



December 20, 2016

U.S. Department of Justice  
Office of Information Policy  
ATTN: Mr. Bobby Talebian  
1425 New York Ave., NW, Suite 11050  
Washington, DC 20530-0001

Submitted via Regulations.gov

Re: OIP Docket No. 100

Dear Mr. Talebian,

The Project On Government Oversight (POGO) provides the following public comment to “Request for Public Comment on Draft ‘Release to One, Release to All’ Presumption,” (OIP Docket No. 100; 81 Fed. Reg. 89023, December 9, 2016). As an independent nonprofit organization committed to achieving a more accountable and transparent federal government, POGO has a longstanding interest in the Freedom of Information Act (FOIA) and the proactive disclosure of government records. POGO supports the premise of “Release to All,” but has two concerns. The first relates to the proposed “Good Cause” exceptions, and the second relates to the timing of postings to the public at large.

POGO believes that the proposed “Good Cause” exceptions are both overly broad and unnecessary. Current exemptions to FOIA already cover sensitive national security and law enforcement information (e.g. FOIA Exemptions 1 and 7). If releasing the information to the public would truly result in “unacceptable foreseeable risk,” then that information would qualify under existing FOIA exemptions. Any information released to a single individual or organization may then be posted online and widely disseminated, so it makes little sense to try to restrict the public’s access to information that has already been released to the public through the FOIA process. Furthermore, it would require more time and energy on the part of government FOIA Officers who will have to spend additional time reviewing the content again in order to determine whether it fits any of the vague “Good Cause” exceptions. In the case of graphic content, a description of the records provided may be placed online, alongside instructions on how to receive prompt access to those records.

In the event that “Good Cause” exceptions are allowed in the final policy, POGO strongly recommends that a defined set of allowable exceptions be outlined in this policy and be included in FOIA officer training programs, rather than leaving it completely to the individual judgment of each agency’s Chief FOIA Officer.

Regarding the timing of postings, there are legitimate concerns that immediately releasing records requested through FOIA will discourage journalists and civil society from using this important public accountability tool. On one hand, this is information that belongs to the public, and POGO believes that in many cases information that can be released under FOIA should be freely released for this reason. On the other hand, one of the powerful incentives for investigative journalists to invest time and resources into using FOIA is that they will obtain information in order to report on the operations and activities of the federal government. A survey conducted by the Reporters Committee for Freedom of the Press confirmed as much, with only 25 percent supporting “release to all” unconditionally, while an additional 60 percent conditionally supported “release to all,” provided there was a delay. We worry that not including some kind of delay will discourage journalists and others from investigating and reporting on the operations and activities of the federal government and will weaken government accountability and oversight.

POGO sees an alternative option available to the government that may alleviate the tension between the desire for openness and the incentives for journalists and civil society organization to invest time and energy in the FOIA process. POGO believes that requested records should, by default, be made available online as soon as administratively possible. However, FOIA requestors should also be allowed to delay the public posting of the response to their request by up to 30 calendar days if they so desire—with the understanding that during this time, should someone else make the same or a similar FOIA request, the records be promptly provided to the new FOIA requestor. In this way, a requestor who may have invested a significant amount of time, energy, and money in a specific or multiple FOIA requests will temporarily have sole, but not “exclusive” access to the records in question.

POGO believes this public posting delay would provide several benefits. First, it would allow for requestors—especially journalists and civil society groups—to thoroughly review and analyze the sometimes voluminous records provided. Without a delay, some requestors would be pressured to hastily review and publish commentary, leading to less thorough and thoughtful reviews of the documents, and greater chance that those documents may be misinterpreted.

Second, individuals or organizations often make significant investments to obtain information. These investments can include the time, energy, and resources spent submitting a FOIA request, negotiating/working with FOIA officers to clarify or modify the request, appealing redactions or denials, and sometimes even prolonged lawsuits. Providing the FOIA requestor with a period of delayed public posting will allow their investment and work to be acknowledged and cited by others who are interested in the information found in the disclosed records.

A situation may arise in which an individual or organization wishes to verify the claims of a prior FOIA requester before information has been publicly posted. This may happen especially when information in a FOIA response is urgent, newsworthy, or controversial. In such a situation, any individual or organization requesting a duplicate FOIA response should be provided with the same information without having to go through the traditional FOIA process—regardless of any delay in public posting. It would be counter-productive to, in the name of transparency, deny other requestors the same access to records which have already been released

to the public. To this end, we believe the final policy should not use the word “exclusive” to describe the delayed public posting of materials requested.

If you have any questions, I can be reached at [dvanschooten@pogo.org](mailto:dvanschooten@pogo.org) or (202) 347-1122.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel Van Schooten". The signature is fluid and cursive, with a long horizontal stroke at the end.

Daniel Van Schooten  
Researcher