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United States Senate

COMMITTEE ON

HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

MICHAEL L. ALEXANDER, STAFF DIRECTOR
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June 25, 2009

The Honorable Jeffrey D. Zients
Deputy Director for Management and
Chief Performance Officer
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Mr. Zients:

As part of the Subcommittee's ongoing oversight of federal contracting, I am writing to request information relating to federal agencies' compliance with Congressional requests for information.

At the Subcommittee's June 10, 2009 hearing on security contracts at the U.S. Embassy in Kabul, I questioned the State Department's responsiveness to the Subcommittee's investigation. I asked William Moser, the State Department's Deputy Assistant Secretary for Logistics Management, why it had been so difficult for the State Department to respond to the Subcommittee's requests. Mr. Moser responded:

We think an honest dialogue with the members of the legislative branch is to our benefit. And we are more than happy to share the documentation with you. But we do have a process in the State Department.¹

Prior to the Subcommittee's hearing, the State Department repeatedly assured the Subcommittee that it was doing everything it could to respond as quickly as possible to the Subcommittee's requests. However, even the State Department's expedited procedures for a request from a Senate Subcommittee are unduly cumbersome. As a result, the State Department's "process" severely impacted the Subcommittee's investigation and preparation for the hearing.

The State Department's failure to comply with the Subcommittee's request in a timely manner is not unique. In recent years, federal agencies' failure to respond to and process requests for information has caused unacceptable delays for Members of Congress and citizens entitled to information under the Freedom of Information Act (FOIA). While Congressional committees are not subject to FOIA, multiple agencies have made the questionable determination that individual Members of Congress should be required to file FOIA requests in order to obtain information.

¹ Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Contracting Oversight, Testimony of William Moser, Deputy Assistant Secretary for Logistics Management, Department of State, *Hearing on Allegations of Waste, Fraud, and Abuse in Security Contracts at the U.S. Embassy in Kabul*, 111th Cong. (June 10, 2009).

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The National Security Archive, an independent non-governmental research institute and library located at The George Washington University, submitted a statement for the record in connection with the Subcommittee's June 10 hearing regarding agency processing times for FOIA requests. Although FOIA requires agencies to respond to requests within 20 days (with a 10 day extension in usual circumstances), federal agencies average approximately 56 days to respond to a simple FOIA request. The State Department takes approximately 115 days, on average, to respond to a simple request and 201 days to respond to an expedited request. 23 agencies have backlogs stemming back more than five years and several agencies have had FOIA requests pending for more than 10 years.²

In your written statement for your nomination hearing before the Senate Homeland Security and Governmental Affairs Committee, you stated your intention to achieve "unprecedented transparency and accountability throughout government operations."³ With your history of leadership and successful management in the private sector over the past 20 years, I have no doubt that you understand the need for timely access to information. I encourage you to make one focus of your efforts the improvement of agencies' responsiveness to Congress and the American people.

To assist the Subcommittee in its ongoing investigations, I would like to request a briefing for Subcommittee staff regarding the Office of Management and Budget's plans to improve agencies' procedures for responding to Congressional requests. Please provide this briefing on or before August 21, 2009.

I look forward to working with you in the future. Please contact Alan Kahn with the Subcommittee staff at (202) 224-3230 with any questions and to schedule the requested briefing.

Sincerely,



Senator Claire McCaskill

Chairman

Subcommittee on Contracting Oversight

Enclosure

² Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Contracting Oversight, Statement for the Record of the National Security Archive, *Hearing on Allegations of Waste, Fraud, and Abuse in Security Contracts at the U.S. Embassy in Kabul*, 111th Cong. (June 10, 2009).

³ Senate Committee on Homeland Security and Governmental Affairs, Written Statement of Jeffrey Zients, *Hearing on the Nominations of Tara J. O'Toole and Jeffrey D. Zients*, 111th Cong. (June 10, 2009).

**Senate Committee on Homeland Security and Government Oversight
Subcommittee on Contractor Oversight**

**Statement of the National Security Archive
On
The Freedom of Information Act at the Department of State
June 8, 2009**

Introduction

Since 2003, the National Security Archive (the “Archive”) has regularly examined federal agency Freedom of Information Act (FOIA) processing times. The Archive is an independent non-governmental research institute and library located at The George Washington University and a leading user of the Freedom of Information Act, which it relies on to assemble collections of key records that document United States decision-making on national security, foreign, intelligence, and economic policy matters. In 1999, the Archive won the George Polk Award, one of U.S. journalism's most prestigious prizes, for—in the words of the citation—“piercing the self-serving veils of government secrecy, guiding journalists in the search for the truth and informing us all.”

Using responses to the Archive’s FOIA requests and statistics from the agencies’ annual FOIA reports submitted to Congress, the Archive has issued a series of eight innovative audit reports that evaluated agency responsiveness to FOIA requests.¹ Those audit reports, and the Archive’s groundbreaking “10-oldest pending FOIA requests” metric, became essential evidence behind congressional efforts to improve agencies’ administration of the FOIA that culminated in enactment of The OPEN Government Act of 2007 (“2007 FOIA amendments”). Annual reports submitted by the agencies for fiscal year 2008 are the first to require reporting under the 2007 FOIA amendments of the ten oldest pending FOIA requests, interagency consultations, and appeals, and to require reporting of average FOIA request processing times.

Under the FOIA, agencies are required to respond to FOIA requests with a determination within 20 business days.² The FOIA allows agencies to extend the deadline up to ten days in certain “unusual circumstances.”³ Under the 2007 FOIA amendments, if the request must be re-routed to the proper component of the agency, the 20-day time period may not start until ten days after the request arrives at the agency.⁴

Case Study: The Department of State

In preparing this statement, the National Security Archive gathered information reported to Congress by 88 agencies in their FY 2008 FOIA reports.⁵ Statistics collected for this analysis

¹ Available at <http://www.gwu.edu/~nsarchiv/nsa/foia/audits.htm>

² 5 U.S.C. §552(a)(6)(A)(i).

³ 5 U.S.C. §552(a)(6)(B)(i).

⁴ 5 U.S.C. §552(a)(6)(A)(ii).

⁵ Three agencies’ FY 2008 annual reports were not available as of the date of this statement (AID, CEQ, and FEC).

include average processing times for simple, complex, and expedited requests, and the 10 oldest pending requests and consultations at each agency that reported this information for FY 2008.

- **Simple Requests**

Simple requests are requests “that an agency using multi-track processing places in its fastest (non-expedited) track based on the low volume and/or simplicity of the records requested.”⁶ These are usually requests for a single document, a small number of documents, or a subject for which it is easy to conduct a search. Across the federal government, 324,493 simple requests were processed in FY 2008. The weighted average processing time for a simple request was 56.40 days.

According to its FY 2008 Annual Report,⁷ the Department of State processed 1,111 simple requests. The average processing time reported by the Department of State for simple requests in FY 2008 was 115 days. This is 104% times greater than the government-wide weighted average. (See Ex. A)

- **Complex Requests**

Complex requests are requests “that an agency using multi-track processing places in a slower track based on the high volume and/or complexity of the records requested.”⁸ These may involve a large number of documents, a broad subject that requires more search time, or classified information. Government-wide 241,328 complex requests were processed in FY 2008. The weighted average processing time for a complex request was 194.03 days.

In the complex queue, the Department of State reported that it processed 1,780 requests in FY 2008. It reported its average processing time for a complex request as 275 days. This is 42% longer than the government-wide weighted average. (See Ex. A)

- **Expedited Requests**

Expedited requests are processed on a separate track and are processed “as soon as practicable.”⁹ Requests are placed in the expedited track when the requester demonstrates a “compelling need” for expedition.¹⁰ These most typically will be requests by news media and other information disseminators when there is an urgent need to inform the public about government activity. In 2008, the State Department granted expedition to 12 of 44 requests. Although the law requires the agency to decide whether it will expedite within 10 days of submission of the request,¹¹ on average the State Department took 22 days to make a determination to grant or to deny expedited processing.

⁶ Department of Justice, “2008 Guidelines for Agency Preparation of Annual FOIA Reports,” FOIA Post (May 2008).

⁷ Available at <http://www.state.gov/documents/organization/117700.pdf>.

⁸ Department of Justice, “2008 Guidelines for Agency Preparation of Annual FOIA Reports,” FOIA Post (May 2008).

⁹ 5 U.S.C. §552(a)(6)(E)(iii).

¹⁰ 5 U.S.C. §552(a)(6)(E)(i)(I).

¹¹ 5 U.S.C. §552(a)(6)(E)(ii)(I).

At the Department of State, the average processing time for expedited requests was 201 days. This is 512% more than the government-wide weighted average of 32.84 days. This is only 74 fewer days on average than the average processing time for a complex request at the Department of State. (See Ex. A)

- **Ten Oldest Pending FOIA Requests**

In 2008, the oldest pending FOIA request at the State Department was dated February 23, 2000, and its tenth oldest request was dated October 23, 2002. Thus, at the end of FY 2008, the State Department had unanswered FOIA requests that had been pending for as long as eight years. Of the 74 agencies reporting their oldest pending requests, with the oldest of the old in the 74th place, the Department of State was in the 61st place. (See Ex. B and C)

Interagency consultations are “the process whereby the agency responding to a FOIA request first forwards a record to another agency for its review because that other agency has an interest in the document.”¹² Of the 26 agencies that reported their ten oldest interagency consultations in 2008, with the oldest of the old in 26th place, the State Department was in 19th place, with their ten oldest consultations ranging in date from May 16, 2003, to March 22, 2005. (See Ex. D)

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Please contact Meredith Fuchs, General Counsel, National Security Archive, at (202) 994-7000 or mfuchs@gwu.edu, with any questions.

¹² Department of Justice, “2008 Guidelines for Agency Preparation of Annual FOIA Reports,” FOIA Post (May 2008).

Exhibit A: Average Processing Times, FY 2008

AGENCY	Simple Requests		Complex Requests		Expedited Requests	
	Number Processed	Average (Bus. Days)	Number Processed	Average (Bus. Days)	Number Processed	Average (Bus. Days)
Department of Agriculture	37	26	1529	112	94	93
Department of Commerce	1378	13	320	109	16	8
Department of Defense	48388	30	22856	190	396	21
Department of Education	1679	111	547	39	10	17
Department of Energy	1600	70	111	86	3	10
Department of Health and Human Services	48246	60	12869	300	59	110
Department of Homeland Security	40526	146	49304	280	127	58
Department of Housing and Urban Development	NR	NR	NR	NR	NR	NR
Department of the Interior	3499	19	696	59	11	8
Department of Justice	47991	43	6698	273	262	10
Department of Labor	13868	23	6980	16	122	17
Department of State	1111	115	1780	275	12	201
Department of Transportation	7183	37	3159	101	80	126
Department of the Treasury	3299	10	13280	23	8	4
Department of Veterans Affairs	0	N/A	98042	NR	2707	NR
Agency for International Development	NR	NR	NR	NR	NR	NR
American Battle Monuments Commission	3	9	18	12	0	0
Amtrak (National Railroad Passenger Corporation)	8	10	101	27	2	10
Broadcasting Board of Governors	9	10	0	N/A	0	N/A
Central Intelligence Agency	751	59	9947	179	NR	NR
Chemical Safety and Hazard Investigation Board	19	18	21	437	0	N/A
Commission on Civil Rights	41	6	0	N/A	2	2
Committee for Purchase From People Who Are Blind or Severely Disabled	0	N/A	35	16	0	N/A

Commodity Futures Trading Commission	151	24	0	N/A	0	N/A
Consumer Product Safety Commission	3358	12	479	85	0	N/A
Corporation for National Service	45	9	0	N/A	0	N/A
Court Services and Offender Supervision Agency	NR	NR	NR	NR	0	N/A
Defense Nuclear Facilities Safety Board	27	6	0	N/A	0	N/A
Environmental Protection Agency	11175	43	415	61	4	51
Equal Employment Opportunity Commission	13831	38	N/A	N/A	605	20
Council on Environmental Quality	NR	NR	NR	NR	NR	NR
Office of Management and Budget	142	26	0	N/A	0	N/A
Office of National Drug Control Policy	NR	NR	NR	NR	NR	NR
Office of Science and Technology Policy	15	51	4	359	0	25
Office of the United States Trade Representative	0	N/A	53	102	0	N/A
Export-Import Bank	39	16	55	118	3	45
Farm Credit Administration	28	9	0	N/A	0	N/A
Farm Credit System Insurance Corporation	6	10	0	N/A	0	N/A
Federal Communications Commission	730	21	0	N/A	0	N/A
Federal Deposit Insurance Corporation	516	9	254	15	10	16
Federal Election Commission	NR	NR	NR	NR	NR	NR
Federal Energy Regulatory Commission	44 *	20	6 *	69	0	N/A
Federal Housing Finance Board	36	5	0	N/A	0	N/A
Federal Labor Relations Authority	77	28	0	N/A	0	N/A
Federal Maritime Commission	2	24	0	N/A	0	N/A
Federal Mediation and Conciliation Service	107	8	0	N/A	9	2

Federal Mine Safety and Health Review Commission	59	8	0	N/A	0	N/A
Federal Open Market Committee	18	9	3	19	0	N/A
Federal Reserve Board	319	3	517	19	2	136
Federal Retirement Thrift Investment Board	34	25	0	N/A	0	N/A
Federal Trade Commission	986	8	192	33	0	N/A
General Services Administration	301	15	0	N/A	0	N/A
Institute of Museum and Library Services	44	11	0	N/A	1	1
Inter-American Foundation	6	12	0	N/A	0	N/A
Legal Services Corporation	8	16	1	N/A	1	N/A
Merit Systems Protection Board	351	9	16	48	0	N/A
Millennium Challenge Corporation	17	45	0	N/A	0	N/A
National Aeronautics and Space Administration	614	34	631	83	13	36
National Archives and Records Administration	12784	10	439	480	NR	NR
National Capital Planning Commission	4	1	0	N/A	0	N/A
National Credit Union Administration	122	12	29	31	2	19
National Endowment for the Arts	51	NR	0	N/A	0	N/A
National Endowment for the Humanities	16	21	8	67	0	N/A
National Indian Gaming Commission	76	10	24	26	4	12
National Labor Relations Board	4663	9	0	N/A	5	1
National Mediation Board	16	13	0	N/A	0	N/A
National Science Foundation	348	20	N/A	N/A	0	N/A
National Transportation Safety Board	49	13	140	29	0	N/A
Nuclear Regulatory Commission	332	13	28	56	0	N/A
Occupational Safety and Health Review Commission	73	9	1	28	0	N/A
Office of the Director of National Intelligence	73	107	0	N/A	3	104

Office of Federal Housing Enterprise Oversight	27	11	4	12	0	N/A
Office of Government Ethics	42	11	0	N/A	0	N/A
Office of Personnel Management	0	N/A	5536	51	0	N/A
Office of Special Counsel	25	4	48	28	23	5
Overseas Private Investment Corporation	50	26	N/A	N/A	0	N/A
Peace Corps	132	14	0	1	1	3
Pension Benefit Guaranty Corporation	0	N/A	1764	5	2	7
Postal Regulatory Commission	32	5	0	N/A	0	N/A
Railroad Retirement Board	82	13	0	N/A	0	N/A
Securities and Exchange Commission	15463	158	65	575	2	3
Selective Service System	55	4	0	N/A	0	N/A
Small Business Administration	2640	14	0	0	0	0
Social Security Administration	32586	30	2140	60	0	N/A
Surface Transportation Board	19	11	N/A	N/A	0	N/A
Tennessee Valley Authority	89	8	40	39	0	N/A
United States Copyright Office	45	14	0	N/A	0	N/A
United States International Boundary and Water Commission	24	17	0	N/A	0	N/A
United States International Trade Commission	65	16	0	N/A	2	10.5
United States Postal Service	1788	13	112	52	8	5
United States Trade and Development Agency	0	N/A	31	53	0	N/A
TOTALS	324493	56.40 (weighted average)	241328	194.03 (weighted average)	4611	32.84 (weighted average)

* FERC uses 4 tracks; this chart includes FERC Track 1, Track 3, and Expedited.
NR = not reported
N/A = not applicable

Exhibit B: Ten Oldest Pending Perfected Requests, FY 2008

Agency	Oldest Pending Request	10th Oldest Pending Request
AIR	April 9, 1997	January 3, 2002
Amtrak	March 3, 2006	July 1, 2008
Army	June 5, 1997	August 12, 2003
CFTC	June 20, 2008	September 19, 2008
CIA	May 1, 1992	January 26, 2001
CPSC	July 29, 2004	April 27, 2006
DHS	February 25, 2000	April 19, 2002
DIA	December 16, 1994	September 17, 1997
DOA	August 7, 2001	June 11, 2004
DOC	January 6, 2006	October 2, 2006
DOD	December 1, 1992	January 25, 1994
DOD - CEN	January 12, 2004	July 8, 2005
DOD - OSD	December 1, 1992	January 27, 1994
DOE	November 16, 1999	December 15, 2004
DOI	May 5, 1997	August 14, 2000
DOJ	February 13, 1995	March 26, 2001
DOJ-Criminal	February 13, 1995	April 16, 2003
DOJ-DEA	January 4, 2004	September 30, 2005
DOJ-FBI	February 15, 2006	October 4, 2006
DOL	July 4, 2006	November 26, 2007
DOL - Mine Safety and Health	October 18, 2007	June 23, 2008
DOS	February 23, 2000	October 23, 2002
DOT	June 5, 2003	February 14, 2005
DOT - Federal Motor Carrier Safety	September 27, 2007	December 31, 2007
DOT - Secretary	February 3, 2006	January 17, 2007
EDU ¹³	May 27, 2006	December 16, 2007
EEOC	April 19, 2007	May 15, 2008
EPA	June 13, 2003	July 9, 2004
EXIM	March 2, 2007	August 14, 2008
FAA	June 5, 2003	February 14, 2005
FCA	none	none
FCC	November 8, 2006	April 3, 2008
FDIC	July 29, 2008	August 27, 2008
FEC	n/a	n/a
FEMA	November 9, 2004	March 14, 2006
FERC	October 27, 2004	September 15, 2008
FMC	August 21, 2007	June 9, 2008
FRB	May 15, 2008	August 25, 2008
FTC	April 3, 2008	September 28, 2008
GSA	May 23, 2008	September 25, 2008
HHS	June 14, 1999	September 9, 2000
HUD	July 1, 2004	November 21, 2007
ICE	March 29, 2007	August 29, 2008
MSPB	June 3, 2008	September 30, 2008

¹³ The Department of Education provided this information as days old, rather than providing the date of the request.

NARA	September 21, 1992	March 14, 1994
NASA	June 14, 2004	November 13, 2005
NAVY	January 30, 1998	June 24, 2004
NCUA	September 9, 2008	September 29, 2008
NEH	July 1, 2005	September 15, 2008
NGA	June 8, 2006	July 7, 2006
NIGC	August 11, 2008	September 24, 2008
NIH	n/a	n/a
NLRB	August 11, 2008	September 4, 2008
NRC	May 17, 2008	September 11, 2008
NRO	July 15, 2004	March 30, 2007
NSA	January 5, 1993	May 16, 1993
NSF	August 27, 2007	September 17, 2008
NTSB	February 16, 2007	May 30, 2008
ODNI	October 2, 2006	March 8, 2007
OFHEO	September 15, 2008	September 30, 2008
OMB	September 16, 2008	September 25, 2008
OPM	August 28, 2001	September 5, 2006
PBGC	September 12, 2008	September 22, 2008
Peace Corps	n/a	n/a
RRB	February 2, 2005	September 22, 2008
SBA	December 19, 2007	September 17, 2008
SEC	August 1, 2005	May 18, 2007
SSA	November 13, 2007	February 12, 2008
TRE	March 1, 1994	March 13, 2000
TSA	October 27, 2004	February 16, 2006
TVA	April 1, 2008	September 17, 2008
USTDA	none	none
USTR	March 14, 2006	September 27, 2007
VET	March 26, 2003	February 3, 2005

*Exhibit C: The Worst Performers: Backlogs Older than 5 Years Old, FY 2008
Requests Filed Before February 2004*

Agency	Oldest Pending Request	10 th Oldest Pending Request
CIA	May 1, 1992	January 26, 2001
NARA	September 21, 1992	March 14, 1994
DOD	December 1, 1992	January 25, 1994
NSA	January 5, 1993	May 16, 1993
TRE	March 1, 1994	March 13, 2000
DIA	December 16, 1994	September 17, 1997
DOJ	February 13, 1995	March 26, 2001
AIR	April 9, 1997	January 3, 2002
DOI	May 5, 1997	August 14, 2000
Army	June 5, 1997	August 12, 2003
NAVY	January 30, 1998	June 24, 2004
HHS	June 14, 1999	September 9, 2000
DOE	November 16, 1999	December 15, 2004
DOS	February 23, 2000	October 23, 2002
DHS	February 25, 2000	April 19, 2002
DOA	August 7, 2001	June 11, 2004
OPM	August 28, 2001	September 5, 2006
VET	March 26, 2003	February 3, 2005
DOT	June 5, 2003	February 14, 2005
FAA	June 5, 2003	February 14, 2005
EPA	June 13, 2003	July 9, 2004
DOJ-DEA	January 4, 2004	September 30, 2005
DOD - CEN	January 12, 2004	July 8, 2005

Exhibit D: Ten Oldest Pending Consultations, FY 2008

Agency	Oldest Pending Consult	Newest Pending Consult	Notes
DOD	December 29, 1994	December 1, 1999	
DOE	June 11, 1998	July 20, 2004	
NSA	November 14, 1998	March 27, 2007	
CIA	May 3, 2000	February 11, 2005	
DOJ	September 28, 2001	October 12, 2006	
DOJ-Criminal	September 28, 2001	May 14, 2007	
DIA	December 17, 2001	January 6, 2003	
DOS	May 16, 2003	March 22, 2005	
DHS	July 1, 2004	January 28, 2008	
NGA	December 21, 2005	September 14, 2006	
EPA	January 30, 2006	September 16, 2008	
DOJ-DEA	May 2, 2006	June 13, 2007	
Army	September 14, 2006	November 6, 2007	
ODNI	May 29, 2007	July 18, 2008	only 3 pending consults
DOT	August 28, 2007	n/a	only 1 pending consult
DOT - Secretary	August 28, 2007	n/a	only 1 pending consult
DOJ-FBI	October 9, 2007	March 7, 2008	
FEMA	January 28, 2008	August 14, 2008	only 2 pending consults
DOJ-EOUSA	February 19, 2008	September 23, 2008	only 6 pending consults
NAVY	March 24, 2008	August 8, 2008	only 4 consults pending
DOD - OSD	July 3, 2008	July 28, 2008	
DOC	July 18, 2008	August 28, 2008	only 5 pending consults
DOD - CEN	July 30, 2008	August 22, 2008	only 5 pending consults
NRO	August 13, 2008	September 25, 2008	only 2 pending consults
ICE	September 11, 2008	September 11, 2008	only 2 pending consults
TRE	September 25, 2008	September 30, 2008	only 2 pending consults