



OFFICE OF GOVERNMENT INFORMATION SERVICES

COMPLIANCE REVIEW OF THE USE OF “STILL INTERESTED” LETTERS

PART 2: OGIS REVIEW OF FOIA PROGRAMS’ FISCAL YEAR 2014 USE OF STILL INTERESTED LETTERS

RELATIVELY FEW REQUESTS REPORTED CLOSED BUT ADDITIONAL OVERSIGHT AND TRANSPARENCY NEEDED

Summary

Findings

In the course of processing Freedom of Information Act (FOIA) requests, some Federal agencies ask requesters if they are still interested in the requested records. Typically, the agency sets a deadline for the requester’s affirmative response; receiving none, the agency closes the request.

We previously reviewed historical data to better understand trends in the use of these letters and the effect on FOIA requesters. In the course of our research, we found that data from FOIA Annual Reports to the Attorney General of the United States (hereafter referred to as Annual FOIA Reports) show Cabinet-level agencies closed few requests using still interested letters between Fiscal Year (FY) 1998 and FY 2014. However, the data does not capture several key data points, including how long the agency gives requesters to respond or how many times an agency sends still interested letters before records are processed.

We used data from Fiscal Year (FY) 2014 Annual FOIA reports to select a sample of FOIA programs to review regarding their use of these letters.

We found that

- Agencies appeared to close relatively few requests using still interested letters even using a broad definition of what might constitute requests closed using these letters;
- Reviewed FOIA programs reported following updated July 2, 2015 guidance on the use of still interested letters from the Department of Justice’s Office of Information Policy (OIP); and
- there is no guidance on how FOIA requests that are closed as a result of still interested letters should be reported in the Annual FOIA Reports, contributing to a lack of transparency regarding the use of still interested letters.

OGIS will issue recommendations regarding our observations on the use of still interested letters in a subsequent report.

Background

On October 30, 2014, the Electronic Privacy Information Center (EPIC) and a coalition of open government groups asked OGIS to review agency use of still interested letters to administratively close FOIA requests.¹ The groups asked that we review “this practice and its impact on FOIA requesters as a barrier to pursuing government records.” The letter specifically asked us: “How often are [still interested letters] sent to requesters? How widespread is this practice across federal agencies? What is the source of this tactic—what trainings and guidance created it?” and “What percentage of requests subject to administrative closure letters end up being closed?”

OGIS Director James Holzer informed EPIC on August 27, 2015, that he had directed the OGIS Compliance Team to include agency use of still interested letters as part of its agency compliance assessments, and that the team would review the use of still interested letters government-wide.

On April 27, 2016, we issued an analysis of available data from Cabinet-level agencies’ Annual FOIA Reports from Fiscal Year (FY) 1998 to FY 2014. We found that the number of requests Cabinet-level agencies reported closing using still interested letters accounted for less than 1 percent of all FOIA requests processed by those agencies in all but one of the 17 years reviewed. We also found that the number of requests Cabinet-level agencies reported closing using still interested letters did not appear to have a large effect on those agencies’ backlogs. Our report also noted that while OIP has issued guidance on the use of still interested letters,² no guidance exists regarding how agencies should report requests closed using still interested letters.

“Still interested” correspondence is a letter or an email that an agency sends to a FOIA requester asking if the requester remains interested in the requested records despite the time that elapsed since the request was filed. These letters are generally sent to the requester a significant amount of time after the FOIA request is made and inform the requester that if he or she does not indicate interest within a certain time, the agency will not process the request and will administratively close it. Sometimes it is the first communication—other than an acknowledgement letter sent upon receipt of the request—that the agency has with the requester.

These letters can give the appearance to requesters—particularly frequent, savvy requesters—that an agency’s FOIA process does not work.

FOIA requires that agencies annually report to the Department of Justice (DOJ) the number of requests in which the agency cited exemptions to withhold records in full. OIP requires agencies to categorize all other requests that are full denials based on reasons other than exemptions into one of the nine sub-categories.” These sub-categories are:

¹ Letter to OGIS Director Miriam Nisbet from the Electronic Privacy Information Center and a coalition of open government groups, October 30, 2014, accessed February 29, 2016, http://foia.rocks/OGIS_Letter_final.pdf.

² “The Importance of good Communication with FOIA Requesters” last updated August 21, 2014, <http://www.justice.gov/oip/blog/foia-post-2010-oip-guidance-importance-good-communication-foia-requesters> and “Limitations on the Use of ‘Still-Interested’ Inquiries,” last updated July 20, 2015, <http://www.justice.gov/oip/oip-guidance-8>.

- no records
- all records referred to another component or agency
- request withdrawn
- fee related reason
- records not reasonably described
- improper FOIA request for other reason
- not agency record
- duplicate request
- other

If the agency reports requests under the category “other,” OIP requires that the agency describe the reason separately. In describing other reasons, some agencies directly note a lack of a response to a still interested letter while some agencies report other reasons that might be attributed to a lack of a response to a still interested letter (e.g., no response from requester or unable to contact requester).

Methodology

As part of OGIS’s mandate to review agency FOIA policies, procedures, and compliance, 5 U.S.C. §§ 552(h)(2)(A) and (h)(2)(B), we reviewed the following sources for this report:

- Examples of still interested letters to administratively close pending requests³
- Data from the FY 2014 FOIA Annual Reports to the Attorney General of the United States (hereafter referred to as Annual FOIA Reports)

Review of FY 2014 Data

We reviewed data from agencies’ FY 2014 Annual FOIA Reports to identify FOIA programs in which the use of still interested letters to close requests might have the greatest effect on requesters. We identified the 15 agencies and departments that processed the largest number of requests in FY 2014 (See table 1). To understand and account for the ways that different programs within an agency use the letters, we narrowed the review to focus on data from the programs that processed the most requests per agency.

It is important to note that our review of the Annual FOIA Report data makes several assumptions based on the existing reporting framework required by FOIA. The programs in our review processed 595,589 of the 714,231 FOIA requests processed in FY 2014—almost 84 percent of the total requests processed government-wide in that year. We reviewed the number of requests the program reported as closing using still interested letters and compiled data on the number of requests the program reported as “withdrawn,” and the number of requests closed for “other” reasons that were described as either “no response from requester” or “unable to contact requester.” Among our assumptions is that requests closed for reasons other than a lack of a response to a still interested letter are likely to be among the requests reported as withdrawn and

³ We reviewed examples submitted by open government groups and observed during OGIS mediation cases and compliance reviews.

reported closed as a result of a lack of response or unable to locate requester. We looked for programs that reported a relatively high percentage or number of two types of requests: those closed using something that might be interpreted as a still interested letter and those requests reported as withdrawn. Based on our analysis, we chose seven FOIA offices to follow up with regarding their use of still interested letters.

Table 1: Agencies reviewed for possible use of still interested letters to close requests

	Program Data Reviewed <i>*Programs Interviewed Regarding use of still interested letters in italics and bold</i>
Department of Agriculture	Farm Service Agency, Forest Service, Animal & Plant Health Inspection Service, <i>Natural Resources Conservation Service</i> , Food Safety & Inspection Service
Department of Defense	<i>Army</i> , Navy, Defense Logistics Agency, National Security Agency
Department of Health & Human Services	Centers for Medicare & Medicaid Services, <i>Food & Drug Administration</i> , Office of the Secretary, Administration for Children & Families, National Institutes of Health, <i>Centers for Disease Control & Prevention</i>
Department of Homeland Security	Citizenship & Immigration Services, Customs & Border Protection, Immigration & Customs Enforcement, National Protection & Programs Directorate, US States Coast Guard, US Secret Service
Department of Justice	Executive Office for Immigration Review, Bureau of Prisons, Federal Bureau of Investigation, Executive Office for United States Attorneys, US Marshals Service
Department of Labor	Occupational Safety & Health Administration, Wage & Hour Division, Employment & Training Administration, Mine Safety & Health Administration, Office of Workers' Compensation Programs
Department of State	Headquarters, Office of the Inspector General
Department of Transportation	Federal Aviation Administration, <i>Federal Motor Carrier Safety Administration</i> , Federal Highway Administration, Federal Railroad Administration, Office of the Secretary
Department of the Treasury	Internal Revenue Service, Office of the Comptroller of the Currency, Departmental Offices, <i>Bureau of the Fiscal Service</i> , Treasury Inspector General for Tax Administration
Department of Veterans Affairs	Veterans Health Administration, Veterans Benefit Administration, Office of the Inspector General, Office of Information Technology, Office of Acquisition, Logistics & Construction
Environmental Protection Agency	Region 2, <i>Headquarters</i> , Region 5, Region 4, Region 9
Equal Employment Opportunity Commission	Data reported only at the Agency level
National Archives & Records Administration	Data reported only at the Agency level
Securities & Exchange Commission	Data reported only at the Agency level
Social Security Administration	Data reported only at the Agency level

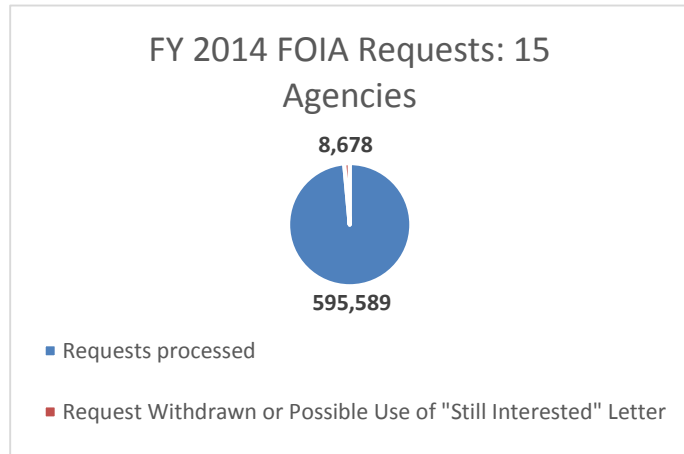
Findings

Few Requests Reported Closed by Possible Use of Still Interested Letters

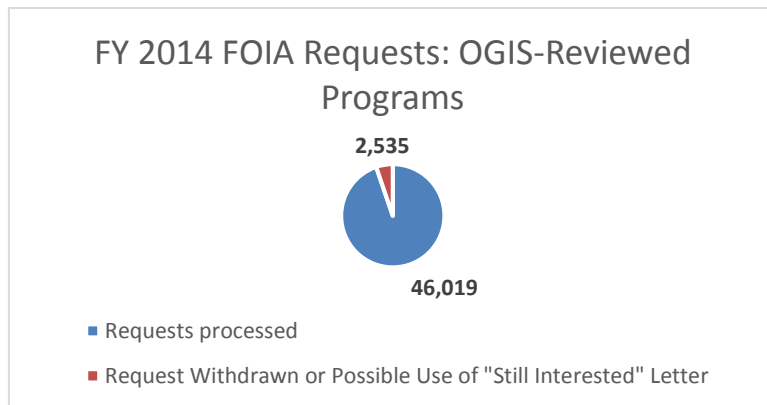
Our findings for FY 2014 are similar to those from our first report on historical trends in the use of still interested letters: few requests are closed after the possible use of still interested letters or after requesters withdraw their requests.

We found that even after we expanded the data we collected to make sure that we captured any requests that *might* have been closed using still interested letters, the 15 agencies that processed the most requests in FY 2014 reported closing only

about 0.15 percent of the requests the programs processed for an “other” reason that might be used to describe a still interested letter—931 of the 595,589 requests processed by those 15 agencies that year. As discussed previously, “other” reasons we included in our review are “unable to locate requester,” and “no response from requester.”



We also reviewed data regarding the number of requests the agency reported as “withdrawn” during FY 2014. About 1 percent of the requests processed by these agencies were reported as withdrawn—7,747 requests of the 595,589 processed by the 15 agencies. As previously noted, we know the data we collected includes requests *not* closed using still interested letters. The total 8,678 requests closed by the possible use of still interested letter or withdrawn represents 1.5 percent of the total number of requests processed by these agencies.



Moving onto the seven FOIA programs we reviewed more closely, it is important to note that we targeted FOIA programs in which the use of still interested letters we thought might have the greatest effect on requesters because of the high percentage or high number of requests closed for the reasons we explain above. Despite our selection criteria and the fact

that we collected data we know includes requests *not* closed using still interested letters, the seven FOIA programs we reviewed closed about 5.5 percent of the requests they processed using a method that *might* be related to still interested letters—2,535 requests closed of the 46,019 requests processed. The FOIA programs reported 385 requests were closed for an “other” reason that might be related to a still interested letter (less than 1 percent of the requests processed by

these programs) and 2,150 requests were reported as withdrawn (about 5 percent of requests processed). Despite the relatively small number of requests closed, we acknowledge requester frustration with still interested letters, which can give the appearance that an agency’s FOIA process does not work.

Of the programs we followed up with to discuss their use of still interested letters, the Centers for Disease Control and Prevention (CDC) at the Department of Health and Human Services (HHS) reported the largest number of cases closed using still interested letters in FY 2014—209, which accounts for about 20 percent of the requests processed by the CDC that year.

The Department of Agriculture’s Natural Resources Conservation Service (NRCS) reported closing about seven (7) percent of the requests it processed in FY 2014 because the agency received “No Response from Requester.”

The Army reported closing less than one (1) percent of the requests the FOIA office processed in FY 2014 because it was “Not Able to Locate the Requester.”

Possible Use of Still Interested Letters by Select Agencies

Agency	FOIA Office	Requests Processed in FY 2014	Closed by Possible Use of “Still Interested” Letter	Percentage	Requests Withdrawn	Percentage Withdrawn
Department of Agriculture	Natural Resources Conservation Service	388	28*	7.22%	35	9.02%
Department of Defense	Army	30,743	148**	0.48%	592	1.93%
Department of Health & Human Services	Food & Drug Administration	10,191	0	0.00%	1,055	10.35%
Department of Health & Human Services	Centers for Disease Control & Prevention	1,028	209***	20.33%	58	5.64%
Department of the Treasury	Bureau of the Fiscal Service	306	0	0.00%	48	15.69%
Department of Transportation	Federal Motor Carrier Safety Administration	1,431	0	0.00%	132	9.22%
Environmental Protection Agency	Headquarters	1,932	0	0.00%	230	11.90%

* “No response from requester”

** “Unable to contact requester”

*** “Based on response/non-response to continued interest correspondence”

The percentage of requests that were reported as “withdrawn” by each of the programs we interviewed ranged from nearly two (2) percent by the Army to almost 16 percent by the Bureau of the Fiscal Service at the Department of Treasury.

Agency Reporting on the Use of Still Interested Letters is Inconsistent

The sample of still interested letters provided to us by non-governmental organizations includes several agencies that reported closing no requests using an “other” method described as a still interested letter in FY 2014; it is possible, but unlikely, that requesters responded to every still interested letter that these agencies sent.

During our interviews with the 7 FOIA programs about their use of still interested letters we learned that there is no standard for how agencies report their use in Annual FOIA Reports. One of the programs explained that it specifically reports all cases closed using still interested letters; the program clarified, however, that it reports a request as withdrawn if a requester cancels the request in response to a still interested letter. Three of the programs we contacted reported that they include all cases closed using still interested letters as “withdrawn.”⁴ Another agency responded that it does not use still interested letters, but would report any cases closed as a result of using still interested letters as “withdrawn.” Another agency reported that it reports all cases closed using still interested as “no response from requester.”

More Consistency in Practices Due to Guidance from the Department of Justice

On July 2, 2015, OIP issued “Limitations on Use of Still Interested Inquiries,” updating its 2010 guidance on the issue.⁵ OIP’s 2015 guidance instructs agencies to take several steps when using still interested letters. The guidance also included an implementation checklist that suggested agencies:

- ensure there are reasonable grounds to make a still-interested inquiry;
- not make multiple still interested inquiries unless the agency has good cause;
- attempt to contact the requester using the requester’s preferred mode of communication;
- send a brief email or letter to the requester noting the request is closed in order to memorialize any decision made by the requester by telephone;
- provide the requester with no fewer than 30 working days to respond to the inquiry before closing the request;
- alert the requester to the fact the request will be administratively closed at the end of 30 working days if the requester elects to not respond;
- make good faith efforts to reach the requester using multiple methods of communication prior to administratively closing the request; and
- re-open the request if the requester responds to the inquiry within a “reasonable” amount of time after the agency’s deadline.⁶

⁴ Not all requests reported as withdrawn are closed using a still interested letter.

⁵ “Limitations on the Use of ‘Still-Interested’ Inquiries,” last updated July 20, 2015, <http://www.justice.gov/oip/oip-guidance-8>.

⁶ “reasonable” is not defined in the guidance. “Limitations on the Use of ‘Still-Interested’ Inquiries.”

The sample of letters provided to us pre-date OIP's 2015 guidance and provide a range of deadlines for requesters to respond—from seven days to 30 days.⁷ Two of the still interested letters were emails; the remaining examples provided to us were either sent as email attachments or mailed to the recipient.

Most of the letters included multiple ways for the requester to contact the FOIA office, including a phone number and an email address; however, one letter did not include any information about how to contact the office.

We also note that the amount of time that passed between when the request was made and when the requester received the still interested letter varied greatly; while most of the requests were about a year old when the agencies' sent the letters, some letters concerned requests that were four and seven years old. Many of these inconsistencies are addressed in OIP's 2015 guidance on the use of still interested letters.

All of the seven FOIA offices we interviewed after OIP issued its guidance reported that their practices follow the 2015 guidance, or that the office is taking steps to comply with the guidance. One agency reported that there was no need to change its practices with respect to the use of still interested letters as it already met the OIP guidelines. One other office reported that there were no changes in its practices because the office does not use still interested letters. The remaining five offices that we interviewed reported changing the offices' practices to comply with OIP guidance, or that the updated guidance helped the office improve their practices and employees' understanding of how the letters should be used. Two offices noted that as a result of OIP's guidance, they extended the deadline for requesters to respond to still interested letters to 30 working days.

Few Agencies Have Written Procedures on the Use of Still Interested Letters

Only two of the FOIA offices that we followed up with reported having written guidance for FOIA processors on how to use still interested letters. Several of the offices reported that while the program does not have written guidance on the use of the letters, the program shared OIP's guidance with FOIA personnel. The lack of standard operating procedures for how FOIA processors should use still interested letters might contribute to some of the remaining variation in how FOIA programs use these letters.

Lack of Transparency Regarding How Agency Uses Still Interested Letters

We note that there is not much publicly available information that helps requesters understand how an agency or program uses still interested letters. For the seven programs we contacted to discuss their use of the letters, we did not find any information about still interested letters on the agencies' websites.

⁷ The letters do not indicate if the deadlines relate to calendar or working days.

Conclusions

Our findings in Part 1 and Part 2 of our review of still interested letters indicate that while we cannot account for the full effect that still interested letters have on requesters, few requests are closed using still interested letters. We also found that there a lack of guidance regarding how agencies should report these cases in Annual FOIA Reports.

Our review of FOIA program's use of still interested letters indicates that while OIP's additional guidance on using still interested letters has improved consistency in terms of how agency's use these letters, there is significant variation is how agencies report these letters. Our review also found that few agencies have written procedures for using still interested letters and that there is a lack of transparency regarding how agencies use these letters.

OGIS will issue recommendations regarding our observations on the use of still interested letters in a subsequent report.