



June 12, 2015

The Honorable Jason Chaffetz
Chair, House Committee on Oversight and Government Reform
2157 Rayburn House Office Bldg.
Washington, D.C. 20515-6143

**Re: Response to Request for Additional Comment on Improvements
to the Freedom of Information Act ("FOIA")**

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Dear Mr. Chairman:

Please find below the ACLU's response to your request for additional comment, sent by email on June 8 and following on the hearing held on June 2, 2015. We again applaud the committee for convening this hearing on ways to improve FOIA, which, while needing surgical improvement, is the most important tool the American people have to uncover government waste, fraud, abuse and illegality.

Our specific responses follow:

(1) Are there any exemptions that should or could be eliminated in their entirety? If yes, which one(s)? If not, why not?

Without weighing in on the wholesale elimination of any of the current exemptions or exclusions in FOIA, we urge reform because the current exemptions and exclusions have been grossly misused and certainly need to be narrowed.

Exemption 5, in particular, should only apply to material legitimately covered by the attorney-client privilege or the work product doctrine. The "deliberative process" privilege, which is not even mentioned in the statute, must be eliminated or, at the very least, limited to pre-decisional and deliberative material.

In no case can it be used to withhold factual material or any document that has the force of law—formal, informal or customary—in any entity covered by FOIA. The "deliberative process" privilege has been used repeatedly over the past decade—indeed, since Watergate—to withhold material that is effectively a body of secret law, and to insulate the government from having to answer difficult questions that clearly implicate the public interest.

Additionally, one thing that must be absolutely forbidden through statute is the use of a false response when material exists but is excludable under 5 U.S.C. § 552(c)'s law enforcement exclusions. We fear that agencies

continue to issue “no records” responses when, in fact, records exist but are not subject to FOIA because they pertain to an ongoing investigation, confidential informant, or the existence of the documents itself is classified as a matter of foreign intelligence, counter-intelligence or international terrorism. Agencies should instead issue what amounts to a Glomar response. Please see our written testimony for more information.

(2) Which exemptions need to be narrowed in scope? In what ways do they need to be narrowed?

As discussed in more detail in our written testimony, we support the proposal—including in past iterations of the FOIA reform legislation currently pending before the House—to include a public interest balancing test in exemption 5, which would require the disclosure of material, even when arguably covered by the exemption, when disclosure would be in the public interest. Such a caveat would significantly limit abuses of Exemption 5, which have become severe.

We also continue to have serious concerns with abuses of exemption 7, related to ongoing law enforcement activities. This exemption, as with all the others, must be construed narrowly and in no case may be used to withhold “secret law” material. That is, it cannot be used to withhold material applying law to facts that is binding—formally, informally or customarily—on any entity or any individual, in or out of government.

Further, we strongly oppose any false response to a FOIA request. We fear that agencies continue to issue “no records” requests when, in fact, records exist but the existence of those records is classified or they are excludable from FOIA under § 552(c). In such a case, agencies should issue a truthful and informative response that does not confirm the existence of the documents. Again, please see our written testimony for more detail.

Finally, we note that exemption 1, while not, in theory, objectionable, is a font of FOIA abuse simply because of the problem of selective and over-classification. While a separate issue from the text of FOIA, selective and over-classification is perhaps the single greatest challenge facing open and transparent government today, and we look forward to working with Congress to finally address this crucial issue.

(3) What do agencies need to better perform? What kind of consequences should agencies face for non-compliance? What kinds of incentives could we put in place to encourage compliance?

We are concerned that the question of whether agencies have sufficient resources to properly comply with FOIA may become politicized. Congress could either create an independent entity similar to the Privacy and Civil Liberties Oversight Board (or, indeed, could confer authority on the PCLOB) to both audit FOIA compliance and determine whether any agency faces resource constraints.

Additionally, centralization and consolidation of the FOIA process, government-wide, would eliminate redundancies, improve efficiencies and better meet the overall goal of FOIA: to open government process and procedure to public scrutiny. We support the creation of a central portal

that would allow the public to submit and track requests, search other requests and review disclosed material electronically.

We also continue to express serious concern with the lack of uniform rules for the preservation of agency material in an electronic and easily searchable format. We have received FOIA denials from agencies like the Department of Defense claiming undue burden in the search of archived emails because they are not stored in an easily searchable format. Agencies should not be allowed to subvert open government laws because of poor archival practices.

With respect to consequences for non-compliance, one of the first things Congress should do is ensure that agencies are following the clear intent of the 2007 FOIA reforms in not charging fees when they fail to abide by the clear deadlines imposed by the law.

Additionally, Congress should amend FOIA to require the production of disclosable material within the initial 20-day window (that is, Congress should clarify that a simple response is not sufficient and that actual production must begin before the deadline, even if on a rolling basis). FOIA non-compliance could also be considered in the appropriations process.

Finally, Congress could create a fund to provide performance bonuses for agency FOIA officers, based on clear metrics keyed to improving disclosure.

(4) What other legislative solutions should the Committee consider?

Congress should immediately pass the FOIA reform legislation currently pending before both chambers, and should reintroduce the public interest balancing test for exemption 5 from previous versions of those bills.

Congress could also include clarifying language in sections (b) and (c) of FOIA to prohibit agencies from issuing false responses to FOIA requests for documents that are either exempt under section (b)(1) or excludable under section (c). Agencies should instead be required to issue a truthful and informative response that preserves the opportunity for appeal and litigation but that does not confirm the existence of the documents.

Congress could also clearly forbid the withholding of “secret law” material. That is, Congress could expressly require the disclosure of any material with the force of law—formal, informal or customary—at any entity subject to FOIA. This would include, for instance, opinions of the Office of Legal Counsel, which are binding as a matter of administrative law. Congress could also expand FOIA to apply to entities like the Foreign Intelligence Surveillance Court, which should be required to disclose substantive legal opinions to the public.

Relatedly, Congress could limit the application of the “deliberative process” privilege, or eliminate it entirely, in exemption 5 (in addition to the creation of a public interest balancing test). The deliberative process privilege, at most, *only* applies to pre-decisional and deliberative material, and does not apply to factual material. Congress could require agencies involved in deliberation to segregate factual material from potentially deliberative material as a matter of course, which would further alleviate the rampant and egregious abuses of exemption 5.

* * *

Again, we thank the committee for calling this important hearing, and we look forward to continuing to work with Congress to improve government transparency and accountability. Please do not hesitate to contact Gabe Rottman at 202-544-1681 or grottman@aclu.org with any questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Macleod-Ball".

Michael Macleod-Ball
Acting Director, Washington Legislative Office

A handwritten signature in black ink, appearing to read "Gabriel Rottman".

Gabriel Rottman
Legislative Counsel/Policy Advisor