



# **Senators Unite to Slam FOIA Compliance**

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# **POGO Statement for the Record**

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## POLITICO

'There is a big problem': Senators unite to slam FOIA compliance

The premier transparency law is hobbled by backlogs and mountains of electronic data, lawmakers are told.



“My conclusion from this is: there is a big problem,” Sen. Dianne Feinstein (D-Calif.) said during an oversight hearing on the federal government’s ongoing struggle to implement the records-access law in a timely way. | Alex Wong/Getty Images

By JOSH GERSTEIN  
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The often bitterly divided Senate Judiciary Committee had little difficulty Tuesday finding consensus that the nation’s premier transparency law, the Freedom of Information Act, isn’t working well.

“My conclusion from this is: there is a big problem,” Sen. Dianne Feinstein (D-Calif.) said during an oversight hearing on the federal government’s ongoing struggle to implement the records-access law in a timely way.

Sen. Jon Ossoff (D-Ga.) said he believes the half-century-old statute allowing journalists, advocacy groups and members of the public to request federal agency records appears to be failing to live up to its original ambitions.

“My impression is the chasm is massive — it’s vast,” he said. “We’re talking about timelines that are worse than routinely unmet, but almost never met. We’re talking about massive backlogs.”

One particular focus Tuesday was on the impact of the coronavirus pandemic on federal agencies' compliance with FOIA.

Senators heard good and bad news on that front: As the pandemic spread, new requests were down, but agencies fell even further behind in processing them. During fiscal year 2020, which covered the first six months of the pandemic, agencies received 8 percent fewer requests but processed 12 percent fewer, according to the Government Accountability Office.

That caused a spike in the already substantial backlog of requests, which reached 142,000 at the end of September 2020, up 18 percent from a year earlier, GAO official James McTigue said.

McTigue said some agencies faced challenges getting FOIA processing staff set up to telework when the pandemic broke out and others had paper records stranded at offices workers weren't allowed to enter. Others, such as the FBI, would not authorize telework for FOIA processing due to security concerns and therefore had to establish protocols for workers to come into the office, which created a greater delay, he said.

A GAO report issued Tuesday found that agencies are not fully complying with a requirement to post certain types of records online. The panel's ranking member, Sen. Chuck Grassley (R-Iowa), pressed the Justice Department's top FOIA

official on what happened to a pledge President Barack Obama's administration made in 2016 to post most responses to FOIA requests on agency websites under a so-called "release to one, release to all" policy.

The DOJ official, Babak Talebian, declined to commit to broad implementation of such an approach but said officials are moving in that direction.

"We conducted a pilot....There were some challenges," Talebian said. "We are still encouraging agencies to make proactive disclosures, and some agencies are implementing that at a 'release to one, release to all' level....We want to continue working towards a time where agencies can have the capacities to get to a point where they can release more and more records on their websites, getting to a 'release to one, release to all.'"

The federal government's FOIA ombudsman, Alina Semo, said some agencies are still sluggish in posting completed requests online because of concerns they'll receive complaints that the records aren't accessible to the disabled.

"There's an inherent tension, and agencies are sometimes technologically hamstrung in posting large amounts of data," Semo said.

Grassley also pressed Talebian on why it took Attorney General Merrick Garland until earlier this month to issue written guidance urging agencies to lean in favor of disclosure when answering FOIA requests. There was no explicit discussion at

the hearing of how the Trump administration implemented the transparency law, but a similar memo from then-Attorney General Eric Holder during the Obama administration emerged in March 2009.

“Why did it take so long?” Grassley asked.

“In his first full day of his first full week in office, the attorney general joined us for Sunshine Week to provide public remarks to reinforce the importance of FOIA,” said Talebian, director of Justice’s Office of Information Policy. “Under his leadership, we continue to apply our guidance and our training.”

Judiciary Committee Chair Dick Durbin (D-Ill.) said one challenge with implementing FOIA is the volume of emails and other electronic records that have to be searched and processed — sometimes so many records that having a human apply each necessary redaction is all but impossible. Durbin pressed Talebian on whether officials are considering using artificial intelligence to make such requests more manageable.

“We’re seeing records in volumes in different forms that could not have been envisioned when FOIA was enacted,” Talebian said. “Certainly, we’re definitely looking at advanced technology, including artificial intelligence to help us with the search and maybe even the processing of records.”

“Is our federal government flirting with the idea or serious?” Durbin asked.

“I would say: serious. We want the best tools,” Talebian added.

Sen. Sheldon Whitehouse (D-R.I.) used the session to complain about the Justice Department’s ongoing resistance in court to a FOIA request for an Office of Legal Counsel opinion detailing DOJ’s legal rationale why sitting presidents cannot be criminally prosecuted. U.S. District Court Judge Amy Berman Jackson ordered the release of the opinion, prepared in connection with the release of Special Counsel Robert Mueller’s report. She rejected the department’s arguments that the memo was part of the deliberative process and found that it was an after-the-fact justification for the decision not to prosecute then-President Donald Trump.

The Justice Department appealed that ruling to the D.C. Circuit Court of Appeals, where the case remains pending.

“There was no decision to be made,” Whitehouse said, noting that he and other senators have filed an amicus brief urging the appeals court to force disclosure of the opinion. The Rhode Island Democrat said DOJ’s interpretation would allow the exemption for deliberative process “to just run wild through the agencies.”

Talebian acknowledged he was involved in decision-making in the case but declined to explain further, citing a need to protect the same type of deliberative process that Whitehouse criticized.





**Statement of Melissa Wasser, Policy Counsel  
Project On Government Oversight  
Before the Senate Judiciary Committee  
On “The Freedom of Information Act: Improving Transparency  
and the American Public’s Right to Know for the 21st Century”  
March 29, 2022**

Chairman Durbin, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to submit a statement for the record regarding problems with the Freedom of Information Act (FOIA). I am Melissa Wasser, a policy counsel at the Project On Government Oversight (POGO). POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

Four years ago this month, this Committee held a similar hearing on FOIA reform with agency witnesses.<sup>1</sup> That hearing demonstrated a bipartisan interest in strengthening FOIA and increasing proactive disclosure of records. Unfortunately, not much has changed since 2018. It is time for Congress to act and realign agency FOIA implementation with the spirit of the law.

Despite the fact that FOIA is one of the most useful tools the public has to educate itself about what the federal government is doing — and hold the government accountable — the last round of substantive reforms to FOIA was passed back in 2016. Those reforms were a step in the right direction, but there are still numerous issues that impact the law’s effectiveness. Today, I will highlight those existing problems, explain why they deserve your attention, and discuss several recommendations to improve the system and promote greater access to information.

### **Departures From the Statute**

When agencies apply expansive redactions to requests for information and ignore statutory proactive disclosure guidelines, these problems complicate the FOIA implementation process. The overly expansive use of exemptions, combined with the avoidance of proactive disclosures, means that agencies continue to cause severe backlogs and delays for requesters seeking information from their own government. Congress should address these problems.

FOIA provides a statutory right of access to federal agency records.<sup>2</sup> Anyone can request information by submitting a request to a federal executive branch agency and asking for records. The law provides nine exemptions that allow an agency to withhold or redact records. When reasonable exemptions are applied

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<sup>1</sup> *The Freedom of Information Act: Examining the Administration’s Progress on Reforms and Looking Ahead: Hearing before the Senate Committee on the Judiciary*, 115th Cong. (March 13, 2018), <https://www.judiciary.senate.gov/meetings/the-freedom-of-information-act-examining-the-administrations-progress-on-reforms-and-looking-ahead>.

<sup>2</sup> 5 U.S.C. § 552 (2021), <https://www.law.cornell.edu/uscode/text/5/552>.

properly, government agencies strike a balance between protecting sensitive information and leaving large portions of information available to the public, adhering to the letter and the spirit of the law.

However, as POGO has previously reported, agencies often use FOIA exemptions improperly, withholding records simply because they may reveal problems at the agency or just “paint the agency in a bad light.”<sup>3</sup>

Reporting shows that requesters consistently receive large swaths of arbitrarily redacted information, including fully redacted pages, rather than substantive responses.<sup>4</sup> POGO has been on the receiving end of several requests with entire pages of text redacted. These redactions are obviously arbitrary, given that similar requests by other organizations resulted in the release of the same records with significantly less information withheld.<sup>5</sup>

The FOIA Improvement Act of 2016 codified a foreseeable harm provision that required agencies to withhold information only if “the agency reasonably foresees that disclosure would harm an interest protected by an exemption.”<sup>6</sup> Agencies are allowed this discretion, but they should balance the possibility of harm against public interest even when they can technically withhold the information, especially considering FOIA’s presumption of openness.

POGO therefore recommends that any future FOIA legislation include the addition of a public interest balancing test. Adding such a test to FOIA’s foreseeable harm standard would have agencies determine, before they decide not to release information, whether the harm of releasing agency information outweighs the public interest in accessing it. This fix could help prevent improper withholding of information and over-redaction when agencies respond to requests.

When requesters fail to receive information in a timely manner, they can ask a court to order the agency to respond on a specific timeline. However, it should not take costly FOIA litigation and appeals for agencies to comply with the law. At the 2018 hearing, Senator Grassley agreed, stating “instead of litigating over a FOIA request, agencies should proactively release that information now for all to see.”<sup>7</sup> It is not enough for agencies to promote compliance with FOIA: these agencies have a statutory duty to comply with the law, and they are failing to do so with impunity.

When Congress passed the FOIA Improvement Act of 2016, it required proactive disclosures intended to increase access to government information.<sup>8</sup> Agencies are now required to “make available for public

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<sup>3</sup> Nick Schwellenbach and Sean Moulton, “The ‘Most Abused’ Freedom of Information Act Exemption Still Needs to Be Reined In,” Project On Government Oversight, February 6, 2020, <https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in/>.

<sup>4</sup> Sharon Lerner, “NIH Sent The Intercept 292 Fully Redacted Pages Related To Virus Research in Wuhan,” *The Intercept*, February 20, 2022, <https://theintercept.com/2022/02/20/nih-coronavirus-research-wuhan-redacted/>; see also Jason Leopold and Anthony Cormier, “A New Version of the Mueller Report Reveals That Mueller Declined to Charge Donald Trump Jr. And Roger Stone With Computer Crimes,” *Buzzfeed News*, February 11, 2022, <https://www.buzzfeednews.com/article/jasonleopold/robert-mueller-declined-charge-trump-jr-roger-stone>.

<sup>5</sup> Nick Schwellenbach and Sean Moulton, “The ‘Most Abused’ Freedom of Information Act Exemption Still Needs to Be Reined In,” Project On Government Oversight, February 6, 2020, <https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in/>.

<sup>6</sup> 5 U.S.C. § 552(a)(8) (2021), <https://www.law.cornell.edu/uscode/text/5/552>.

<sup>7</sup> Prepared Statement by Senator Chuck Grassley for Hearing on “The Freedom of Information Act: Examining the Administration’s Progress on Reforms and Looking Ahead,” March 13, 2018, <https://www.judiciary.senate.gov/download/03-13-18-grassley-statement>.

<sup>8</sup> FOIA Improvement Act of 2016 (P.L. No. 114-185), <https://www.congress.gov/114/bills/s337/BILLS-114s337enr.xml>.

inspection in an electronic format,” records “that have been requested 3 or more times.”<sup>9</sup> However, only one of three agencies that the Government Accountability Office (GAO) reviewed in 2021 had policies in place to address and document compliance with proactive disclosure requirements.<sup>10</sup> Furthermore, none of the three agencies reviewed by GAO fully complied with requirements to track and report the number of records disclosed each year.<sup>11</sup>

POGO recommends that commonly requested records, like visitor logs, calendars for agency heads, reports, and testimony submitted to Congress should be proactively disclosed by agencies. These records hold significant importance to the public.

Congress should pay particular attention to proactively disclosing the work of one office. The Department of Justice’s Office of Legal Counsel (OLC) is responsible for advising executive branch agencies and the president on the legality of proposed actions. Its opinions are not consistently released to Congress or the public, who lose the opportunity to scrutinize and question the legal analysis of these opinions in real time. The opinions effectively become secret law, with no consistent way for Congress or the public to access them.

OLC has avoided complying with FOIA requests and takes the position that its opinions are exempt from open records laws,<sup>12</sup> even as a court held that some of these opinions should be proactively made available to the public.<sup>13</sup> This lack of transparency hinders this Committee’s and Congress’s ability to conduct robust congressional oversight and make legislative corrections to increase transparency when necessary.

POGO is recommending that Congress require the Justice Department to publicly post all final interpretations of law issued by OLC online within 30 days. This would allow Congress to take their power back and act as a check on this increasingly powerful office. Proactive disclosure of these records would free up capacity for FOIA offices to use resources elsewhere, help reduce FOIA backlogs, and lower litigation costs for both agencies and requesters. This necessary fix provides additional ways to streamline agency communication with other FOIA requests.

### **Unintended Interpretations**

When another branch of government interprets the language of FOIA in ways that decrease transparency and conflict with the spirit of the law, it is up to Congress to rectify these interpretations and clarify intent. Two such relatively recent interpretations have worked to limit the information the public and individual Members of Congress can receive.

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<sup>9</sup> Department of Justice, “OIP Summary of the FOIA Improvement Act of 2016,” <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016>.

<sup>10</sup> U.S. Government Accountability Office, Freedom of Information Act: Actions Needed to Improve Agency Compliance with Proactive Disclosure Requirements, GAO-21-254 (March 2021), 4, <https://www.gao.gov/assets/720/712947.pdf>.

<sup>11</sup> U.S. Government Accountability Office, Freedom of Information Act: Actions Needed to Improve Agency Compliance with Proactive Disclosure Requirements, GAO-21-254 (March 2021), 13, <https://www.gao.gov/assets/720/712947.pdf>.

<sup>12</sup> David Janovsky, “Rubber Stamp or Rule of Law?,” Project On Government Oversight, March 23, 2021, <https://www.pogo.org/analysis/2021/03/rubber-stamp-or-rule-of-law/>.

<sup>13</sup> Knight First Amendment Institute at Columbia University, “Office of Legal Counsel May Be Required to Release Many of Its Legal Opinions, Court Says,” September 12, 2020, <https://knightcolumbia.org/content/office-of-legal-counsel-may-be-required-to-release-many-of-its-legal-opinions-court-says>.

A 2019 Supreme Court decision made it significantly more difficult for the public to access certain types of corporate information about businesses that receive taxpayer money through government programs.<sup>14</sup> By adopting a broader reading of what can be deemed “confidential” under FOIA’s Exemption 4, the court made it easier for agencies to withhold more of the information submitted to the government by private businesses.

A standard more consistent with the goal of providing maximum transparency to the public is that business records should be considered confidential only if their release would likely result in substantial competitive harm to the business. POGO supports passage of the Open and Responsive Government Act of 2021, S. 742, which would restore a longstanding legal interpretation regarding confidential commercial information and limit the amount of information that could be considered confidential.<sup>15</sup> This fix would allow greater transparency into entities spending government funds.

Another unintended interpretation of FOIA prevents individual Members of Congress from receiving information vital to conducting oversight. Under current interpretation of the statute, the executive branch has used FOIA exemptions to justify withholding information from Members of Congress unless those Members request documents while acting in the capacity of committee or subcommittee chairs. The Justice Department’s Office of Information Policy issued guidance in 1984 allowing agencies to respond to all other congressional requests for information with documents that have been subject to FOIA redactions.<sup>16</sup>

Congress’s intent for the law is clear: The limits that FOIA establishes to protect sensitive information (such as classified documents or personal information) do not apply to Members of Congress. Applying FOIA redactions to congressional information requests severely limits Congress’s ability to conduct oversight and pass legislation to address issues facing the public. No Member of Congress should be denied access to the information they need to do their job simply because the law allows the agency to withhold those documents from release to the public under FOIA.

This is a simple fix. Adding the phrase “or any member thereof” after the word “Congress” in 5 U.S.C. § 552(d) would clarify that FOIA cannot be used to redact information from any Member of Congress, regardless of their status as a committee or subcommittee chair.<sup>17</sup>

## **Delays and Funding Issues**

Under FOIA, an agency must provide a response within 20 business days of receiving the request.<sup>18</sup> However, in fiscal year 2020, agencies took an average of 97 days to process requests, with responses to more complex requests averaging six months.<sup>19</sup> Budgetary issues and shortfalls regularly plague FOIA offices and often contribute to an agency’s failure to meet the 20 business-day deadline to respond.<sup>20</sup>

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<sup>14</sup> Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356 (2019).

<sup>15</sup> Open and Responsive Government Act of 2021, S. 742, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/742/text>.

<sup>16</sup> Department of Justice Office of Information Policy, “FOIA Update: OIP Guidance: Congressional Access Under FOIA,” January 1, 1984. <https://www.justice.gov/oip/blog/foia-update-oip-guidance-congressional-access-under-foia>.

<sup>17</sup> This change passed the House of Representatives in December 2021 as Section 525 in H.R. 5314, the Protecting Our Democracy Act.

<sup>18</sup> 5 U.S.C. § 552(a)(6)(A) (2021), <https://www.law.cornell.edu/uscode/text/5/552>.

<sup>19</sup> Melissa Wasser, “Fact Sheet: Reforms to the Freedom of Information Act,” Project On Government Oversight, January 26, 2022, <https://www.pogo.org/resource/2022/01/fact-sheet-reforms-to-the-freedom-of-information-act/>.

<sup>20</sup> “The Increase in FOIA Lawsuits Isn’t the Problem – It’s Agencies Underfunding their Transparency Obligations,” American Oversight, March 17, 2020. <https://www.americanoversight.org/the-increase-in-foia-lawsuits-isnt-the->

When agencies fail to meet their obligations to make timely determinations on FOIA requests, they add to already significant backlogs.

Agencies determine how they allocate funding for administrative activities, including FOIA. To address a pattern of poor funding, each agency should be required to evaluate what it needs to comply with FOIA and communicate to Congress how much it will budget to meet its FOIA obligations. Then, Congress should appropriate a direct line item to agencies' FOIA offices, rather than including said funding in the overall category of general administrative activities. Dedicating adequate funding for FOIA offices would allow the offices to increase capacity where needed and respond to requests in a timely manner, while also reducing backlogs.

Congress should also address agency-specific fixes to FOIA in any future FOIA reform legislation, especially for agencies that handle a high volume of requests annually. Currently, there is a problem contributing to inefficiencies in FOIA processing at the Department of Homeland Security (DHS). If a person is looking for information on foreign-born individuals, they can request access to an alien file, or A-file, through a FOIA request. An A-file includes documents that DHS maintains on foreign-born individuals that document the person's immigration history.<sup>21</sup>

But because A-files are stored off-site, it takes DHS longer to retrieve them, slowing overall FOIA processing times.<sup>22</sup> It is predictable that there will be a significant demand for these records. But including these A-file requests in the same system as public FOIA requests creates greater inefficiency in DHS's FOIA process. In fact, a majority of the agency's backlog is held by agency components that "process records related to immigration."<sup>23</sup>

POGO therefore recommends that Congress direct the agency to create a separate system to respond to those specific A-file requests and ensure the agency has the resources to do so. Removing A-files from the FOIA process could help make the agency's FOIA office more effective and efficient in responding to its many requests.

## Recommendations

We at POGO are encouraged to see bipartisan conversations about necessary improvements to FOIA and hope to see further legislative action soon. Congress has an opportunity to maximize access to information and relieve agency FOIA burdens in the process. As such, POGO urges the Committee to prioritize the following issues when considering legislation to reform FOIA:

- Require agencies to weigh the public's interest in the release of information against the specific, identified foreseeable harm releasing information could bring.

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[problem-its-agencies-underfunding-their-transparency-obligations](#); Department of Justice Office of Information Policy, "FOIA Update: FOIA Affected By Budget Constraints," January 1, 1990.  
<https://www.justice.gov/oip/blog/foia-update-foia-affected-budget-constraints>.

<sup>21</sup> U.S. Citizenship and Immigration Services, Policy Manual, Chapter 2 - Record of Proceeding,  
<https://www.uscis.gov/policy-manual/volume-1-part-c-chapter-2>.

<sup>22</sup> U.S. Citizenship and Immigration Services, "Avoiding Common Index and Records Request Issues with A-Files,"  
<https://www.uscis.gov/records/genealogy/historical-record-series/a-files-numbered-below-8-million>.

<sup>23</sup> "DHS increased the number of requests processed between FY 2014 and FY 2018 by 92 percent compared to the number processed between FY 2009 and FY 2013." U.S. Department of Homeland Security Departmental Freedom of Information Act (FOIA) Backlog Reduction Plan: 2020 - 2023, A Business Modernization Roadmap (March 2020), 7, [https://www.dhs.gov/sites/default/files/publications/final\\_dhs\\_backlog\\_reduction\\_plan\\_2020-2023\\_3.6.20.pdf](https://www.dhs.gov/sites/default/files/publications/final_dhs_backlog_reduction_plan_2020-2023_3.6.20.pdf).

- Require agencies to proactively disclose categories of commonly requested records, including visitor logs, calendars for agency heads, and reports and testimony submitted to Congress.
- Require the Department of Justice to publicly post Office of Legal Counsel opinions.
- Pass the Open and Responsive Government Act (S. 742) to re-establish public access to government information about businesses.<sup>24</sup>
- Close the loophole that allows agencies to treat requests for information from Members of Congress as Freedom of Information Act requests from the public.
- Designate a line item in each agency's budget for specific funding for FOIA offices.
- Direct and resource the Department of Homeland Security to create a system to respond to individual A-file requests outside of the FOIA process.

## **Conclusion**

POGO thanks the Committee for holding this important hearing, and we urge you to fix the broken FOIA system by implementing our recommendations. It is encouraging to see bipartisan legislative efforts to improve FOIA. POGO is here to be a resource as the Committee navigates potential legislative options to strengthen this critical law. We stand ready to assist you in these endeavors however we can.

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<sup>24</sup> Open and Responsive Government Act of 2021, S. 742, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/742/text>.