

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074

MINORITY (202) 225-5051

<http://oversight.house.gov>

January 19, 2016

The Honorable John F. Kerry
Secretary
U.S. Department of State
2201 C Street NW
Washington, D.C. 20520

Dear Mr. Secretary:

The volume of high profile Freedom of Information Act (FOIA) litigation involving the Department of State has increased sharply in recent years. In fiscal year 2010, the Department experienced a seventy percent increase in litigation costs over the prior year.¹ In 2012, FOIA-related litigation drained the Department's resources to such an extent that the number of requests that were processed decreased by more than 10,000 compared to the prior year.² In fiscal year 2014, the Department spent more than two million dollars on FOIA litigation (more than double what the Department spent in 2013), and experienced a sixty percent increase in lawsuits for failing to meet statutory obligations with respect to FOIA.³

On January 7, 2016, the Department of State Office of Inspector General (OIG) released a report that may explain why more and more FOIA requesters are turning to an expensive litigation process to get responses to their FOIA requests. The report, titled "Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary," described a blatant disregard for FOIA compliance within the Office of the Secretary's Executive Secretariat (S/ES).⁴

The OIG found that searches conducted by S/ES do not meet statutory and regulatory requirements for completeness because "S/ES currently searches Department email accounts only if a FOIA request mentions emails or asks for 'all records,' or if S/ES is requested to do so during the course of litigation."⁵ Despite Department-wide policy that requires email searches, the FOIA analyst responsible for S/ES record searches "described the decision to search email accounts to be a discretionary one that is only exercised periodically."⁶

¹ U.S. Dep't of State, *Freedom of Information Act Annual Report Fiscal Year 2009*; U.S. Dep't of State, *Freedom of Information Act Annual Report Fiscal Year 2010*.

² U.S. Dep't of State, *Freedom of Information Act Annual Report Fiscal Year 2012*.

³ U.S. Dep't of State, *Freedom of Information Act Annual Report Fiscal Year 2013*; U.S. Dep't of State, *Freedom of Information Act Annual Report Fiscal Year 2014*.

⁴ Office of Inspector Gen., U.S. Dep't of State, *Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary*, ESP-16-01 (Jan. 2016).

⁵ *Id.* at i; see also *id.* at 9.

⁶ *Id.* at 9.

Attorneys who represent the Department in FOIA litigation stated that FOIA requesters have indeed produced evidence that S/ES falsely attested that no responsive records existed in cases where such records did in fact exist.⁷ The OIG report further details multiple other failures at S/ES that directly resulted in litigation, including providing nonresponsive records and withholding responsive records until the Department is forced to litigate.⁸

The Department's repeated failure to comply with the FOIA statute—as detailed in the OIG report—demonstrates either incompetence or purposeful obstruction of the requesters' right to access agency records, or both.⁹ The Department's posture with respect to FOIA compliance has resulted in a dramatic increase in costly litigation,¹⁰ and it directly contributes to the Department's inability to meet statutory deadlines, as well as increased backlogs.¹¹ Further, S/ES's inadequate FOIA operation drains the resources of the Department's entire FOIA program by causing staff to run repeated searches, respond to unnecessary appeals requests, and handle increased inquiries from the requesters.¹²

The Committee's jurisdiction includes FOIA and it is a long-standing Committee priority to ensure that it is implemented effectively. Towards that end, please assist the Committee by producing the following documents and information as soon as possible, but by no later than February 1, 2016:

1. The performance standards for the current Director of Secretariat Staff;
2. A list of names, titles, and dates of employment of all employees with FOIA responsibilities at the Office of Information Programs and Services and at S/ES;
3. For each employee with S/ES FOIA responsibilities within the last ten years:
 - a. All performance evaluations, and
 - b. A list of all training received and a description of the training;
4. State Department policies and guidance on FOIA search and response procedures;
5. For each of the 417 FOIA requests tasked to S/ES that involved the current and past four Secretaries of State:

⁷ *Id.* at 13.

⁸ *Id.* at 13-16.

⁹ *Id.*

¹⁰ *Id.*; see also U.S. Dep't of State, *Freedom of Information Act Annual Report Fiscal Year 2014*, at 37.

¹¹ Office of Inspector Gen., U.S. Dep't of State, *Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary*, ESP-16-01 (Jan. 2016), at 6-8; see also U.S. Dep't of State, *Freedom of Information Act Annual Report Fiscal Year 2014*, at 43.

¹² Office of Inspector Gen., U.S. Dep't of State, *Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary*, ESP-16-01 (Jan. 2016), at 13-16.

- b. The documents produced, or a link to the documents in the FOIA reading room;
and
 - c. All records and communications related to each request;
6. A list of all lawsuits filed against the State Department involving FOIA requests in the past fifteen years;
 7. A list of all lawsuits filed against the State Department involving FOIA requests tasked to S/ES in the past fifteen years and costs attributable to each lawsuit; and
 8. The Department's procedures for certifying to requesters when a request is closed.

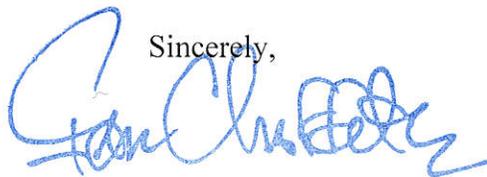
In addition, please make the Department's Transparency Coordinator available for a briefing no later than Tuesday, January 26, 2016.

Please deliver your responses to the Committee on Oversight and Government Reform Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X.

Should you have any questions regarding this request, please contact Katy Rother or Tristan Leavitt of the House Oversight and Government Reform Committee staff at (202) 225-5074. Thank you for your prompt attention to this matter.

Sincerely,



Jason Chaffetz
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Member
The Honorable Steve A. Linick, Inspector General, U.S. Department of State

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTHOUR, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,
CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE,
DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,
INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.