

Attorney General Eric Holder upholds “The Legality of Assassinating Americans”

Responds to Rosemary Award for Worst Open Government Performance

By [Nate Jones](#)

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Washington, DC, March 12, 2012 – Attorney General Eric Holder kicked off Sunshine Week 2012 by [rehashing](#) widely discredited [statistics](#) released by the Department of Justice after it was awarded the Rosemary Award by the National Security Archive for the [worst open government performance](#) by a federal agency in 2011.

In his speech, Holder stated that Department of Justice’s work on FOIA was “nothing short of remarkable,” but –just as his recent speech on the legality of assassinating Americans [did not mention](#) the “targeted killing” of al-Awlaki– Holder did not mention or refute his department’s Rosemary Award, or the reasons the DOJ was awarded it. His department’s open government failures included the DOJ Office of Information Policy’s attempt to issue new regulations that (among other steps backward) would have [allowed the agency to lie](#) to FOIA requesters and exclude online media from news media reduced fee status; the “[odd](#)” argument made to the Supreme Court by the DOJ’s Assistant Solicitor General that the Freedom of Information Act should become a withholding rather than a disclosure statute; and the DOJ’s “[war on leakers](#)” which has surely had a chilling effect upon –to use Holder’s own words– “the sacred bond of trust which must always exist between the government and those we are privileged to serve.”

Holder did, however, repeat claims from a [Department of Justice press release](#) posted just after being awarded the Rosemary Award, boasting of a 94 percent FOIA release rate and a 26 percent reduction in FOIA backlog. A [National Security Archive analysis](#) of the DOJ’s release rate shows that the DOJ excluded nine of the eleven reasons that the Department denied documents to requesters from its count. These include denials based upon: fees (pricing requesters out); referrals (passing the request off to another agency while the requester still waits); “no records” (very frequently the result of inadequate searches by DOJ employees); and requests “improper for other reasons” (which ostensibly include the “can neither confirm nor deny” glomar exemption).

What Holder did not mention was that when the full eleven reasons for denial are factored in, the Department of Justice’s “release rate” is a much more believable 56.7 percent. Melanie Pustay, head of the DOJ Office of Information Policy since 2007, also spoke. She boasted that Department of FOIA officials are using “new and creative” methods to improve FOIA output. Unfortunately, these methods appear to include “new and creative” math that obfuscates the true number of documents released under FOIA in an attempt to portray the Department of Justice in a better light. Josh Gerstein recently reported in Politico that one other “new and creative” method that the Federal Bureau of Investigation used to reduce its

backlog was to simply close some requests even though the requesters “[may not always have been notified](#).”

Dan Metcalfe, founding director and 25-year veteran of the Justice Department’s Office of Information and Privacy (now called the Office of Information Policy), agrees. He [told](#) The Atlantic Wire reported his judgment that, “The department’s most recent backlog reduction claim appears to be grossly wrong.” Metcalfe pointed out that to boast of a reduced backlog, the DOJ omitted data about 3,081 other “[pending FOIA requests](#)” that have not been responded to, but could not all technically be overdue. When these “pending” requests are factored in, the Department of Justice achieved a much more modest 4.5 percent decrease in actual outstanding requests. According to Metcalfe, “For [the Department of Justice] to falsely claim that it ‘continues to lead by example’ has now become sad to the point of being pathetic, as is the notion that it is doing more today than ever in the past to promote FOIA disclosure.”

A [FOIA survey](#) by the Associated Press also debunks the Department of Justice’s claims about sky-high FOIA release rates government-wide. Pustay used similarly misleading math to claim an astounding 92 percent FOIA release rate across all government agencies. The Associated Press surveyed the 37 largest FOIA agencies and found a much more plausible 65 percent release rate. Unlike the Department of Justice, the Associated Press survey tallied all denials of requests including fee denials, “no records” denials, and referrals to other agencies.

It’s unclear why the Attorney General chose to regurgitate these misleading statistics. Perhaps, he simply read what the Office of Information Policy provided him, without double checking the facts. Perhaps he actually placed more importance on scoring favorable headlines than presenting a clear picture of the DOJ’s progress on FOIA. No matter the reason, the discredited figures he cited in his speech went far in disproving DOJ spokeswoman Tracy Schmalzer’s [bold](#) assertion that, “Anyone who knows anything about the Freedom of Information Act will tell you that the Department of Justice is doing more than ever to promote openness and transparency under that act.”

An analysis of the DOJ’s annual [FOIA reports](#) also shows that the DOJ’s three leadership offices, the Office of the Attorney General, the Office of the Deputy Attorney General, and the Office of the Associate Attorney General have some of the worst FOIA results within the Department of Justice. As Holder “celebrated and showcased” the Department of Justice’s FOIA progress, the combined backlog of his own leadership offices had risen 26 percent since fiscal year 2010. Troublingly, the Office of Information Policy is responsible for processing FOIA requests at the DOJ leadership offices. How can Americans trust the DOJ OIP to reform FOIA throughout the federal government, when it can’t even improve the backlog in its own department’s leadership offices? As Senator Grassley told OIP Chief Pustay during last year’s Sunshine Week, “The president set a very high benchmark [on FOIA]. And if we’re doing the same thing after two and a half years of this administration, the same as we’ve been doing for 20 years, the president’s benchmark isn’t being followed by the people he appoints.”

Today’s presentation did provide some room for optimism from agencies other than the DOJ that have taken bold steps to improve their FOIA process. The Federal Communications Commission now proactively posts its proceedings on its relaunched, search-centered website. The Nuclear Regulator Commission harnessed the power of e-discovery tools and

electronic delivery of records to push out documents about the Fukushima nuclear catastrophe. The Social Security Administration set up a FOIA process evaluation working group to evaluate its FOIA efficiency. The Department of the Interior completed a complete “reorganization” of the FOIA office, led by the the Secretary of the Interior; FOIA officials are now required to send monthly summaries of overdue FOIA requests.

However each of these FOIA reforms was created by individual agencies, and the Department of Justice has done very little –three years after Holder’s [FOIA memorandum](#)– to effect this kind of government-wide, rather than piecemeal, FOIA change.

At the Department of Justice, Holder proclaimed that he “is committed to this work,” and announced a new search pane for the [FOIA.gov](#) website –essentially a pane that simply shows the results of a google search with “site:.gov” added at the end. His promises to post monthly FOIA logs of requests to the Attorney General’s office and to eventually incorporate the FOIA.gov search and tracking into the AG’s FOIA webpage are baby steps in the correct direction. But Holder did not comment on his agency’s 21.8 percent increase its use of the b(5) “deliberative process” exemption, a key indicator showing the DOJ’s backsliding on discretionary releases. Holder also did not mention the US government’s increased reliance on the b(1) national security exemption to censor information about an ever-expanding sphere of topics (Holder’s own DOJ [refuses to confirm or deny](#) the existence of an Office of Legal Counsel memo allowing the “targeted killing” of US citizens without trial). Nor did he propose fixing the unnecessary and wasteful referral system, in which multiple ([sometimes up to fourteen](#)) agency reviews of documents lead to [twenty-year-old outstanding FOIA requests](#).

The one fact that Holder did get absolutely correct was his comment that the Department of Justice’s FOIA progress to date is “only the beginning” of what needs to be done to achieve his 2009 promise to ensure that the Freedom of Information Act “is realized in practice.” To actually realize this, Holder must force his Department of Justice to work toward actual, difficult, fundamental, FOIA change within his DOJ and throughout the federal government, rather than merely restating his Office of Information Policy’s misleading FOIA statistics.

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