

Statement for the Record

Committee on Homeland Security – Oversight, Management, and Accountability Subcommittee

The Public's Right to Know: FOIA at the Department of Homeland Security

October 17, 2019

We, the undersigned organizations, thank the Oversight, Management, and Accountability Subcommittee of the Committee on Homeland Security for scheduling this important hearing on improving public access to critical records at the Department of Homeland Security. We write to recommend that the committee expand its oversight of the Department's implementation of the Freedom of Information Act (FOIA) and ensure its compliance with the statute as enacted by Congress.

The Department of Homeland Security faces a significant challenge as it and its component agencies respond to approximately 40% of all Freedom of Information Act requests sent to the federal government in 2018¹. It also has a significant backlog of requests and responds to a range of topics including everything from immigration files to complex cases involving transnational crime. There is a crucial public interest at stake in ensuring the public can exercise its right to access government information, it is therefore critical that the agency significantly improve both its records management and its processes for complying with FOIA.

Recommendation: Remove Alien Files Requests from the FOIA Process

Requests related to individuals who are dealing with an immigration enforcement action against them consume a disproportionate amount of the Department's limited FOIA resources. This imbalance results in duplication of work, unnecessary delays in immigration courts, and a distorted public view of the FOIA statute, the purpose of which is to provide access to information about government, not as a vehicle for individuals to access information about themselves.

In a recent presentation to the FOIA Advisory Committee, Professor Margaret Kwoka stated²:

"The person who is in removal proceeding has to file a FOIA request with the main FOIA office which then has to assign that request to a FOIA officer for processing. That person [the FOIA officer] will inevitably come back around and look to—and find— *the same sets of records that the trial attorney has on their desk in immigration court*. So this not only duplicates work in some sense but also means the judge in immigration proceedings—in immigration court—can't resolve any disputes that arise over the records. Many attorneys noted that when they hadn't received a response to their FOIA request, they will use that as a basis for continuance in immigration court so thereby potentially holding up the underlying proceedings and using greater agency resources in that regard as well (emphasis added)."

¹ Department of Homeland Security, *FOIA Annual Report for 2018*.

https://www.dhs.gov/sites/default/files/publications/dhs_fy2018_foia_report_updated.pdf

² Professor Margaret Kwoka, *FOIA Advisory Committee at the National Archive*. June 6, 2019, <https://www.archives.gov/ogis/foia-advisory-committee/2018-2020-term/meetings>

There is no statutory requirement that immigrants must request their Alien Files (A-files) through the Freedom of Information Act; instead, the requirement comes from DHS regulations. Moreover, in *Dent v Holder*, the 9th Circuit held that immigrants have a right to proactive disclosure of their records and are not required to seek them using the FOIA process³. To preserve limited resources and streamline the process for both requestors and FOIA officers, DHS must enact new regulations under the Administrative Procedures Act or create a new system for processing of A-files that doesn't rely on the Freedom of Information Act. We encourage the Committee to direct DHS to update its regulations and reform its internal policies to separate this process from FOIA.

Recommendation: Allocate Funding for Digitizing Records

The Department of Homeland Security spends a significant portion of its FOIA resources processing immigration-related files; a burden that could be reduced by modernizing the process. The Committee should allocate funding for technology that allows the various components to more quickly share records as needed for the purposes of FOIA. A recent report by the Office of Government Information Services recommended, in part, that USCIS and DHS⁴:

“Weigh the costs and benefits of producing machine readable digitized versions of A-Files that will enable the use of computer assisted review tools; [and] explore how technology can be used to ensure that records do not need to be re-processed multiple times.”

Given the scale of DHS FOIA operations, allocation of funding for such technology could result in reduced spending in the long-term by reducing duplicative work and making it easier to process requests.

Recommendation: Expand Fee Waivers and Expedited Processing

The Committee should call on the Department of Homeland Security to expand the use of fee waivers and expedited processing under FOIA. In 2018, DHS received 4,103 requests for expedited processing and granted it in only 588 cases; approximately 14% of the time⁵. Expedited processing is crucial to the public's right to know information of critical public interest, to ensure timely research by academics, and to uphold the due process rights of immigrants. The Committee should further direct the agency to expand the use of fee waivers, in particular by the U.S. Coast Guard, which accounts for 80% of FOIA fee requests for the entire Department. Requiring the public to pay fees to access public documents is detrimental to the right to information, sometimes limiting access to those who are able to pay exorbitant fees. In fiscal year 2018, DHS collected \$18,518 in fees which amounts to approximately 0.03% of the entire FOIA budget of DHS, demonstrating that FOIA fees are not crucial to funding the FOIA office.

³ National Immigration Council. “*Dent v. Holder* Strategies for Obtaining Documents from the Government during Removal Proceedings.” June 12, 2012, https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/dent_practice_advisory_6-8-12.pdf

⁴ Office of Government Information Service. *Compliance Review of U.S. Citizenship and Immigration Services*. February 9, 2018, <https://www.archives.gov/files/uscis-foia-compliance-assessment-report.pdf>

⁵ Department of Homeland Security *supra* (n 1) 18.

Recommendation: Expand Cooperation between Components

Given the size of DHS, and the overlapping missions of many of its components, the committee should direct DHS to expand cooperation between its offices under FOIA. It is common for DHS to receive a FOIA request and redirect the request to one of its components for processing. While it is encouraging that these organizations communicate with each other to fulfill requests, this process can also cause unnecessary delays. For the purposes of FOIA, the Committee should expand, through legislation if necessary, the access of FOIA officers to electronic records. Currently, many FOIA officers do not have direct access to the records that have been requested and must retrieve records from other agency employees. Expanding the access of FOIA officers within and between agencies would minimize delays and expand cooperation between components.

Recommendation: Direct DHS to Reduce its Reliance on Exemptions

FOIA officers at the Department of Homeland Security have a pattern of over-use of FOIA exemptions. In 2018, DHS received 395,751 FOIA requests and applied a redaction more than 400,000 times. In particular, the department relies heavily on FOIA's Exemption 7, which allows the government to withhold documents that are law enforcement sensitive⁶. In almost half of requests for documents, the Department argued that redacted information, if released, "could reasonably be expected to risk circumvention of the law," a rate of use that clearly suggests excessive redactions. The Committee should therefore direct DHS and its components to review their pattern and practice related to the use of exemptions.

Continuing Oversight as a Check against Potential DHS Abuses

Freedom of Information Act requests are a critical tool used to uncover evidence of potential rights abuses by the Department of Homeland Security. For example, following reports of mistreatment of at-risk detainees in federal detention centers, American Oversight is suing under FOIA to obtain records on the treatment of transgender, pregnant, and juvenile detainees. Records recently obtained by the Project On Government Oversight shed light on ICE's use of solitary confinement for detainees with mental illnesses.

Examples such as these demonstrate that not only is it necessary for the Committee to direct DHS to reform its FOIA practices in the ways recommended above, but the Committee must also continue its vigorous oversight of DHS's compliance with FOIA as a way to protect against potential civil and human rights violations by the Department.

American Oversight
Electronic Frontier Foundation
National Freedom of Information Coalition
Open the Government

Demand Progress
Government Accountability Project
National Security Archive
Project On Government Oversight

⁶ *infra*.