

Why I'm Suing the FBI, the DoD and the CIA

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Over the past year, I've filed dozens of Freedom of Information Act (FOIA) requests with the FBI, CIA, Department of Defense, and other government agencies in hopes of prying loose documents I need to support my investigative reporting efforts on a wide-range of issues and policies.

One of the frustrating realities about the FOIA process is the enormous backlog of requests government agencies have to contend with, which means many months or years could pass before my request is finally processed and I receive a response.

However, a [little-known FOIA provision allows requesters to seek an estimated date of completion](#) from government agencies on their FOIA requests. Specifically, the law, as it was amended in 2007, says:

Pursuant to 5 U.S.C. § 552(a)(7)(B), "Each agency shall ... establish a phone line or Internet service that provides information about the status of a request to the person making the request ..., including ... an estimated date on which the agency will complete action on the request."

To demonstrate how effective the law can be when requesters utilize it, I sent an email to Eric Neuschafer, a Department of Homeland Security (DHS) FOIA analyst, last week inquiring about the estimated date of completion on a FOIA request I filed last October for documents related to the role the agency played, if any, in the crackdown on the Occupy Wall Street protest movement.

Neuschafer promptly responded to my query stating, "At this time, it is my best estimate that we will have information ready for release on or around March 15."

But unlike DHS, many other government agencies still refuse to follow the law and provide requesters with estimated dates of completion. Indeed, last December, I first queried David Sobonya, the FBI's public information officer, via email about two separate FOIA requests I filed last year and requested he provide me with an estimated date of completion. [The FOIA requests I filed with the agency are for documents I am trying to obtain that will help flesh out an investigative story I have spent the past year working on.]

Sobonya responded to my email on December 29 by stating, "due to the voluminous requests that the FBI receives on a daily, weekly, monthly and annual basis a specific time frame for completion cannot be provided."

I sent Sobonya another email, citing the section of the law requiring he provide me with an estimated date of completion for my two outstanding FOIA requests, which he said was still in the hands of a "disclosure analyst."

Sobonya responded to that email by inadvertently sending me a note addressed to “Denny” that was clearly intended for Denny Argall, the FBI’s public liaison officer.

“I feel this will be the new trend,” Sobonya said of my request for an estimated date of completion, which he was required to provide me with under the law. “The assigned disclosure analyst advised that an estimated date for completion cannot be provided. How do you wish for me to respond?”

I advised Sobonya that he clearly sent me an email intended for someone else. He replied to my email by saying he would try and obtain answers to my request for estimated dates of completion for my two FOIA requests. But he never did. Sobonya said my FOIA requests were being “processed in the ‘First-in/First-out’ order and that we are not able to give an estimated date of completion.”

We went back and forth via email several times over the course of a few weeks. Again and again, I cited the law and demanded Sobonya provide me with an estimated date of completion. Eventually, he stopped responding to my queries altogether and his superiors in the Records Information/Dissemination Section (RIDS) did not return my calls or respond to my emails.

So, on Tuesday, [I sued the FBI in US District Court for the District of Columbia](#). I hooked up with the Arlington, Virginia-based public interest law firm [National Security Counselors](#), and we also sued the CIA, the Department of Defense, Department of Justice, Department of Energy, Department of Treasury, the Office of Director of National Intelligence and the National Archives and Records Administration, alleging the agencies had violated 5 U.S.C. § 552(a)(7)(B) of the FOIA by failing to provide the National Security Counselors with estimated dates of completion for separate FOIA requests.

As our lawsuit states, the agencies’ “repeated refusal to provide estimated dates of completion represents an ongoing policy, practice, or Standard Operating Procedure (SOP).”

“A policy, practice, or [Standard Operating Procedure] of refusing to provide estimated dates of completion to requesters is in violation of FOIA,” our complaint further states. “Such a practice constitutes outrageous conduct for purposes of the broad equitable powers provided by FOIA to the Court. Such a policy is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.”

We want the District Court to find the FBI and other government agencies named in the lawsuit in violation of its statutory responsibilities under FOIA and to issue an injunction compelling those agencies to provide requesters with estimated dates of completion when asked.

It’s worth noting that less than two weeks before we filed our lawsuit, the government’s own FOIA ombudsman published a blog post entitled, “[How to Invite a FOIA Lawsuit](#),” which said, “failing to give a requester an estimated date of completion” can be “litigation invitations.”

The 2007 amendments to FOIA require agencies to provide requesters with an estimated date of completion, but many agencies still do not do so. When asked why, agencies report that they have not determined how best to accurately compute an estimated completion date or that they are reluctant to provide an estimated completion date: if the date is not met it would open up a whole set of other problems related to revising the estimated date of

completion and to maintaining or re-building rapport with the requester and agency officials if the dates slip.

Aside from the fact that FOIA requires agencies to provide requesters with an estimated date of completion, providing estimated completion dates can be advantageous to agencies. First, an estimate is just that, an agency's educated guess based on the information it has available at that point in time. Estimated completion dates can also keep an agency on track and in tune with its FOIA process. For example, if an agency figures out how much time it takes for each stage in the FOIA process, it makes it easier to manage its FOIA case load by recognizing bottlenecks in the process. When requesters are given an estimated date of completion, it helps to manage their expectations of when they will receive a response to a request.

This is not the first time Kel McClanahan, the executive director of National Security Counselors and the attorney handling our lawsuit, has sued government agencies for failing to provide FOIA requesters with estimated dates of completion.

In February 2010, his firm [filed a lawsuit on behalf of British author Gregg Muttitt](#), who was writing a book about the role the US and UK governments played in the development of Iraq's oil law. Among other claims, the lawsuit, *Muttitt v. United States Central Command, Department of Defense, Department of State, and Department of the Treasury*, argued that the State Department refused to provide Muttitt with an estimated date of completion on his FOIA requests.

Last September, the US District Court for the District of Columbia held in that case that a [repeated failure of an agency to provide estimated dates of completion would constitute a viable claim in a FOIA lawsuit](#).

McClanahan, who had previously weighed in on a story I had published last month about a [secretive process the FBI employs for certain FOIA requests known as "blackballing,"](#) told me that one of the "primary concerns that Congress sought to address when it passed the OPEN Government Act in 2007 was the widespread inability of FOIA requesters to receive any feedback from agencies during the processing of their requests."

"For this reason, Congress chose to include a requirement that all agencies must provide any requester who asked with an estimated date on which they would complete the processing of their requests," McClanahan said. "However, many agencies were slow to implement the new mandate, and when challenged they fought back. So the purpose of our lawsuit is to attempt to close the door on all possible loopholes or alternative interpretations that agencies can develop to avoid complying with what is a very clear statutory requirement, as well as signaling to all agencies that the Muttitt case was not a fluke and that all agencies are required to provide this vital information to requesters," McClanahan added.

Despite the new era of transparency and open government President Obama [promised](#) three years ago, "his administration has been just as secretive—if not more so—than his predecessors, and the Freedom of Information Act (FOIA) has become the prime example of his administration's lack of progress," the Electronic Frontier Foundation (EFF) [noted](#) last month.

When Attorney General Eric Holder issued [new FOIA guidelines in March 2009](#), he said the

Justice Department would only defend government agencies in FOIA lawsuits if it concluded [their FOIA denials were truly \(not technically\) prohibited by law](#). It will be interesting to see how the Justice Department responds to this lawsuit. Whether or not a Justice Department attorney mounts a spirited defense defending the government's practices should prove an excellent indicator of how seriously the rank and file takes Holder's guidelines.

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