reporters Committee for Freedom of the Press, and the guide will be published on RCFP's FOIA Wiki site, which receives contributions from the FOIA Project, MuckRock, National Security Archive, FOIA Mapper, and the general public. By adding the guide to the FOIA Wiki, the goal is to provide a resource for the public to add additional coordinated FOIA efforts that stand out as notable successes, identify trends and share lessons learned.

II. FOIA SUCCESS STORIES

1. Collaborating on FOIA investigations to uncover secret lobbying

Coordinated FOIA work between transparency advocates and experienced journalists can expose documents that increase public awareness and help advance transparency reforms. The Freedom of the Press Foundation (FPF) and journalist Jason Leopold joined forces in 2016 to file targeted FOIAs and litigate to obtain Justice Department records that revealed the Obama Administration's secret efforts to block FOIA legislation. The case provides lessons on ways transparency groups can benefit from working closely with FOIA journalists to identify and obtain records that enhance advocacy goals.

In 2015, FPF filed a FOIA for evidence of secret lobbying after receiving a tip that the Obama administration had opposed a FOIA reform bill that was on the verge of passing but died in December of 2014. After receiving no records from the Justice Department, the group filed a lawsuit in to force the Department to process the request.[5]

As a result of the lawsuit, FPF received a six-page memo and email correspondence confirming suspicions of the Justice Department's efforts to undermine the reforms.[6] FPF's Executive Director Trevor Timm worked with Leopold, whose own FOIA requests yielded documents demonstrating that the SEC and FTC also meddled in reform efforts. The documents received widespread attention after Leopold published a piece for VICE News in March 2016, as Congress was again debating a new FOIA reform bill, the FOIA Improvement Act of 2016.[7]

The publication of the records, timed to correspond to that year's Sunshine Week events, raised public awareness of the urgent need for FOIA reforms and helped in the final push for the passage and signing of the FOIA bill. The reforms were a major transparency victory, enshrining provisions that advocates had been promoting for a decade and significantly advancing the public's right to know.[8]

FOIA Tip: Collaborate with investigative journalists on FOIA efforts to break stories that raise public awareness and fuel advocacy campaigns.

2. Partnering with FOIA litigators to unveil government monitoring of protests

FOIA planning between groups with the capacity to litigate and subject matter experts with grassroots reach can lead to positive transparency gains. Color Of Change (COC) is a grassroots organization that works directly with communities impacted by government surveillance practices, and the Center for Constitutional Rights (CCR) has years of experience with FOIA litigation. Together, they were able to identify relevant records and sustain litigation to secure the release of evidence of secret government monitoring of protests.

The case began in July 2016, when COC and CCR filed a set of FOIA requests with the Department of Homeland Security (DHS) and the Federal Bureau of Investigation (FBI) for records related to government monitoring of Black Lives Matter (BLM) protests and organizers.[9] The groups prepared for litigation early on in the process, under the assumption that the DHS and FBI would deny access or heavily redact the records sought. After receiving no documents from either agency, the groups filed a lawsuit in October 2016, arguing that the information requested was of vital public importance.[10]

FOIA Tip: Coordinate with groups that litigate before filing a request for sensitive information if the case is likely to require a challenge in court.

The lawsuit was cited widely in the press, and led to the release of documents on government monitoring of Black Lives Matter protests, including internal emails and field reports that were circulated among law enforcement agencies in 2016.[11] The records provide important primary source documentation that have helped increase public awareness about the civil rights and privacy threats stemming from government monitoring of organizing and dissent.

3. Planning FOIA litigation to expose secret influence of private contractors

Another case involving the Center for Constitutional Rights shows how early planning between subject matter experts and attorneys on FOIA litigation can bring about important court decisions and lay bare the influence of private companies in policymaking. In this case, Detention Watch Network (DWN) worked with CCR to prepare for litigation early, predicting that they would need to challenge the government's use of the "trade secrets" exemption to block information from release. The early planning helped prepare for the unusual intervention of private contractors in the case, and contributed to a landmark court decision opening up avenues to push for greater overall transparency in government contracting.

In November 2013, DWN and CCR filed a joint FOIA request with DHS and Immigration and Customs Enforcement (ICE) for documents relating to the "detention bed mandate," a quota set by Congress that requires ICE to maintain 34,000 beds in immigration detention centers at any given time.[12] The request asked for internal documents to better understand the impact of the quota on detention policy, including agreements with contractors and communications between private companies and government officials.

After receiving no documents in response to the request, the groups filed a lawsuit.[13] The court ruled that the details of all government contracts with private detention companies were subject to public release under the FOIA, and the government decided not to appeal the decision. However, the private prison companies CCA and GEO Group then intervened to block the release of the responsive records.

The Supreme Court denied hearing the case in October 2017, rejecting the private contractors' unusual attempt to keep the records secret after the government had acceded to the lower court's ruling.[14] The case led to the release of documents revealing how companies such as CCA and GEO Group reap enormous benefits from the bed quota, and influence policies that result in higher numbers of arrests and detentions of immigrants. The final decision marked an important gain for groups advocating against the privatization of immigration detention, and a major advancement for broader transparency efforts related to private government contracting.

4. Working with subject matter experts and journalists to reveal conflicts of interests

American Oversight coordinates on FOIA initiatives with subject matter experts and journalists in ways that exemplify good FOIA practice. As part of their investigations into harmful chemicals used by the EPA across the country, for example, the group collaborates with the Environmental Working Group (EWG), bringing together its FOIA and litigation skills with the subject matter expertise of EWG. The groups are currently pursuing a FOIA lawsuit for documents regarding EPA Administrator Scott Pruitt's decision to overrule agency scientists and continue the use of neurotoxic pesticides.[15]

American Oversight has also worked with *New York Times* journalists on efforts to raise public awareness about Pruitt's relationships to industry representatives. The group sued the EPA in June 2017 to force the agency to comply with FOIA requests for copies of Pruitt's calendars from February through May 2017, and then worked with NYT journalist Eric Lipton to analyze and draw out conclusions from the released documents. The effort sparked a front-page story that exposed how Pruitt's meeting schedule significantly favored energy and chemical industry executives and lobbyists.[16]

5. Targeting multiple agencies to uncover military involvement in domestic surveillance

Researching the various agencies that could be in possession of desired information is an important step in the FOIA process. Targeting multiple agencies with the same FOIA can help the requester get the information they are looking for, sometimes unearthing records that shed light on previously unknown government monitoring practices.

Human Rights Watch researcher Sarah St. Vincent found through FOIA work that the Air Force had documents in its archives on domestic surveillance of Americans by the military. The revelations came after St. Vincent filed FOIA requests with twenty-two federal agencies, including with other Pentagon components and the Department of Homeland Security (DHS), seeking records related to the government's use of intelligence surveillance laws for counter-narcotics or immigration enforcement purposes. The requests asked for legal, policy, and other documents relating to Section 702 of the Foreign Intelligence Surveillance Act (FISA), and Executive Order 12333, laws the government uses as the basis for large-scale U.S. surveillance programs that affect people in the United States as well as Americans abroad.[17]

The FOIAs led to the disclosure of records from the Air Force revealing for the first time a Defense Department policy that apparently authorizes warrantless monitoring of U.S. citizens and green-card holders.[18] HRW featured the documents in its reporting, and the revelations have played a central role in raising public awareness, and fueling public advocacy campaigns aimed at enhancing oversight and accountability for warrantless surveillance programs.[19]

FOIA Tip: Do background research to find out what agencies could be in possession of the desired records, and to determine if other organizations or individuals are filing similar requests.

6. Designing collaborative FOIA platforms to enhance transparency at the community level

The Electronic Frontier Foundation (EFF) and MuckRock have spearheaded vanguard initiatives that foster greater information access throughout the country. The groups provide innovative platforms for the public to file their own information requests, and obtain records needed to better understand how law enforcement policies are being implemented in local communities. The efforts exemplify ways groups with national reach can promote widespread use of state and local open records laws to access information that is not available through other channels.

EFF's "Street-Level Surveillance" documentation project is enhancing transparency relating to surveillance technologies increasingly used by law enforcement.[20] As part of the project, EFF and MuckRock created a crowd sourcing site that provides a template for anyone to file requests to get information about local law enforcement surveillance practices, such as biometrics data collection programs.[21] The information released through this project has been pivotal in community efforts to hold local law enforcement accountable for public expenses and incidents of police abuse.

FOIA Tip: Use FOIA platforms that provide samples of FOIAs already filed to shape your own petitions for records from federal and state agencies.

MuckRock has also partnered directly with local groups, such as the Lucy Parson Labs - a Chicago-based collaboration between data scientists, transparency activists and technologies - to use FOIA to investigate the use of surveillance equipment by the Chicago Police Department.[22] This collaboration has also fueled transparency and accountability efforts related to the use of new surveillance devices by law enforcement, particularly in cases where these devices have been used to target social organizing and protests.

7. Lobbying in coalitions to obtain records on government dissent

FOIA success sometimes requires working in coalitions to advocate for changes to the law. The National Security Archive (the Archive) did this successfully, joining forces with a coalition of open government advocates pushing for FOIA reforms in 2016 to limit use of certain exemptions by agencies keeping important historical records under seal. It was only after the reforms passed into law that the Archive was able to get the documents it had sought under FOIA for two decades.

The Archive first submitted a request in 1997 to the Department of State for records on the "Dissent Channel," an informal means of communication established during the Vietnam War for State Department employees to express their dissent over certain policies. The State Department denied access under Exemption 5 of the FOIA, which allows agencies to withhold certain categories of privileged information, including deliberative records. The Archive submitted the request again in 2016, this time taking advantage of the new provision that advocates fought to include in the FOIA Improvement Act that prohibited the use of Exemption 5 to claim the deliberative process privilege for records more than 25 years old. The Archive filed suit in April 2017 to compel the agency to process and finally release the requested records.[23]

The judge ruled in the Archive's favor, leading to the disclosure of files that document a long trend of formal critiques of U.S. policy by State Department Foreign Service Officers. The records provide important insight into the historical significance of the Dissent Channel, which made headlines when it

was reactivated in January 2017, when over 1,000 diplomats signed a memo opposing the White House "Travel Ban," that suspended immigration from seven majority-Muslim countries. [24]

8. Using open records laws at the state level to strengthen accountability

State and local transparency laws can be effective tools when federal agencies keep information under wraps. Journalists with *E&E News* rely on state public records laws to break stories about EPA nominees[25] and on media access restrictions imposed by the EPA when Administrator Scott Pruitt announces controversial policy changes.[26] *Washington Post* journalists have also used state-based laws to develop a database on police accountability, documenting cases of systematic police rehiring after being fired for misconduct.[27]

Organizations that focus on federal FOIA action are also using local open records laws as part of their investigative work. In one case, Citizens for Responsibility and Ethics in Washington (CREW) filed a request with the Secret Service in October 2017 for information on how much Vice President Mike Pence's trip to Indianapolis cost taxpayers, when he traveled there to watch and then leave a football game in protest. While waiting for the Secret Service to respond, CREW's Chief FOIA Counsel Anne Weismann filed an open records request with the Indianapolis Metropolitan Police Department for documentation on the cost of Pence's visit to the city to attend the football game. In response, CREW quickly received records from the Indianapolis MPD, which showed that the trip cost more than $14,000 in local police expenses. The records generated media attention and demonstrated how local and state open records laws can be powerful tools to obtain information that the federal government often withholds from the public.

FOIA Tip: Use state and local open records laws to pry open information that the federal government does not possess or shields from public view.

9. Long term FOIA investigations divulge government waste & abuse

Long-term investigative work and institutional knowledge of government policy fosters positive FOIA results. Because of their decades of experience, POGO investigators know how to target records with information on potential conflicts of interest that can be relevant years down the road. POGO's long-term investigative prowess has led to FOIA disclosures exposing waste and abuse, such as army contractors hiding deadly chemical risks, abuses by contractors providing services at torture prisons, and more.

In 2017, POGO's FOIA work helped thwart the confirmation of a nominee with a questionable past. As part of its investigations into FEMA housing contracts after Hurricane Katrina, POGO initially filed a FOIA in 2006 for records relating to the former head of FEMA's Recovery Division, Daniel Craig, including communication between Craig and companies that received $500 million in non-competitive contracts. Years later, POGO received a partial response from DHS and other records were sent to the DHS Office of the Inspector General (IG), which denied access to certain records, citing personal privacy and law enforcement exemptions.[28]

POGO appealed the decision, and 11 years after the initial request, the DHS IG finally released an investigative report to POGO, providing insight into Craig's employment negotiations with two of the four FEMA housing contractors, one of which was a client of Craig's post-FEMA employer. Around the same time as the IG release of that report, Craig's name also re-surfaced as President Trump's nominee for FEMA Deputy Administrator. Craig quickly withdrew his nomination in September 2017, however, after POGO and NBC started asking questions based on findings from the FOIA records and government officials became aware of Craig's questionable past.[29]

10. Using foreign information laws to access files on human rights abuses

International collaboration with open government groups and journalists can lead to the release of information on U.S. diplomacy and national security policies. Partnering with groups in other countries that have strong freedom of information laws opens up avenues to access information blocked by U.S. agencies. The result can lead to greater access to files relevant to better understanding the impact of U.S. assistance to governments responsible for human rights abuses, in some cases, in violation of U.S. laws.[30]

The National Security Archive regularly partners with open government organizations in other countries to coordinate use of information laws to gain access to information about issues relevant to advocacy efforts across borders. The Archive has worked with groups in Mexico, for example, to request records relating to U.S. security assistance and human rights cases.[31] The coordinated requests in both countries have led to the disclosure of records leading to press attention in the U.S. and Mexico, and supporting the advocacy efforts of human rights defenders and reform advocates in both countries.[32]

FOIA Tip: Partner with groups in other countries using access laws to get information that U.S. agencies keep secret.

III. CONCLUSION & RECOMMENDATIONS

Conclusion

Successful FOIA initiatives take place in an ecosystem encompassing an array of actors working to raise public awareness and promote government accountability. While the outcome of every FOIA case depends on multiple factors, and there is no magic template for filing requests that guarantees success, there are notable patterns that emerge when examining success stories that can help guide a requester in their approach to FOIA.

One of the primary lessons that emerge out of this study is that successful FOIA work is greatly enhanced through collaboration, which includes: coordinating with journalists to share documents and break stories; connecting subject matter experts with FOIA specialists; consulting with FOIA litigators; planning joint advocacy strategies around FOIA requests, and; working with a coalition to change the law. As the public and advocacy community relies more on FOIA, collaboration can lead to new relationships between openness advocates working on various issue areas and amplify collective demands for transparency and accountability. Increasing coordination is also important to help consolidate requests to reduce FOIA redundancy and agency backlogs.[33]

The cases examined in this guide represent a tiny fraction of the broad universe of successful FOIA initiatives, and understanding new lessons requires a much larger sample size and regular updates with new cases. By hosting this guide on the Reporters Committee for Freedom of the Press FOIA Wiki site, the goal is to encourage FOIA experts and the public to add new and emerging cases that document additional lessons to help requesters map out effective strategies in their FOIA work.

Recommendations

FOIA Fundamentals[34]

1. Do the background research

Before filing a FOIA, it is critical to do thorough background research to be able to develop a well-crafted request and to prepare to respond to FOIA offices if asked to provide additional information or narrow a request. Reaching out to other researchers, investigators, and FOIA specialists working on the same issue is an important step in the FOIA process, in order to understand what information is already available and to prepare for an administrative appeal when it is time to challenge agency denials.

2. Locate the right agency

Search the agency website for the FOIA office contact. Agencies accept requests by email, fax or mail. The Justice Department's FOIA.gov website provides directions on how to file a request, includes a portal to file directly with certain agencies, and directs users to FOIA systems of agencies that are not yet linked to the site.[35] FOIAonline is another government site run by the EPA that gives the public the ability to file requests directly with a number of agencies, including DHS and DOJ components.

3. Describe the specific records

Provide enough details about the specific records sought in FOIA requests so that the records can be located with a reasonable amount of effort. This includes information on the type of document, title, subject area, date of creation if known, original source of the record, or other relevant details. If you do not have details about specific records, provide enough event-related information, such as the date and circumstance surrounding the event the record covers, to facilitate the conduct of an organized, non-random search for your requested records.[36]

4. Request a fee waiver

Requesters can ask the agency to waive or reduce search and copy fees if they think the fees are too high, or if the fees are fair but the total charges make the request prohibitively expensive. The law provides that the agency "shall" waive or reduce fees if the requester meets the public interest test. Requesters may also be entitled to fee benefits if they fall within a certain category of requester.[37] Apart from the fee waiver request, it is important to identify yourself for fee categorization purposes, and indicate that you are a "non- commercial" requester, in order to avoid paying excessive fees.[38]

5. Expedite the requests

In some circumstances, agencies will grant a request for expedited processing for reporters, organizations or individuals who demonstrate they are "primarily engaged in disseminating information," and if the request concerns a matter of "compelling need." The Justice Department also provides for expedited processing to public interest groups for requests that concern a matter of "widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."[39] There are additional ways to avoid long processing delays, including keeping the request targeted and specific, and offering to speak with the FOIA officer to help them locate the responsive documents.

FOIA Tip: Use cloud sharing software to share requests and responsive documents with the public. The sharing provides updated examples for new and experienced requesters of FOIA best practices.

6. Target various agencies

Requesting information from multiple agencies can often yield positive results. Additionally, filing the same request with multiple agencies can also help reduce inter-agency referrals, which can add extra time to the processing of the request.

7. Appeal the denial

Federal agencies often fail to adhere to FOIA's disclosure requirements either procedurally or substantively. When this occurs, requesters can appeal adverse decisions to higher authorities within an agency.[40]

FOIA Collaboration

1. Approach FOIA with a philosophy of openness

FOIA users who consistently share their requests, appeals, and documents with the public play an essential role in advancing FOIA best practices.[41] While there is often a need to initially keep documents internal while conducting investigations or planning media strategies, the open availability of the documents ultimately leads to more efficient FOIA requesting. Through an open approach, the public can see how FOIAs are crafted, identify language that works, and avoid receiving the same FOIA denials seen in other cases.

2. Learn the landscape

Before filing requests, it is best practice to learn about other groups that are engaged in similar FOIA work, and coordinate with organizations and individuals seeking the same information. This helps build collective knowledge between groups working towards similar advocacy goals and provides opportunities for collaboration that helps reduce FOIA redundancies. By learning the landscape, requesters with subject matter expertise can benefit from connecting with FOIA experts and lawyers.

3. Plan litigation strategies early and litigate strategically

The cases highlighted in this study demonstrate that early FOIA litigation planning can help prepare for agency denials and court challenges. Preparing for a FOIA case that is expected to require litigation by working with lawyers early in the process can help lay the groundwork for success. Talking with experts who know FOIA case law is increasingly important to ensure groups are choosing litigation carefully.

4. Coordinate early with journalists

Developing relationships with journalists is important to achieving the best results from FOIA work. It is also important for journalists to reach out to FOIA experts and researchers as they shape their own requests and prepare stories.

5. Promote FOIA reforms

Successful FOIA disclosures in some cases require legislative reforms to force the release of the desired information. Groups that have been filing FOIA requests for decades provide important institutional knowledge needed to promote reforms to FOIA that strengthen the law and enhance the public's right to know.

6. Use state and local open records laws

Using state and local open records laws can be an effective way to gain access to information that the federal government blocks from disclosure. Several cases highlighted in this study show how requesting documents at the local level can provide information about federal spending and can be a powerful tool to expose government waste and abuse.

7. Look in archives overseas

Collaborating on FOIA requests with civil society groups in other countries can be an effective way to obtain relevant information on U.S. foreign policy that exists in archives overseas. Groups in countries with strong information laws can help open up avenues for information that U.S. agencies keep hidden from the public.

Check out Open the Government's report that examines attacks on the public's right to know, as well as the state of transparency in the White House, the Department of Justice, the Department of Homeland Security, and the Environmental Protection Agency.

ENDNOTES

[1] For more on the new secrecy challenges under this administration, *see Closing Democracy's Window, the Growing Culture of Secrecy in Washington and the Erosion of the Public's Right to Know*, Open the Government, March 2018: http://bit.ly/2FDIVIY.

[2] While the law was reformed in 2016 to include significant provisions aimed at advancing the public's right to know, implementation of the reforms has been inconsistent across agencies and it is difficult to document a measurable impact. Serious backlogs, agency obstruction, and overuse of exemptions are a few of the issues that public advocates still face constantly when trying to pry open information through FOIA.

[3] In December 2017, for example, OTG held a town hall that brought together open government leaders, criminal justice experts, privacy advocates, researchers, FOIA specialists, and journalists, to discuss ways to use FOIA to confront secrecy challenges relating to government surveillance practices. *See Advocates look to deepen FOIA collaboration to combat surveillance secrecy,* Open the Government, December 14, 2018: http://bit.ly/2HS4ZOv.

[4] The online version of this report provides additional information on organizations that are using FOIA to gain access to government information, and a list of resources to help FOIA users tailor well-crafted requests, navigate the FOIA landscape, and identify opportunities for collaboration.

[5] Trevor Timm, *Freedom of the Press Foundation sues the Justice Department for details about its push to block transparency reform*, Freedom of the Press Foundation, December 15, 2015: http://bit.ly/2FGPmet.

[6] Trevor Timm, *New documents show the Obama admin aggressively lobbied to kill transparency reform in Congress*, Freedom of the Press Foundation, March 8, 2016: http://bit.ly/2GfK2g6.

[7] Jason Leopold, *It Took a FOIA Lawsuit to Uncover How the Obama Administration Killed FOIA Reform*, Vice News, March 9, 2016: http://bit.ly/1TLiNgz.

[8] Among other advancements, the bill codified the presumption of openness - requiring records be released unless there is a foreseeable harm or legal requirement to withhold them. Implementation of the new provisions, however, has been inconsistent across agencies and it is difficult to determine the effectiveness of the reforms, or the impact of the codification of the foreseeable harm standard. Lawsuits involving the foreseeable harm standard are still underway, at the time of the writing of this report. *See* Lauren Harper, *Foreseeable Harm Standard Tested in Court,* The National Security Archive, Unredacted, December 7, 2017: http://bit.ly/2D6Oydl.

[9] The requests coincided with the 50th anniversary of the passage of the FOIA, and the groups released an accompanying press statement highlighting the importance of FOIA in obtaining information on government surveillance of constitutionally protected First Amendment activity. *See, Civil rights groups mark 50th Anniversary of Freedom of Information Act by filing requests to expose government surveillance of activists of color*, Center for Constitutional Rights, July 6, 2016: http://bit.ly/2D9m17a.

[10] *Human Rights Attorneys Sue FBI, DHS for Docs about Surveillance of the Movement for Black Lives*, Center for Constitutional Rights, October 20, 2016: http://bit.ly/2hUjJUO.

[11] Sweta Vohra, *Documents show US monitoring of Black Lives Matter*, Al Jazeera, November 7, 2017: http://bit.ly/2oYOOXA.

[12] Freedom of Information Act Request filed with the Department of Homeland Security, Detention Watch Network and the Center for Constitutional Rights, November 25, 2013: http://bit.ly/2DgpDUY.

[13] CCR and DWN argued in February 2014 that there was an urgent need for the information due to upcoming budget appropriations, and the judge in the case ordered the agencies to begin a monthly production of responsive documents. As DHS and ICE started disclosing documents, DWN and CCR published a report on immigration detention, providing advocacy groups and the public access to previously secret records with information on the private companies benefiting from the quota. *See New Report: Financial Market for Immigrant Detention Exposed,* Center for Constitutional Rights, June 11, 2015: http://bit.ly/2HjA2BL.

[14] *Supreme Court Rules in Favor of Government Transparency Against Private Prison Corporations*, Center for Constitutional Rights, October 10, 2017: http://bit.ly/2xw5QTl.

[15] *American Oversight and Environmental Working Group Challenge EPA over Failure to Release Pesticide Records*, American Oversight, June 22, 2017: http://bit.ly/2tEqKyh.

[16] Eric Lipton, *E.P.A. Chief's Calendar: A Stream of Industry Meetings and Trips Home*, The New York Times, October 3, 2017: http://nyti.ms/2xOWbEh.

[17] *Human Rights Watch Asks US about Use of Secret Surveillance for Drug, Immigration Purposes*, Human Rights Watch, January 23, 2017: http://bit.ly/2pbyfY7.

[18] *US: New Evidence Suggests Monitoring of Americans*, Human Rights Watch, October 25, 2017: http://bit.ly/2tBwuZA.

[19] *Dustin Volz, Exclusive: U.S. widens surveillance to include 'homegrown violent extremists' – documents*, Reuters, October 25, 2017: http://reut.rs/2zLUs2y.

[20] The project is a collaborative effort that involves attorneys, technologists, and activists, working to get information on privacy-invasive police technology, advocate for limits on how the technologies are used, and hold agencies accountable for their abuse. The project has generated important resources for members of the public, advocacy organizations, journalists, defense attorneys and policymakers. *See, A Guide to Law Enforcement Spying Technology*, Electronic Frontier Foundation: http://bit.ly/2oTlKzH.

[21] *Street Level Surveillance: Biometrics FOIA Campaign*, MuckRock: http://bit.ly/2Ij3MQv. EFF and MuckRock also launched a collaboration in February 2018 in which they filed more than a thousand public records requests for information on how much data local police are collecting through automated license plate readers (ALPRs). David Mass, *EFF and MuckRock Are Filing a Thousand Public Records Requests About ALPR Data Sharing*, Electronic Frontier Foundation, February 16, 2018: http://bit.ly/2FB10UP.

[22] *Opening the Chicago Surveillance Fund*, MuckRock: http://bit.ly/2FLCm7e.

[23] See, *National Security Archive v. U.S. Department of State*, filed April 26, 2017: http://bit.ly/2p0EsGU.

[24] Carol Morello, *Dissent memo circulating in the state Department over Trump's policy on refugees and immigrants*, January 30, 2017: http://wapo.st/2FtKvOi.

[25] Corbin Hiar, *Behind the doomed effort to defend, promote Dourson*, E&E News, December 14, 2017: http://bit.ly/2CQHIsv.

[26] Ariel Wittenberg and Kevin Bogardus, Barnstorming the states: 'Pruitt does not want open press', E&E News: http://bit.ly/2taGdpy.

[27] Kimbriell Kelly, Wesley Lowery, and Steven Rich, *Fired/Rehired: Police chiefs are often forced to put officers fired for misconduct back on the streets*, The Washington Post, Aug. 3, 2017: http://wapo.st/2FgfSft.

[28] Scott Amey, *Previous Ethics Investigations Cause FEMA Nominee to Withdraw*, Project On Government Oversight, September 14, 2017: http://bit.ly/2Fzs6Me.

[29] Suzy Khimm, *Trump FEMA Nominee Withdraws After NBC Questions on Falsified Records*, NBC News, September 13, 2017: http://nbcnews.to/2wZp3t5.

[30] Freedom of information laws in other countries often have strong disclosures provisions, such as provisions mandating release of files on human rights violations and public interest balancing tests, leading to the release of information that the U.S. FOIA might restrict from disclosure. For more on using information laws in other countries, *see* John Ciorciari & Jesse Franzblau, *Hidden Files*, Columbia Human Rights Law Review, November 2014: http://bit.ly/2tutNc3.

[31] Michael Evans and Jesse Franzblau, *Mexico's San Fernando Massacres: A Declassified History*, National Security Archive, November 6, 2013: http://bit.ly/2twC4MK.

[32] Jesse Franzblau, *New Document Throws More Light on Mexico's San Fernando Killings*, Open Society Justice Initiative, December 22, 2014: https://osf.to/2p3SzKW.

[33] Collaboration is also important to ensure that the surge in FOIA cases that are going to court does not lead to bad case law. For more on the rise in FOIA litigation, *see, FOIA Lawsuits Surge in Trump Administration's First Year,* The FOIA Project, January 16, 2018: http://bit.ly/2FyaWyB.

[34] For more on how to file a FOIA from a media perspective, see Libby Casey, *Everything you need to know about FOIA - How to be a journalist*, The Washington Post, December 14, 2017: http://bit.ly/2HnLI6n.

[35] FOIA.gov was first created in response to the 2016 FOIA reforms, which directed the DOJ and Office of Management and Budget (OMB) to build a consolidated online request portal. The DOJ released the first iteration of the new version of the website on March 8, 2018. See *DOJ Announces the First Iteration of the New National FOIA Portal on FOIA.gov*, U.S. Department of Justice, Office of Information Policy, March 8, 2018: http://bit.ly/2FB4Yga.

[36] American Oversight provides model templates for targeted and well-crafted requests, identifying keywords and specific records. *See* American Oversight, *FOIA Request to EPA Calendar Entries and Phone Logs for Senior Officials*, April 5, 2017: http://bit.ly/2FB3XYN.

[37] For a description of the categories of requesters, *see* Reporters Committee for Freedom of the Press, *Fee Waivers*: http://bit.ly/2FmrvBp.

[38] All non-commercial requesters, including nonprofit organizations, pay for document-search time in excess of two hour and duplication in excess of 100 pages. Ibid.

[39] CREW regularly request and are granted expedited processing on the grounds the subject matter requested is of widespread and exceptional media interest or, in some cases, based on the argument that the requested information involves possible questions about the government's integrity that affects public confidence. *See, FOIA Request – Department of Justice, Sessions Recusal,* Citizens for Responsibility and Ethics in Washington, January 29, 2018: http://bit.ly/2DdbDLt.

[40] *See* sample appeal from Open the Government & POGO, here: http://bit.ly/2FsGRAq. The RCFP FOIA Wiki also provides samples of appeals, here: http://bit.ly/2HirScK.

[41] Groups highlighted in this study, such as American Oversight, use Document Cloud to publish everything they request and receive through FOIA, along with analysis explaining the records. *See* DocumentCloud.org: http://bit.ly/2dU93iM.

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