

December 22, 2016

U.S. Department of Justice
Office of Information Policy
ATTN: Mr. Bobby Talebian
1425 New York Avenue, NW, Suite 11050
Washington, DC 20530

Re: Release to One, Release to All [OIP Docket No. 100]

Dear Mr. Talebian:

We welcome the opportunity to comment on the draft “Release to One, Release to All,” FOIA policy prepared by the Justice Department’s Office of Information Policy (OIP) (“[Release to All](#)” policy). The release of this draft guidance is a useful development and we support the ongoing efforts to implement the release to all presumption across the Executive Branch, which generally calls for records released in response to a FOIA requests to be simultaneously posted online for public viewing.

Members of the open government community have increasingly called for more information to be made available proactively. Greater online publication can increase the practical accessibility of information; a majority of the public visit government websites, compared to a relatively small number of people who file FOIA requests, and obtaining information online is generally more convenient than filing a FOIA request. The ability of the public to more easily find the information they seek should thus reduce some of the need for FOIA requests and improve response time for the requests that are submitted. Thus, OIP’s Release to All policy may help lessen the burden on FOIA offices throughout the federal government.

As you finalize the official guidance for this policy, we recommend you consider the following recommendations, in order to ensure that the implementation policy guidance is utilized to maximize the amount information available to the public in accordance with the FOIA, and not cited to restrict regular online posting of information in the public interest.

Exclusion and Exceptions to Posting Requirements:

The draft policy recognizes that some records should not generally be released to anyone other than the requester because doing so would invade the requester’s privacy. Part A – “Exclusion of First-Party & Analogous Requests,” excludes documents released to first-party requesters seeking information about themselves, or authorizing someone else to have access to their information, in cases where “information typically would not be provided to any other member of the public due to the individual’s privacy interest in the records.”¹ We agree with the need for this privacy exception and that certain

¹ See Office of Information Policy, Department of Justice, draft policy implementing a “Release to One, Release to All” policy for FOIA processed records [herein Release to All Draft Policy], *available at* <https://www.justice.gov/oip/blog/request-public-comment-draft-release-one-release-all-presumption>.

documents, such as documents released in response to a FOIA request for records on an individual's immigration status, should not be posted on agency websites.

We object, however, to Part B of the policy – the “good cause” exemptions to posting. The “good cause” exemption, if implemented, would constitute a broad carve-out for law enforcement and intelligence agencies wishing to not publicly release records under the so-called “mosaic theory” argument. This theory posits that “bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate...” in such a way that would pose a grave damage to national security.²

This theory has been promoted, for many years, as a justification for restricting access to information that would otherwise be disclosable. It is important to note that there is nothing in statute or any existing regulation that permits the use of the “Mosaic theory” as an acceptable justification for withholding information. Moreover, as has been noted, “...the mosaic theory has been applied in ways that are unfalsifiable, in tension with the text and purpose of FOIA, and susceptible to abuse and overbreadth.”³ We are concerned that this broad exception for law enforcement and intelligence agencies could allow these and other agencies to inappropriately assert expansive claims of discretion to refuse to post information, and to circumvent their proactive disclosure requirements under FOIA.

We therefore recommend this language be removed, and replaced with language that notes the exemptions to the FOIA which permit withholding of classified information or other information protected by statute, including any that may make a distinction for online posting of released information.

Similarly, we are concerned with the provision in the draft policy that allows for agencies to exclude posting records that agencies find are “not necessarily appropriate for posting, such as graphic videos of an automobile accident or records that raise scientific integrity risks.” In order to ensure agencies do not use this exclusion broadly to refuse to make information publicly available, we recommend that the guidance require agencies to provide written justification that reasonably describes the harm that the publication of the records would cause and obtain approval from the Chief FOIA Officer of that agency when citing this exemption.⁴ Agencies should also be required to include a notice in their FOIA reading

² The mosaic theory posits that “[the] business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is of the management of a cloak-and-dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.” *Halkin v Helms*, 598 F.2d 1,8, (D.C. Cir. 1978). *See, however*, Patrice McDermott, *Who Needs to Know? The State of Public Access to Federal Government Information*, Bernan Press, p. 137.

³ David E. Pozen, Note, “The Mosaic Theory, National Security, and the Freedom of Information Act,” 115 *Yale Law Journal*, 2005. http://www.yalelawjournal.org/pdf/358_fto38tb4.pdf.

⁴ The guidance should require agencies follow the FOIA statute, which permits agencies to withhold information under the FOIA “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law,” as well as FOIA case law, which has held that when defending withholdings in court, government agencies can be required to demonstrate the identifiable damage that disclosure would cause. *See, i.e.*, *ACLU vs. DOD* [Docket No. 06-314—cv.] where a U.S. District Judge ordered the Department of Defense to demonstrate why the release of photos depicting abusive treatment of detainees by

rooms describing each case where records released in response to a FOIA request are not posted on the website.

Timing of Postings

We note that some reporters and media groups have expressed concern that the simultaneous release of documents released through FOIA and posted online might negatively affect their reporting, by giving away their scoops that come from FOIA releases.⁵ While we do not take a particular position on either of the options presented in the draft Release to All policy, we generally support the consideration of adopting a policy of posting documents with a brief delay.⁶

Lastly, we agree with past recommendations that OIP and OMB should direct agencies to post additional materials along with the documents produced to a requester – including final determination letters associated with the document produced in response to the FOIA request.⁷

If you have any questions or would like to discuss this issue further, please contact Patrice McDermott, Executive Director of OpenTheGovernment.org at 202-332-6736 or pmcdermott@openthegovernment.org.

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Bill of Rights Defense Committee/Defending Dissent Foundation
Electronic Frontier Foundation
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U.S. soldiers in Iraq and Afghanistan would endanger American lives. Available at <http://caselaw.findlaw.com/us-2nd-circuit/1429177.html>. The Judge in that case has continued to require the DOD provide justification for withholding each photograph. See Lauren Walker, *Government Ordered to Release 2,100 Pictures of Detainee Abuse*, Newsweek, Mar. 20, 2016, available at <http://www.newsweek.com/government-ordered-release-2100-pictures-detainee-abuse-315680>.

⁵ See Reporters Committee for Freedom of the Press, Reporters Committee launches survey of journalists on “Release to One, Release to All” FOIA policy, August 2, 2012, available at <https://www.rcfp.org/reporters-committee-launches-survey-journalists-release-one-release-all-foia-policy>.

⁶ The draft contains two potential options for the timing of posting FOIA-processed documents: “1) agencies should post documents online as soon as administratively feasible following a release to a requester; or 2) agencies should post documents online as soon as administratively feasible, but only after a delay of five working days following release to a requester, to allow requesters a brief period of time with exclusive access to the requested records.”

⁷ See Cause of Action, Release to One, Release, comment submitted August 10, 2016, which notes; “The absence of the final determination letter would leave the public guessing at these elements and thus decrease the informational value of the postings. Final determination letters are usually bundled with a production when the agency sends the documents to the requester and thus this recommendation would not increase agency workload. OIP and OMB should also consider directing agencies to post the original request along with the final determination letter and the produced documents, as this too would increase the productions’ informational value.” Available at <http://causeofaction.org/release-to-one-release-to-all/>.