



March 13, 2018

Congressional Requesters

**Freedom of Information Act: Federal Court Decisions Have Not Required the Office of Special Counsel to Initiate Disciplinary Actions for the Improper Withholding of Records**

Based on the principles of openness and accountability in government, the *Freedom of Information Act*<sup>1</sup> (FOIA) requires federal agencies to provide the public with access to agency records unless the information is exempt or excluded from disclosure.<sup>2</sup> Each year, federal agencies respond to FOIA requests and subsequently release information to FOIA requesters, which contributes to the understanding of government actions. When responding to requests, agencies are generally required by the act to determine within 20 working days whether a request will be fulfilled.<sup>3</sup>

In addition, FOIA allows requesters to sue an agency in federal court if the agency does not respond to a request for information within the statutory time frames or if the requesters believe they are entitled to information that is being withheld by the agency. Further, the act requires the Office of Special Counsel (OSC) to initiate a proceeding to determine whether disciplinary action is warranted against agency personnel in cases involving lawsuits where a court has found, among other things, that agency personnel may have acted arbitrarily or capriciously in responding to a FOIA request.<sup>4</sup> The act requires the Department of Justice (Justice) to notify OSC

---

<sup>1</sup>5 U.S.C. § 552.

<sup>2</sup>Agencies can apply nine specific exemptions to withhold information that is determined to be, for example, classified, confidential commercial, pre-decisional, private, or one of several types of law enforcement information.

<sup>3</sup>The 20-day time period to respond to a request may be extended beyond 30 days in certain circumstances. For example, the agency may notify the requester that the time limit cannot be met, and provide the requester with an opportunity to limit the scope of the request so that it may be processed within that time limit or offer the requester an opportunity to arrange with the agency an alternative time frame for processing the request.

<sup>4</sup>The Office of Special Counsel is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting employees and applicants for federal employment from prohibited personnel practices, especially reprisal from whistleblowing. The office conducts investigations of alleged prohibited personnel practices, attempts informal resolution through discussion with an agency (or by offering mediation), and, when necessary, takes corrective or disciplinary action.

when a lawsuit meets this requirement.

You asked that we provide information regarding federal court decisions that pertain to the improper withholding of FOIA records. This report discusses how many court decisions citing the improper withholding of FOIA records have resulted in disciplinary actions against responsible agency personnel.

To address the objective, we reviewed Justice's annual *FOIA Litigation and Compliance* reports for calendar years 2008 through 2016 to identify instances in which the department had notified OSC of a lawsuit regarding improperly withheld FOIA records. We focused our review on these specific years because the *OPEN Government Act of 2007* amended FOIA to require Justice to report on court findings.<sup>5</sup> Justice began including this information in its 2008 *FOIA Litigation and Compliance* reports, and at the time of our review, had completed reports through calendar year 2016.

We also searched Justice's Office of Information Policy (OIP) website to identify any court decisions related to the improper withholding of FOIA records.<sup>6</sup> Further, we interviewed OIP officials regarding actions taken by the department to notify OSC of any court cases that would require OSC to initiate a proceeding.<sup>7</sup> In addition, we interviewed OSC officials regarding any proceedings they had initiated to determine whether disciplinary action was warranted as a result of the improper withholding of information in a FOIA request during the same time period of 2008 through 2016, for which lawsuit data were available.

We conducted this performance audit from September 2017 to March 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

## Background

Federal agencies respond to hundreds of thousands of FOIA requests each year.<sup>8</sup> Over 50 percent of federal agencies that are required by FOIA to respond to requests reported in fiscal year 2016 that, on average, they processed simple

---

<sup>5</sup>*Openness Promotes Effectiveness in our National Government Act of 2007*, Pub. L. No. 110-175 (Dec. 31, 2007).

<sup>6</sup>Department of Justice's (Justice) Office of Information Policy manages the department's obligations under FOIA by developing government-wide policy guidance on all aspects of FOIA administration, providing legal counsel and training to agency personnel, and handling the defense of certain FOIA matters in litigation.

<sup>7</sup>5 U.S.C. §552(a)(4)(F)(i).

<sup>8</sup>According to Justice's *Summary of Annual FOIA Reports for Fiscal Year 2016*, federal agencies received 788,769 FOIA requests and processed 759,842 requests.

requests<sup>9</sup> for records within the statutory time frame established by FOIA.<sup>10</sup> However, in responding to these requests, agencies may have used one of nine exemptions to withhold portions of the information requested, or denied the release of all of the requested information.<sup>11</sup> In other instances, agencies may not have responded to requests in a timely manner, thus contributing to backlogs of requests at these agencies.

FOIA provides requesters the right to file an administrative appeal if they disagree with an agency's decision on their request. Absent unusual circumstances, agencies have 20 working days to respond to a requester regarding an administrative appeal. The act also allows a requester to sue an agency in federal court if the agency does not respond to a request for information within the statutory time frames or if the requester believes they are entitled to information that is being withheld by the agency. Courts have held that requesters must exhaust their administrative remedies, such as going through an administrative appeal, before filing a lawsuit.

If a requester decides to file a lawsuit under FOIA, Justice is typically responsible for representing the federal agency involved in the lawsuit.<sup>12</sup> The act requires Justice to notify OSC if, as part of a FOIA lawsuit, a court takes the following actions:

- orders the production of any agency records improperly withheld;
- assesses against the United States attorney fees and other litigation costs; and
- issues a written finding that the circumstances surrounding the withholding raise questions about whether agency personnel acted arbitrarily or capriciously.

FOIA requires Justice to report annually to Congress on any such lawsuits that it refers to OSC.

Once Justice notifies OSC that a court conducted all of the requisite actions in regard to a FOIA lawsuit, OSC is required to initiate a proceeding to determine whether disciplinary action is warranted against the federal agency officer or employee who was primarily responsible for withholding the requested FOIA information. After the investigation and consideration of the evidence, OSC is to submit its findings and

---

<sup>9</sup>For reporting and processing purposes, agencies categorize FOIA requests according to three tracks: simple, expedited, and complex. The simple track is for requests that do not involve voluminous records or lengthy consultations with other entities, and are to be responded to within 20 working days. The expedited track is for requests that are processed pursuant to subsection (a)(6)(E) of FOIA and agencies are given 10 working days to make a decision on whether a request should fall into this track. The complex track is for requests that involve voluminous records and those that require lengthy or numerous consultations, or those requests that may involve sensitive records.

<sup>10</sup>Department of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2016*, (Washington, D.C.).

<sup>11</sup>Nine specific exemptions can be applied to withhold, for example, classified, confidential commercial, privileged, privacy, and several types of law enforcement information, among others.

<sup>12</sup>According to the Department of Justice, some agencies, such as the National Labor Relations Board, the Securities and Exchange Commission, the Equal Employment Opportunity Commission, the Tennessee Valley Authority, and the National Railroad Passenger Corporation, have independent litigating authority to represent themselves on FOIA matters.

recommendations to the administrative authority of the agency concerned<sup>13</sup> and send copies of the findings and recommendations to the agency officer, employee, or representative who may be subject to disciplinary action. The agency is then required to take the corrective action that OSC recommends.<sup>14</sup>

### **Since 2008, No Court Orders Have Been Issued That Required OSC to Determine Whether Disciplinary Actions Should Be Taken for the Improper Withholding of FOIA Records**

According to the available information and Justice and OSC officials, since fiscal year 2008, no court orders have been issued that have required OSC to initiate a proceeding to determine whether disciplinary action should be taken against agency FOIA personnel. Specifically, officials in Justice's Office of Information Policy stated that there have been no lawsuits filed by a FOIA requester that have led the courts to conduct all three requisite actions needed for Justice to refer a court case to OSC.

Justice's litigation and compliance reports identified six court cases (between fiscal years 2013 and 2016) in which the requesters sought a referral from the courts in an attempt to have OSC initiate an investigation. However, in all six cases, the courts denied those requests, finding that each case did not result in the courts taking the three actions necessary to involve OSC.

Thus, given these circumstances, Justice has not referred any court orders to OSC to initiate a proceeding to determine whether disciplinary action should be taken against agency FOIA personnel. For its part, OSC officials confirmed that the office has neither received, nor acted on, any such referrals from Justice. As such, OSC has not had cause to initiate disciplinary actions for the improper withholding of FOIA records.<sup>15</sup>

### **Agency Comments**

We provided a draft of this report to the Department of Justice and the Office of Special Counsel. They provided technical comments, which we incorporated as appropriate.

- - - - -

We are sending copies of this report to the appropriate congressional committees, the Attorney General of the United States, the Special Counsel of the Office of Special Counsel, and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions regarding this report, please contact me at (202) 512-9286 or [PownerD@gao.gov](mailto:PownerD@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are Anjalique Lawrence

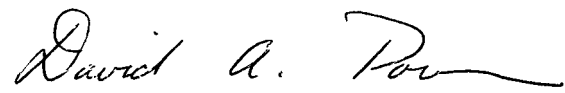
---

<sup>13</sup>Generally, this position varies from agency to agency and can include the Office of the Secretary.

<sup>14</sup>5 U.S.C §552(a)(4)(F)(ii).

<sup>15</sup>5 U.S.C. § 552(a)(4)(F).

(Assistant Director), Gerard Aflague, Nancy Glover, Lori Martinez, Carlo Mozo, David Plocher, Sukhjoot Singh, and Priscilla Smith.

A handwritten signature in black ink that reads "David A. Powner". The signature is written in a cursive style with a long, sweeping underline.

David A. Powner  
Director, Information Technology Management Issues

*List of Requesters*

The Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate

The Honorable Patrick Leahy  
United States Senate

The Honorable John Cornyn  
United States Senate

The Honorable Trey Gowdy  
Chairman  
The Honorable Elijah E. Cummings  
Ranking Member  
Committee on Oversight and Government Reform  
House of Representatives

The Honorable Darrell Issa  
Chairman  
Subcommittee on Courts, Intellectual Property, and the Internet  
Committee on the Judiciary  
House of Representatives

(102332)

---

---

This is a work of the U.S. government and is not subject to copyright protection in the United States. The published product may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.

---

---

## GAO's Mission

The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

---

## Obtaining Copies of GAO Reports and Testimony

The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's website (<https://www.gao.gov>). Each weekday afternoon, GAO posts on its website newly released reports, testimony, and correspondence. To have GAO e-mail you a list of newly posted products, go to <https://www.gao.gov> and select "E-mail Updates."

---

## Order by Phone

The price of each GAO publication reflects GAO's actual cost of production and distribution and depends on the number of pages in the publication and whether the publication is printed in color or black and white. Pricing and ordering information is posted on GAO's website, <https://www.gao.gov/ordering.htm>.

Place orders by calling (202) 512-6000, toll free (866) 801-7077, or TDD (202) 512-2537.

Orders may be paid for using American Express, Discover Card, MasterCard, Visa, check, or money order. Call for additional information.

---

## Connect with GAO

Connect with GAO on [Facebook](#), [Flickr](#), [Twitter](#), and [YouTube](#).  
Subscribe to our [RSS Feeds](#) or [E-mail Updates](#). Listen to our [Podcasts](#).  
Visit GAO on the web at <https://www.gao.gov>.

---

## To Report Fraud, Waste, and Abuse in Federal Programs

Contact:

Website: <https://www.gao.gov/fraudnet/fraudnet.htm>

Automated answering system: (800) 424-5454 or (202) 512-7470

---

## Congressional Relations

Orice Williams Brown, Managing Director, [WilliamsO@gao.gov](mailto:WilliamsO@gao.gov), (202) 512-4400, U.S. Government Accountability Office, 441 G Street NW, Room 7125, Washington, DC 20548

---

## Public Affairs

Chuck Young, Managing Director, [youngc1@gao.gov](mailto:youngc1@gao.gov), (202) 512-4800 U.S. Government Accountability Office, 441 G Street NW, Room 7149 Washington, DC 20548

---

## Strategic Planning and External Liaison

James-Christian Blockwood, Managing Director, [spel@gao.gov](mailto:spel@gao.gov), (202) 512-4707 U.S. Government Accountability Office, 441 G Street NW, Room 7814, Washington, DC 20548



Please Print on Recycled Paper.