

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH
JEFF SESSIONS, ALABAMA
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
JEFF FLAKE, ARIZONA
DAVID VITTER, LOUISIANA
DAVID A. PERDUE, GEORGIA
THOM TILLIS, NORTH CAROLINA

PATRICK J. LEAHY, VERMONT
DIANNE FEINSTEIN, CALIFORNIA
CHARLES E. SCHUMER, NEW YORK
RICHARD J. DURBIN, ILLINOIS
SHELDON WHITEHOUSE, RHODE ISLAND
AMY KLOBUCHAR, MINNESOTA
AL FRANKEN, MINNESOTA
CHRISTOPHER A. COONS, DELAWARE
RICHARD BLUMENTHAL, CONNECTICUT

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, Chief Counsel and Staff Director
KRISTINE J. LYONS, Democratic Chief Counsel and Staff Director

May 18, 2015

VIA ELECTRONIC TRANSMISSION

The Honorable Gene Dodaro
Comptroller General of the United States
United States Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Dodaro:

We are writing in regard to the amount of taxpayer money the government spends on Freedom of Information Act (“FOIA”) litigation in which the complainant substantially prevails. As the Associated Press recently reported, the government has conceded in nearly one in three FOIA cases that “its initial decisions to withhold or censor records were improper under the law – but only when it was challenged.”¹ The Associated Press’s General Counsel, Ms. Karen Kaiser, testified about the issue before the Committee on May 6, 2015. She stated that the reflex of most government agencies in responding to FOIA requests is to withhold information, and often there is no recourse for a requester other than pursuing costly litigation.² Indeed, she testified that “the only way to force the agency to comply with the law was to sue them.”³ This is not how FOIA is supposed to work. Withholding information from the public unless sued undermines the very spirit of FOIA and wastes significant taxpayer money in the process.

As the Supreme Court has explained, “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”⁴ Ideally, the government

¹ Ted Bridis, *Administration Sets Record for Withholding Government Files*, THE ASSOCIATED PRESS, Mar. 18, 2015, available at <http://bigstory.ap.org/article/ab029d7c625149348143a51ff61175c6/us-sets-new-record-denying-censoring-government-files>.

² Testimony of Karen Kaiser before the Committee on the Judiciary, May 6, 2015, available at <http://www.judiciary.senate.gov/imo/media/doc/05-06-15%20Kaiser%20Testimony.pdf>.

³ *Id.*

⁴ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

would properly process requests for information and release the relevant documents as appropriate under the law. However, FOIA allows requestors to bring suit in federal court for a *de novo* review of government agencies' compliance with the law in processing their requests, and gives those courts the jurisdiction to enjoin the agencies from withholding agency records as well as to order the production of any agency records improperly withheld.⁵ The Freedom of Information Act also allows the courts to order the government to pay the complainant's reasonably incurred attorney fees and other litigation costs in any FOIA case in which the complainant has substantially prevailed.⁶ The statute states that a complainant has substantially prevailed if he or she has obtained relief through either:

- (I) a judicial order, or an enforceable written agreement or consent decree; or
- (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.⁷

The Freedom of Information Act also requires each government agency to submit an annual report regarding its FOIA activities to the Attorney General.⁸ Each agency is instructed to "[p]rovide the sum of all costs expended by the agency in litigating FOIA requests [] includ[ing] salaries of personnel involved in FOIA litigation, litigation overhead, and any other FOIA litigation-related expenses."⁹

While each agency is required to provide its annual FOIA litigation costs in its report, the reports fail to distinguish between the litigation costs in those cases in which the court found the government to have lawfully complied with FOIA, and the litigation costs in those cases in which the complainant substantially prevailed.

Accordingly, the Committee requests that the GAO calculate the amount of taxpayer money spent by each agency since 2009 on litigation costs in FOIA cases in which the complainant substantially prevailed. This should include not only the complainants' attorneys' fees and other litigation costs that the court ordered the government to pay, but also the money the government spent on its own personnel, litigation overhead, and litigation-related expenses in such cases.

Please keep [REDACTED] and [REDACTED] of the Committee staff apprised of your review. They can be reached at [REDACTED] and [REDACTED], respectively. Thank you for your attention to this matter.

⁵ 5 U.S.C. § 552(a)(4)(B).

⁶ 5 U.S.C. § 552(a)(4)(E).

⁷ 5 U.S.C. § 552(a)(4)(E)(ii).

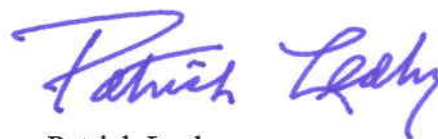
⁸ 5 U.S.C. § 552(e)(1).

⁹ *Department of Justice Handbook for Agency Annual Freedom of Information Act Reports 55* (2013), available at: http://www.justice.gov/sites/default/files/oip/pages/attachments/2014/11/04/departments_of_justice_handbook_for_a_agency_annual_freedom_of_information_act_reports.pdf.

Sincerely,



Charles E. Grassley
Chairman
Senate Committee on the Judiciary



Patrick Leahy
Ranking Member
Senate Committee on the Judiciary