

PTAAARMIGAN LLC

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April 22, 2022

Via Email Karon.Seldon@uspto.gov; FOIARequests@uspto.gov; efoia@uspto.gov

USPTO FOIA Officer
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Re: **Response to USPTO's request for clarification of Freedom of Information Act Request F-22-00098, re DOCX "Yearlong Study"**

Dear Ms. Seldon:

Thank you for your letter of April 6, 2022 requesting clarification of PTAAARMIGAN's Request of March 28, 2022, tracking number F-22-00098. This letter is a near-verbatim copy of PTAAARMIGAN's initial request of March 28, with the USPTO's questions of April 6 and PTAAARMIGAN's responses interlineated.

PTAARMIGAN LLC is a not-for-profit § 501(c)(4) limited liability company. Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a), PTAARMIGAN hereby requests the following records from the U.S. Patent & Trademark Office (USPTO).

DEFINITIONS

"DOCX rule" means any rule or guidance to require, encourage, or incentivize patent application filing in DOCX form, or set fees for such purpose. The term "DOCX rule" includes but is not limited to the amendment to 37 C.F.R. § 1.16(u) to impose a "Non-DOCX Filing Surcharge Fee." Relevant notices include *PPAC Public Hearing on the Proposed Patent Fee Schedule*, 83 Fed. Reg. 37487 (Aug. 1, 2018); *Setting and Adjusting Patent Fees During Fiscal Year 2020*, RIN-AD31, *Notice of Proposed Rulemaking*, 84 Fed. Reg. 37398 (Jul. 31, 2019); *Final Rule*, 85 Fed. Reg. 46932 (Aug. 3, 2020); correction, 85 Fed. Reg. 58282 (Sep. 18, 2020); *Submitting Patent Applications in Structured Text Format and Reliance on the Text Version as the Source or Evidentiary Copy*, 86 Fed. Reg. 29571 (Jun. 2, 2021); delay of effective date, 86 Fed. Reg. 66192 (Nov. 22, 2021); and Directors' Forum, *Modernizing patent filing with DOCX*, <https://www.uspto.gov/blog/director/entry/modernizing-patent-filing-with-docx> (May 25, 2021).

ICR is an "information collection request" under the Paperwork Reduction Act or OMB's Information Collection regulation.

OMB is the Office of Management and Budget.

OIRA is the Office of Information and Regulatory Affairs.

"Records" are defined at 44 U.S.C. § 3301 and 5 U.S.C. § 552(f)(2) to include "any information that would be an agency record subject to the requirements of [FOIA] when

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maintained by an agency in any format, including an electronic format" and any such information "that is maintained for an agency by an entity under Government contract, for the purposes of records management."

The terms "and" and "or" as used herein shall be construed both conjunctively and disjunctively in order to bring within the scope of this request any record that would otherwise not be so included.

REQUEST

1. In the DOCX Final Rule notice, 85 Fed. Reg. 46932, 46957 col. 1 and 46958 col. 1 (Aug, 3, 2020) the USPTO refers to a "yearlong study of the feasibility of processing text in PDF documents:"

through a study.

Comment 55: One commenter wrote that instead of DOCX, applicants could upload most of their submissions as text-based PDFs. The commenter further stated that, currently, the USPTO's computer systems degrade files to flatten them to unstructured bitmaps. The commenter contends the problem is caused by the USPTO.

Response: The USPTO conducted a yearlong study of the feasibility of processing text in PDF documents. The results showed that searchable text data is available in some PDFs, but the order and accuracy of the content could not be preserved. With DOCX, the Office is able to use the text directly and pass it on to USPTO downstream systems, which results in increased data accuracy and a more streamlined patent process.

Please provide all records **relating to this "yearlong study."** To the degree they were available on the USPTO's web site, or on another Federal Government website, as of Aug. 2, 2020, identification by URL is sufficient. This request includes the following, **insofar as they relate to the "yearlong study"** (emphasis added April 22, 2022):

KES: Your request, as written, is a request without any reasonable parameters and extremely overbroad. "all consideration of optional plug-ins, all documents defining any subset of ECMA-376, all documents defining methodology, study design, and assumptions, any contracts with third parties to conduct the "yearlong study etc." Presumably, this request includes every invention, every contract, every study etc. at the USPTO.

PTAAARMIGAN: It appears that all of the USPTO's concerns arise from overlooking both instances of the phrase "relating to the 'yearlong study'" in the "request, as written." So that these phrases need not be overlooked again, they are now bolded above.

To take one example, the USPTO's letter of April 6 letter identifies no basis to read the Request as seeking "every study" at the USPTO. Request 1 specifically identifies a **single** study. If there were multiple studies on DOCX or PDF filing, all such studies are within the request. The Federal Register refers to them in the singular, and Requester does the same.

- a. all considerations of "implementation defined" parameters of Standards ECMA-376 and ISO/IEC 29500;

- b. all consideration of optional plug-ins used by patent attorneys, agents, and applicants;

PTAAARMIGAN: For clarification, this subpart requests documents relating to the "yearlong survey" that consider or explain how the USPTO proposes that its DOCX filing system should handle submitted documents that use optional plug-ins.

- c. all documents defining any subset of ECMA-376 the USPTO proposes to support;

PTAAARMIGAN: The USPTO's letter of April 6 letter misquotes this subpart. Any fear of overbreadth or lack of clarity appears rooted in misquotation of the preamble to Request 1, and misquotation of subpart 1.c.

- d. all documents defining methodology, study design, and assumptions;

- e. any contracts with third parties to conduct the "yearlong study," and instructions to such third party;

PTAAARMIGAN: The USPTO's letter of April 6 letter identifies no basis to read the Request as seeking "every contract" at the USPTO. Subpart 1.e requests only contracts "to conduct the 'yearlong study.'" PTAAARMIGAN believes that at most one contract falls within subpart 1.e. If the "yearlong study" was performed internally, then perhaps no contract exists, and no records are responsive to subpart 1.e.

- f. any survey instrument directed to any member of the public;

- g. any survey instrument directed to agency staff;

- h. any statistical compilation of survey responses;

- i. all underlying data collected in support of the "yearlong study;"

- j. any mathematical or computer models (these should be produced in native form—such as spreadsheets, not as PDF captures of the spreadsheets);

- k. all documents stating assumptions, intermediate findings, conclusions, reservations on the conclusions for the "yearlong study," and the like;

- l. any comparisons to, or analyses of, WIPO's ePCT or inquiries to WIPO relating to PDF or DOCX as a filing medium;

- m. any disclosure to the public of this "yearlong study" and its underlying support;

- n. any request for comment on the "yearlong study" published by the USPTO, before or concurrent with either the July 2019 Notice of Proposed Rulemaking or the August 3, 2020 Final Rule notice;

and documents sufficient to identify:

- o. alternatives considered, and conclusions as to all alternatives rejected;

- p. what variables and attributes of PDF and DOCX were studied, and weight or importance assigned to each;

- q. any null hypothesis and all statistical methods used to reject or confirm that hypothesis;

- r. any comparative study of the reliability of, or feasibility of, processing text from DOCX documents.

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PTAAARMIGAN: The USPTO's letter of April 6 identifies no question of clarity or scope as to subparts 1.a, or 1.f to 1.r. In any event, when read in the context of Request 1, all subparts are of reasonable clarity and scope insofar as they request only documents relating to the "yearlong study."

2. Please provide all communications with OMB or OIRA relating to the DOCX rule. This includes any communications relating to any regulatory review under any executive order, or any ICR or other filing, between July 1, 2016 and March 30, 2022, purporting to cover information collections contained in the DOCX rule. If the USPTO has never sought clearance under the Paperwork Reduction Act or Information Collection regulation for the DOCX rule, it is sufficient to so state.

PTAAARMIGAN: The USPTO's letter of April 6 does not raise any question of clarity or scope as to Request 2.

3. Please provide any objective support for any estimate of burden provided to OIRA for the DOCX rule.

PTAAARMIGAN: The USPTO's letter of April 6 does not raise any question of clarity or scope as to Request 3.

4. Please provide any communications, including any supporting documents, with the Small Business Administration relating to regulatory flexibility analysis or approval for the DOCX rule.

PTAAARMIGAN: The USPTO's letter of April 6 does not raise any question of clarity or scope as to Request 4.

For requests 1, 2, 3, and 4, materials available at <https://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting> as of August 2, 2020 may be omitted. Other records available elsewhere on the USPTO's website, or on another Federal Government website, in each case no later than August 2, 2020, may be identified by URL.

PRIVILEGES AND REQUIRED DISCLOSURE

Under the deliberative process privilege, factual information generally must be disclosed. *EPA v. Mink*, 410 U.S. 73, 87–88 (1973) (deliberative process privilege does not shield "memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context"). Agencies must disclose "those portions of predecisional and deliberative documents that contain factual information that does not 'inevitably reveal the government's deliberations.'" *Reporters Committee for Freedom of the Press v. FBI*, 3 F.4th 350, 366 (D.C. Cir. 2021), quoting *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010). Facts presented "without interpretation, characterization, or analysis by the author" are releasable. *Bayala v. United States Department of Homeland Security*, 264 F.Supp.3d 165, 176 (D.D.C. 2017).

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PTAARMIGAN calls attention to a memorandum of March 15, 2022 from Attorney General Garland, Attachment B to this letter¹

DELIVERY

PTAARMIGAN requests that records be produced in the *native* original electronic form or format in which USPTO maintains records for its own use in ordinary course, with no change or conversion. If the USPTO maintains its records as XLS or XLSX spreadsheets, DOCX, or high-resolution text-searchable PDFs, PTAARMIGAN requests that the records be produced in that native electronic form. For example, a PDF printout of a scanned spreadsheet is *not* a native original form of an electronic spreadsheet—the electronic XLS or XLSX file is. If the USPTO maintains records for its own use as high-resolution or text-searchable PDFs, low-resolution or bitmap PDFs are not “native original electronic form.” Folder structure within directories should be preserved as well. Combining into an enclosing .zip or .rar archive form for emailing, or for physical mail or courier on a CD-ROM or USB drive, is appropriate and appreciated.

PTAARMIGAN prefers to receive the records (a) by email at ptaaarmigan@ptaaarmigan.org (three “a”s), (b) by a file delivery service such as DropBox or KiteWorks, or (c) if the records will exceed 10Mb, via a CD ROM or USB memory to P.O. Box 590372, Newton MA 02459, with a confirmation email that a physical delivery is on its way.

FEE WAIVER

PTAARMIGAN requests a fee waiver for the following reasons. Requests for fee waivers are to be liberally construed. *Bartko v. Dept. of Justice*, 898 F.3d 51, 75 (D.C. Cir. 2018).

Public interest. Disclosure of the requested information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 37 C.F.R. § 102.11(k)(1).

PTAARMIGAN has no commercial, trade or profit interest. PTAARMIGAN LLC is a nonprofit LLC organized under the laws of Missouri, and has applied to the IRS for recognition as a § 501(c)(4) social welfare nonprofit, see Attachment A.

PTAARMIGAN seeks the records in support of its public benefit activities. PTAARMIGAN seeks to advance the public interest, by two general classes of activities.

- PTAARMIGAN's primary activity is disseminating information to inform the public about actual or alleged Federal government activity. PTAARMIGAN disseminates

¹ Merrick Garland, *Memorandum for Heads of Executive Departments and Agencies, Freedom of Information Act Guidelines*, <https://www.justice.gov/ag/page/file/1483516/download> (Mar. 15, 2022)

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information via PTAAARMIGAN's web site, www.ptaarmigan.org, and via publications in periodicals and intellectual property web blogs.

- PTAAARMIGAN advocates on behalf of intellectual property attorneys, agents and owners, and on behalf of IP-owning parties in the private sector.

The records will "contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 37 C.F.R. § 102.11(k)(2)(iii). Upon receipt, PTAAARMIGAN will make these records or their analysis publicly available on its website for use by journalists, scholars, students, and interested members of the public at no charge, and use the information in advocacy, reports, newsletters, and other public disseminations to advance our educational mission. PTAAARMIGAN members have published multiple articles in magazines published by the American Bar Association and American Intellectual Property Law Association, and articles on www.patentlyo.com and www.ipwatchdog.com and <https://www.patentdocs.org> (the three most-read blogs among intellectual property lawyers). Publications by PTAAARMIGAN members and articles based on records previously obtained by PTAAARMIGAN's FOIA requests are listed on PTAAARMIGAN's web site, <http://ptaarmigan.org/resources> in the "projects" and "Articles of Interest" section.

Understanding how Government functions. The records are "likely to contribute significantly to public understanding of Government operations or activities." § 102.11(k)(2)(iv). These records illuminate the USPTO's processes for rulemaking and analysis of a specific regulation, an important government function. To PTAAARMIGAN's knowledge, the records sought are not otherwise available to the public.

Public understanding of operations of the government. The records requested are "likely to contribute significantly to public understanding of the operations or activities of the government," § 552(a)(4)(A)(iii), 37 C.F.R. § 102.11(k)(1), and, therefore, be eligible for a fee waiver:

- the request seeks materials underlying an agency decision, supplementary to the materials made public by the agency;
- the request is made by an advocacy organization whose public interest activities include producing written materials to be distributed to inform and train members of its relevant public, and advocating on legislative and regulatory affairs;
- the requester proposes to make information accessible to members of the public who cannot otherwise readily locate a particular law or interpretive document.

PTAAARMIGAN is such an entity, requesting records for such purposes, and the request seeks records underlying the USPTO's regulatory decisions.

Financial arrangements and motivations. In addition, PTAAARMIGAN requests a public interest fee waiver because the requested records directly concern and bear upon the government's operations and activities, will be highly informative to the public regarding the

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USPTO's policies, including on matters directly affecting thousands of patent and trademark holders and applicants. The public has a right to know significant details of an agency's financial arrangements, especially when the requested records might illuminate potential motivations and influences. Because the USPTO has fee-setting authority, and exercised that fee-setting authority with respect to the DOCX rule for the USPTO's own financial interest, the requested records may disclose potential motivations and influences over the USPTO's fee setting.

Intended effect of law contrasted with function in reality. A fee waiver is appropriate when the requested records may explain an agency's compliance with procedural law, and the requested records may reveal how an agency functions in reality compared to how the system was intended to function. The requested records may illuminate agency compliance with the Administrative Procedure Act and Paperwork Reduction Act, and the consideration the USPTO gave to comment letters during notice-and-comment.

News media. PTAAARMIGAN is likewise eligible for the "news media" fee waiver of search fees. § 552(a)(4)(A)(ii)(II); 37 C.F.R. § 102.11(b)(6) and (d)(1). PTAAARMIGAN makes FOIA records available to the public via its web site, <http://ptaaarmigan.org/resources>. The "news" exception does not require identification of a specific publication venue, only a "solid basis for expecting publication" which, in turn, may be based on "past publication record." § 552(a)(4)(A)(ii). Members of PTAAARMIGAN regularly use FOIA documents articles published by the ABA, AIPLA, and in the major patent law blogs to explain recent developments in agency practice and administrative law to the patent and trademark bar. Examples of those publications are listed at <http://ptaaarmigan.org/resources> in the "Articles of Interest" section. The records produced will likely be incorporated into future comment letters and articles.

CORRESPONDENCE

PTAAARMIGAN may be reached at email address ptaaarmigan@ptaaarmigan.org (three "a"s) for any clarification. § 552(a)(6)(A)(ii)(I).

KEY: Please resubmit your request containing a reasonable description of the records you are seeking. Failure to respond within ten (10) days of the date of this letter will result in the administrative closure of this file.

PTAAARMIGAN: The USPTO's April 6 letter does not identify any statutory or regulatory basis for setting any deadline. The USPTO's April 6 letter identifies neither factual nor legal basis to "close the file" with respect to subparts 1.a, or 1.f to 1.r, or requests 2, 3, and 4.

Any concerns of overbreadth or lack of clarity appear to reflect misreading by the USPTO, not overbreadth or lack of clarity in the April 6 request 1 **as written**. PTAAARMIGAN notes that an agency has only one opportunity to request clarification. § 552(a)(6)(A)(ii)(I). The USPTO's April 6 request exhausts that single opportunity. In several specific respects, the USPTO's April 6 letter is facially arbitrary and capricious. 5 U.S.C. § 552(a)(4)(F)(i). Nonetheless, in good faith, PTAAARMIGAN will respond to

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any facially-plausible showing of overbreadth, or request for clarification (though without a second tolling under § 552(a)(6)(A)(ii)).

Very truly yours,

PTAAARMIGAN

Attachments:

Attachment A Certificate of Organization of PTAAARMIGAN LLC, and § 501(c)(4) registration

Attachment B Merrick Garland, Memorandum for Heads of Executive Departments and Agencies, *Freedom of Information Act Guidelines* (Mar. 15, 2022).

Attachment A

Certificate of Organization of PTAAARMIGAN LLC, and § 501(c)(4) registration

STATE OF MISSOURI



John R. Ashcroft
Secretary of State

CERTIFICATE OF ORGANIZATION

WHEREAS,

PTAAARMIGAN LLC

LC1796489

filed its Articles of Organization with this office on the 22nd day of June, 2021, and that filing was found to conform to the Missouri Limited Liability Company Act.

NOW, THEREFORE, I, John R. Ashcroft, Secretary of State of the State of Missouri, do by virtue of the authority vested in me by law, do certify and declare that on 22nd day of June, 2021, the above entity is a Limited Liability Company, organized in this state and entitled to any rights granted to Limited Liability Companies.

Effective Date: June 22, 2021

IN TESTIMONY WHEREOF, I hereunto set my hand and cause to be affixed the GREAT SEAL of the State of Missouri. Done at the City of Jefferson, the 22nd day of June, 2021.


Secretary of State



Attachment A



Department of the Treasury
Internal Revenue Service
Tax Exempt and Government Entities
P.O. Box 2508, Room 4024
Cincinnati, OH 45021

Date: July 06, 2021
Person to Contact: Customer Services
Contact telephone number: 877-829-5500

PTAAARMIGAN LLC
Po Box 590372
Newton, Massachusetts 02459

We received your Form 8976, *Notice of Intent to Operate Under 501(c)(4)*, you filed on June 22, 2021. This acknowledgement is not a determination by the IRS that you qualify as tax-exempt under Internal Revenue Code (Code) Section 501(a) as an organization described in Code Section 501(c)(4).

For important information about your responsibilities, including recordkeeping, reporting, and disclosure requirements, go to www.irs.gov/charities.

If you have questions, you can call Customer Services at 1-877-829-5500.

Attachment B

**Merrick Garland, Memorandum for Heads
of Executive Departments and Agencies,
Freedom of Information Act Guidelines (Mar.
15, 2022).**



Office of the Attorney General
Washington, D. C. 20530

March 15, 2022

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL

A handwritten signature in blue ink, appearing to read "Merrick Garland", is written over the text "THE ATTORNEY GENERAL".

SUBJECT: FREEDOM OF INFORMATION ACT GUIDELINES

For more than fifty years, the Freedom of Information Act (FOIA), 5 U.S.C. § 552, has been a vital tool for ensuring transparency, accessibility, and accountability in government. As the Supreme Court has explained, the Act's "basic purpose . . . is to ensure an informed citizenry," which is "vital to the functioning of a democratic society [and] needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The guidelines set forth below update and strengthen the federal government's commitment to the fair and effective administration of FOIA.

A. The Presumption of Openness

1. As amended in 2016, the Freedom of Information Act provides that a federal agency or department (hereinafter "agency") may withhold responsive records only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates; or (2) disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A)(i).

2. Information that might technically fall within an exemption should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail. Moreover, agencies are strongly encouraged to make discretionary disclosures of information where appropriate.

3. When an agency determines that it cannot make full disclosure of a requested record, FOIA requires that it "consider whether partial disclosure of information is possible" and "take reasonable steps necessary to segregate and release nonexempt information." *Id.* § 552(a)(8)(A)(ii).

4. To help ensure proper application of the foreseeable harm standard, agencies should confirm in response letters to FOIA requesters that they have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.

5. In determining whether to defend an agency's nondisclosure decision, the Justice Department will apply the presumption of openness described above. The Justice Department will not defend nondisclosure decisions that are inconsistent with FOIA or with these guidelines.

6. Although the fair and effective administration of FOIA requires that openness prevail in the face of doubt, Congress established nine exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. *Id.* § 552(b). As the Act makes clear, however, the "burden is on the agency to sustain" a decision to withhold records under those exemptions. *Id.* § 552(a)(4)(B). Nor may agencies withhold information based merely on speculative or abstract fears or fears of embarrassment.

7. The Justice Department's Office of Information Policy stands ready to provide guidance to agencies making FOIA determinations in close cases and to provide support and training as agencies work to implement this guidance. With respect to specific FOIA litigation, agencies should consult with the relevant Justice Department attorney assigned to the case.

B. Proactive Disclosures

1. The proactive disclosure of information is also fundamental to the faithful application of FOIA. Proactive disclosures enable information about federal government operations to be more readily available to all.

2. FOIA requires agencies to proactively disclose certain categories of records, including previously released records that have been requested three or more times or that "have become or are likely to become the subject of subsequent requests." *Id.* § 552(a)(2)(D)(ii).

3. In making proactive disclosures, agencies should post records online as soon as feasible. Agencies should also continue to maximize their efforts to post more records online quickly and systematically in advance of any public request.

4. The Justice Department has strengthened its efforts to encourage proactive agency disclosures, including by – as the Government Accountability Office (GAO) recommended – providing more specific criteria regarding how relevant metrics should be reported in agency Annual FOIA Reports.¹

C. Removing Barriers to Access and Reducing FOIA Request Backlogs

1. Agencies should continue their efforts to remove barriers to requesting and accessing government records and to reduce FOIA processing backlogs. For example, the Justice Department's Executive Office for Immigration Review has long required individuals to file FOIA requests to obtain official copies of their own records of immigration court proceedings. We are now changing that policy, and I encourage all agencies to examine whether they have

¹ See U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE HANDBOOK FOR AGENCY ANNUAL FREEDOM OF INFORMATION ACT REPORTS (2021), <https://www.justice.gov/oip/page/file/1438431/download>.

similar or other categories of records that they could make more readily accessible without requiring individuals to file FOIA requests.

2. It is equally important to ensure that the public can readily find information that the government makes available. Records should be posted online quickly and systematically. In addition, agency FOIA websites should be easily navigable, and records should be presented in the most useful, searchable, and open formats possible. As we continue to improve our FOIA programs, improving the organization and presentation of disclosed materials should be a core part of our efforts to efficiently provide government records to the public.

3. FOIA.gov continues to serve as the government's central website for FOIA administration. The Justice Department is committed to continuing to build on the functionality of the site to better serve requesters and agencies. Together with the Office of Management and Budget, the Justice Department issued joint guidance in 2019 to ensure full interoperability of FOIA.gov.² Agencies should ensure that they are complying with FOIA.gov's interoperability requirements and are regularly updating their information on FOIA.gov.

4. Timely disclosure of records is also essential to the core purpose of FOIA. Agencies must have effective systems in place for responding to requests in a timely manner. The Justice Department encourages Chief FOIA Officers to undertake a comprehensive review of their FOIA programs to ensure that searches, reviews, and productions of records are conducted as efficiently as possible.

5. Agency FOIA professionals should continue to work with FOIA requesters in a spirit of cooperation. Each agency should actively work with requesters to remove barriers to access and to help requesters understand the FOIA process and the nature and scope of the records the agency maintains. Agencies should also ensure that they promptly communicate with requesters about their FOIA requests. As the Justice Department has emphasized in guidance for more than a decade, agencies should communicate electronically with FOIA requesters to the greatest extent possible, including by accepting FOIA requests and subsequent administrative correspondence electronically.

D. Ensuring Fair and Effective FOIA Administration

Ensuring fair and effective FOIA administration requires support from agency leadership, proper training, and a full understanding of FOIA obligations by the entire agency workforce.

1. I urge agency Chief FOIA Officers to undertake comprehensive reviews of all aspects of their agencies' FOIA administration, with a particular focus on the concerns highlighted in this memorandum. In accordance with FOIA and the Justice Department's FOIA Guidelines, agencies should report to the Justice Department each year on the steps they have taken to improve FOIA operations and facilitate information disclosure at their agencies. 5 U.S.C. § 552(j)(2)(D). The Justice Department's Office of Information Policy will offer specific guidance on the timing and content of such reports to ensure that they inform current and

² See *Guidance for Achieving Interoperability with the National Freedom of Information Act (FOIA) Portal on FOIA.gov* (February 12, 2019).

emerging FOIA challenges and risks, including, as the GAO recommended, the number of requests for which unusual circumstances apply and the effect of litigation on overall FOIA request processing and backlog.

2. In conducting assessments, Chief FOIA Officers should carefully review backlogs of requests and evaluate the allocation of agency resources to FOIA operations.

3. The FOIA Improvement Act of 2016 established a Chief FOIA Officers Council to develop recommendations for increasing compliance and efficiency in responding to FOIA requests, and to identify, develop, and coordinate initiatives for increasing transparency and compliance with FOIA's requirements. The Council has served as a helpful platform for understanding common challenges, advancing new FOIA initiatives, and identifying and sharing best practices. I encourage new agency Chief FOIA Officers to participate on the Council for the benefit of their own agencies and to improve government-wide FOIA administration.

4. The federal government could not process the hundreds of thousands of FOIA requests that are received every year without its dedicated FOIA professionals. FOIA professionals deserve the full support of their Chief FOIA Officers and all their agency colleagues.

5. Successful FOIA administration also requires proper training and a commitment to FOIA compliance by agency personnel. Simply put, FOIA is everyone's responsibility. I encourage each agency head to provide regular and proper training to your workforce that explains the importance of FOIA and every individual's role in administering it. The Justice Department's Office of Information Policy has issued several guidance documents and articles on the topics discussed in this memorandum, including resources to assist you with ensuring proper training and compliance with FOIA. *See* <https://www.justice.gov/oip>. I urge agencies to consult these resources.

6. The Justice Department understands the challenges agencies face in responding to the high number of requests they receive each year. The Department stands ready to work constructively with your agencies, with Congress, and with the FOIA requester community to improve processing capacities, reduce backlogs, and make government more transparent, responsive, and accountable. I encourage your agencies to take advantage of the government-wide resources the Justice Department has made available as you work to comply with your FOIA obligations.³

* * *

Transparency in government operations is a priority of this Administration and this Department. We stand ready to work with each of you to make real the Freedom of Information Act's promise of a government that is open and accountable to the American people.

³ This memorandum, which supersedes previous Attorney General memoranda on this subject, 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.