

[Date]

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

FROM: DOJ, Office of Information Policy

SUBJECT: “Release to One, Release to All” Presumption: Achieving Greater Transparency by Making More Information Available Online

July 4, 2016 marked the 50th anniversary of the signing of the Freedom of Information Act (FOIA). Over the past eight years, agencies have processed more than 4.6 million FOIA requests, utilized technology to realize greater efficiencies in FOIA administration, and made countless documents available online. In conjunction with the signing of the FOIA Improvement Act of 2016, the Administration announced additional steps to build on this record of success. One such step was to promote broader disclosure of records through a “release to one is release to all” presumption (“Release to All”). Implementation of this presumption will mean that all citizens, not just those making a request, have access to information released under the FOIA. While the FOIA Improvement Act of 2016 contains a provision requiring agencies to post FOIA-processed records once they have been requested three or more times, this policy takes that concept further and directs agencies to post such records after the first request.

This guidance outlines how agencies should implement the “Release to All” presumption.

Background

The fundamental purpose of the FOIA is to “ensure an informed citizenry” through disclosure of agency records.¹ In a FOIA [Memorandum published in 2009](#),² the President directed the heads of all federal executive Departments and Agencies to administer the FOIA with a “clear presumption: In the face of doubt, openness prevails.” The President called on agencies to utilize modern technology to inform citizens about what is known and done by their government and to “take affirmative steps to make information public.” Likewise, Department of Justice [FOIA Guidelines](#)³ published in 2009 stressed the importance of proactive disclosures and the DOJ Office of Information Policy (OIP) issued guidance on proactive disclosures in 2015.⁴ When agencies make proactive disclosures, they are enhancing openness by ensuring that information about the operations and activities of the government is readily and efficiently made available to all. Every year agencies post a wide variety of records online, ranging from data on energy resources and food safety to records on procurements, grants, and historical reviews.

¹ NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

² Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009).

³ Attorney General’s Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51,879 (Oct. 8, 2009).

⁴ Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request, Office of Info. Policy (Mar. 16, 2015), <http://www.justice.gov/oip/oip-guidance-5>.

One distinct category of records that all agencies possess is records that have been requested by individual FOIA requesters. In July 2015, DOJ launched a six-month pilot program with seven volunteer Federal agencies to assess the viability of adopting a proactive disclosure policy where FOIA-processed records are posted online so that they are available to the public. Over the course of the pilot, DOJ worked with the participating agencies to capture metrics on the time and resources associated with implementing such a policy. In particular, since the technical process of posting records is not usually a function performed by a FOIA Office, and because there are various steps that need to be taken to prepare documents for posting so that they are accessible to those with disabilities, the pilot attempted to capture the impact of those additional steps on agencies. At the conclusion of the pilot, DOJ made a number of findings, including the need for flexibility in such a policy and the importance of agencies establishing a plan to accommodate the time and resources needed to handle the mechanics of posting increased volumes of records. Significantly, during the course of the pilot some of the participating agencies found that by adopting the policy they reaped additional benefits, such as greater awareness of what was being posted by their agency and improved workflows and coordination between offices. Further details about the pilot are included in the Appendix.

Taking the lessons learned from the pilot, adopting a “Release to All” presumption across the government will build on the efforts over the past eight years to increase transparency.

Guidance on applying the “Release to All” Presumption to Records Released Under the FOIA

All records processed for release under the FOIA, subject to the exclusion and any applicable exemptions as outlined below, should be posted online so that they are available not just to the individual requester, but to the public at large.

This document outlines guidance for posting such records. Further guidance will be issued at a later date to ensure that records posted are easily retrievable by the public through a consolidated online request portal currently under development, as directed by the FOIA Improvement Act.

Exclusion and Exceptions to Posting Requirement

A. Exclusion of First-Party & Analogous Requests

Agencies should only post records that they otherwise would release to any member of the public upon request. When individuals seek access to information about themselves, or authorize someone else to have access to their information, the records containing that information typically would not be provided to any other member of the public due to the individual’s privacy interest in the records. As a result, those records would not fall within the “Release to All” presumption and should not be posted.

Similarly, if a business seeks access to its own records and those records would otherwise be exempt from release to another requester, they would not fall within the presumption and should not be posted.

B. “Good Cause” Exceptions to Posting

Agencies may process under the FOIA particular records, or types of records, that they determine are either not feasible to post, or are not appropriate to post. For example, agencies may process records that are particularly time-consuming or otherwise technically difficult to post online, such as electronically fillable forms. They may also process particular records that, while technically releasable to a FOIA requester, are not appropriate for posting online, such as graphic videos of an automobile accident or records that raise scientific integrity risks. Agencies may process records containing information that if publicly posted could increase risks to individual privacy, such as the risk that de-identified data could be re-identified when combined with other publicly available information, exposing individuals to harms such as identity theft, reputational harm, embarrassment, financial loss, and risk to personal safety. Law enforcement agencies might process records for which there is an unacceptable foreseeable risk of harm to law enforcement or national security interests through mosaic compilation of publicly posted information.

Agencies’ Chief FOIA Officers may, for good cause, such as those described above, determine to exempt particular documents or document categories from the requirement to post online. Agencies should include a notice on their FOIA webpage describing the types of exceptions taken.

C. Posting Descriptions of Released Records as an Alternative to Posting Records Online

In the event an agency determines that the volume of released records, or the age or nature of the records themselves, makes contemporaneous posting of all FOIA-processed records impracticable at this time, the agency may instead briefly describe the processed records and post the list of brief descriptions online where they would otherwise post the released records. These descriptions should be of sufficient detail to describe the general nature and content of the records. The descriptions should be accompanied by a notice to the public that if any party is interested in obtaining a copy of the records, the records will be promptly provided. The agency shall provide for a method for easily obtaining these already processed records by interested parties. Further guidance will be issued on how to create these descriptions of documents, and where and in what format they should be posted, to ensure they will also be readily available to the public through the consolidated online request portal described above.

As discussed below, agencies should work toward steadily increasing the number of requests in which the records themselves are posted online as opposed to this alternative.

Section 508

Section 508 of the Rehabilitation Act requires agencies to provide individuals with disabilities access to electronic information and data comparable to those without disabilities. Documents posted online in accordance with the “Release to All” presumption should be posted in compliance with Section 508 of the Rehabilitation Act.

Timing of Postings

[NOTE: This draft guidance includes two potential options for the timing of posting documents released under FOIA to a requester. The authors seek comment from the public on these two options, or other potential approaches.]⁵

Option 1:

Agencies should post documents online as soon as administratively feasible following a release to a requester.

Option 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.

Effective Date and Timing for Implementation

The “Release to All” presumption will apply to FOIA requests received after TBD.

To the extent administratively feasible, agencies should begin to implement the “Release to All” presumption as soon as possible after TBD, with implementation complete by TBD.

Recognizing that application of this policy will require changes to administrative procedures, however, agencies may employ a phased implementation of the “Release to All” presumption. Full implementation of the policy means that an agency is posting 100% of their FOIA processed records online that are not subject to one of the exceptions outlined herein.

⁵ During the course of the pilot and at presentations made to the Chief FOIA Officers Council, some journalists expressed a desire for agencies to first release records to the requester and only thereafter post the records following a built-in delay. Arguments for providing for such a delay include advancing the causes of investigative journalism, which relies on building a record of information through FOIA, and ensuring that requesters that go through the process of obtaining information under FOIA have first right of access to that information. Arguments against such a delay period before public posting include the overall goals of transparency to the public, and the underlying purpose of FOIA and the benefits of a more informed society. In addition, a delay would be operationally challenging to administer. For example, agencies would need to create new procedures to build in a required delay, adding steps to the administrative process and encumbering workflows, which could negatively impact FOIA administration. Authors are requesting views from the public on this question.

For those agencies unable to fully implement the “Release to All” presumption by TBD, agencies should post a target schedule for implementation on their websites that sets clear milestones for implementation. The schedule may utilize the available alternative of posting descriptions of the released documents in lieu of posting all the records themselves provided: 1) the agency commits to fully posting at least some portion of their eligible FOIA-processed records by March 31, 2017, and 2) the agency commits to steady increases over time in the numbers of the records posted.

All agencies should ensure that, by TBD, they are either posting all eligible FOIA-processed records online, or posting descriptions of all of the documents released.

DOJ will establish reporting mechanisms for agencies to use to report on agency progress in meeting these milestones.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees, agents, or any other person.

Agencies may contact DOJ at 202-514-3642, or by emailing DOJ.OIP.FOIA@usdoj.gov, if they have any questions concerning implementation of this policy.

Appendix I: The Department of Justice “Release to All” Pilot

In July 2015, the Department of Justice launched a six-month pilot program with seven volunteer Federal agencies to assess the viability of releasing FOIA-processed records to the public by having the agency itself post them online. First-party requests were not included in this pilot. Such records are not generally released to anyone other than the requester because to do so would invade the requester’s privacy. As a result, those records are not appropriate for posting and were excluded from the pilot.

Over the course of the pilot, the Department of Justice worked with the participating agencies to capture metrics on the time and resources associated with implementing such a policy. In particular, since the technical process of posting records is not usually a function performed by a FOIA Office, and because there are various steps that need to be taken to prepare documents for posting so that they are accessible to those with disabilities, in accordance with Section 508 of the Rehabilitation Act, the pilot attempted to capture the impact of those additional steps on agencies.⁶ Specifically, the pilot sought to answer many important questions including: the time and costs associated with implementing such a policy both for FOIA offices and for agency IT offices, any impacts on outside stakeholders, and whether exceptions to such a policy would be needed.

The agencies that participated in the pilot were the Office of the Director of National Intelligence, the Millennium Challenge Corporation, the Environmental Protection Agency, and components or offices of the Departments of Defense, Homeland Security and Justice, and the National Archives and Records Administration. Throughout the pilot, the Department of Justice collected metrics, provided guidance, answered questions from the participating agencies, and solicited feedback from the public. All of the information collected from agencies and received from the public was incorporated into the Department’s final [assessment](#) of the pilot.

⁶ The technical requirements set forth in Section 508 of the Rehabilitation Act are complex and detailed, but essentially require that individuals with disabilities have access to and use of information and data that is comparable to the access available to others, unless certain exceptions apply. An accessible information technology system is one that can be operated in a variety of ways and does not rely on a single sense or ability of the user. For example, a system that provides output only in visual format may not be accessible to people with visual impairments. Agency websites are made accessible by, for example, adding words to represent any non-text elements, ensuring that when information is conveyed by color it is also available without color, and identifying row and column headers for data tables, among other requirements. While each agency is responsible for ensuring its own compliance with Section 508, there are a few key agencies and offices that are responsible for standards, guidance, policy, and training. The U.S. Access Board develops and maintains accessibility requirements and provides technical assistance and training on the standards. GSA has been charged with the task of educating federal employees and building the infrastructure necessary to support Section 508 implementation. They operate <http://www.section508.gov/> which serves as a resource for the both federal agencies and the public. Section 508 also requires the Department of Justice to report to the Congress and the President on the federal government's progress in complying with this law. The Department issued a report in September 2012. http://www.ada.gov/508/508_Report.htm

Assessment of the “Release to All” Pilot

After the pilot concluded, the Department of Justice made the following findings in its [assessment](#) of the pilot:

- *Finding 1: Leadership*

Leadership “buy-in” and support is essential to success. Leadership support is also helpful in facilitating the type of collaboration and work-flow alterations often required to implement this policy. In particular, if an agency needs to establish or enhance the links between different parts of the agency, in particular between the FOIA office and the IT/Web Team office, or to prioritize resources devoted to posting records, leadership support becomes incredibly important.

- *Finding 2: Plan to Address Compliance with Section 508 of the Rehabilitation Act*

Section 508 of the Rehabilitation Act requires agencies to take certain steps to ensure that posted material is accessible to all members of the public, including those with disabilities. Because the very essence of the “Release to All” policy is increased posting of documents on agency websites, each agency must have a plan to address the time and resources needed to prepare those documents for posting in accordance with Section 508. There are several aspects that must be considered: identifying the office within the agency that will be responsible for preparing documents for posting in compliance with Section 508; assessing the volume of material that will need to be posted; and identifying the tools that will be used to do so.

All federal agencies subject to the FOIA were asked in their 2016 [Chief FOIA Officer Reports](#) whether or not any of their FOIA professionals were involved with preparing documents to be posted in compliance with Section 508 of the Rehabilitation Act. The time it takes to make a document compliant varies widely by agencies. Of the 100 agencies subject to the FOIA, 24 reported at least some involvement of their FOIA professionals in making sure documents are compliant with Section 508. The type and scope of the involvement by these FOIA offices varied widely between agencies, ranging from answering questions and acting as an intermediary for the Web or IT staff to being fully responsible for preparing documents for posting in accordance with Section 508.

- *Finding 3: Exceptions and Flexibility*

There is a need to remain flexible in implementing this policy. In addition to excluding first-party requests (where someone asks for records on themselves), the pilot demonstrated that agencies will encounter other examples of records that are very difficult and time-consuming to post, or which are inappropriate for posting for other reasons.

- *Finding 4: FOIA Demand*

The metrics collected during the pilot told us very little about whether or not there was an increase or decrease in FOIA demand as a result of participating in this pilot. There are many variables that can and do impact the number of FOIA requests received.

- *Finding 5: Inherent Value in Making Records Available to All*

While the metrics collected during the pilot did not reveal whether the postings resulted in greater numbers of people viewing the posted FOIA releases, there is an inherent value to making this information available to the public. If even one requester can find what he or she is looking for by reviewing the records already processed for release to someone else, that would be one less FOIA request that needs to be made and one less FOIA request that an agency needs to receive. While it may take time for more individuals to realize the advantages of ready access to FOIA releases, the fact that they are available to everyone in and of itself is important.

Additionally, there are some anecdotal parallels that can be drawn from previous open data initiatives. Initially, it was unclear what individuals would use open data, how much it would be used, and whether or not the investment to execute open data policies would be balanced by how many people used and benefited from it. Open data has become extremely important in the open government space and over time the demand and usage of that data has increased. It is a reasonable assumption that the same could be true in the FOIA context.

- *Finding 6: Outside Stakeholder Concerns*

With the exception of journalists, there were no other reported issues from stakeholders as a result of the pilot. Journalists had mixed reactions, with some advocating for a reasonable delay prior to the posting of records to preserve their ability to be the first to report on a given topic, while others disagreed with building in such a delay.

- *Finding 7: Additional Benefits*

During the course of the pilot, some of the participating agencies experienced additional benefits outside of those originally contemplated by the pilot. For example, the need to coordinate and collaborate with other offices improved or participants created new working relationships that will be beneficial in other contexts. Altering work-flows created efficiencies for some agencies who participated. Most of the participants also became more aware of how much and what is posted at their agencies and identified improvements for presenting that material on their websites.