

February 13, 2018

VIA ONLINE PORTAL AND ELECTRONIC MAIL

Laurie Day
Chief, Initial Request Staff
Office of Information Policy
Department of Justice, Suite 11050
1425 New York Avenue, N.W.
Washington, DC 20530-0001
Online Request via [FOIAonline](#)

Re: Freedom of Information Act Request

Dear FOIA Officer for the Office of the Attorney General:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Justice (DOJ), 28 C.F.R. Part 16, the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) makes the following request for records.

On February 12, 2018, the Office of Management and Budget (OMB) released the President's Budget for Fiscal Year 2019 (FY 2019 President's Budget). The FY 2019 President's Budget would eliminate funding for the Department of Justice's Community Relations Service (CRS) in 2019. CRS, known as the nation's "Peacemaker," was created by the Civil Rights Act of 1964 to help communities address tension associated with allegations of discrimination on the basis of race, color and national origin. CRS also helps communities develop the capacity to prevent and respond to violent hate crimes committed on the basis of actual or perceived race, color, national origin, gender, gender identity, sexual orientation, religion, or disability. With the alarming rise in hate incidents and hate crimes nationwide, the work of the CRS is more critical than ever. The FY 2019 President's Budget proposes to transfer CRS's activities to the Civil Rights Division, but in reality, such a move would effectively lead to a shutdown of the office. One of the reasons CRS is effective is because it is not an investigative nor prosecutorial component of the DOJ. Instead, it works through regional offices to deliver services tailored to a community's needs. For mayors, chiefs, sheriffs, and community leaders alike, the fact that CRS is not involved in prosecutions or investigations makes it possible for leaders to ask for the assistance without fear of litigation.

Despite the fact that Congress, with the Civil Rights Act of 1964, created CRS to be a component that has no investigative and prosecutorial role, the FY 2019 President's Budget purports to move CRS' activities into the Civil Rights Division, a component that enforces federal statutes prohibiting discrimination through investigation and prosecution.¹ There is no explanation of how Civil Rights Division could perform the services of the 10 regional and 4 field offices currently serving communities across the country in a manner consistent with the requirements of its founding legislation.

¹ Addendum to the President's FY19 Budget to Account for the Bipartisan Budget Act of 2018, at pp. 699-700,; <https://www.whitehouse.gov/wp-content/uploads/2018/02/appendix-fy2019.pdf> (last visited Feb. 13, 2018).

Indeed, the Civil Rights Act of 1964 states that “[n]o officer or employee of the Service shall engage in the performance of investigative or prosecuting functions of any department or agency in any litigation arising out of a dispute in which he acted on behalf of the Service.” An officer or employee of CRS who makes public “in any manner whatever any information in violation of this subsection, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000 or imprisoned not more than one year.”²

The Office of the Attorney General (OAG) “represents the United States in legal matters generally and gives advice and opinions to the President and to the heads of the executive departments of the Government when so requested.”³ The Lawyers’ Committee believes it is in the public interest to review agency records, including budget documents and any documents regarding the proposed de-funding of CRS and transfer of activities to CRT, related to this proposed unprecedented move of CRS, an agency created by the Civil Rights Act of 1964, into CRT, a litigating component of DOJ.

Requested Records

The Lawyers’ Committee requests that DOJ OAG produce the following within twenty business days:

Any and all records, held by the DOJ, relating to the FY 2019 President’s Budget and the Civil Rights Act of 1964 and/or the FY 2018 President’s Budget and the Civil Rights Act of 1964. These records include any records related to the proposal to end funding for the Community Relations Service and/or to move its activities to another component. These records would include:

- (1) Decision memoranda, policy statements, enforcement policies or guidance, budget documents, or directives.
- (2) Communications in any format, either internally within OAG, communications received by OAG personnel from other offices or officials, or communications sent by OAG personnel to other offices or officials, including DOJ offices, other agencies, including the OMB, Congress, or third parties. This includes any notes taken to memorialize such communications, and communications using personal devices or accounts. This includes any communication to CRS personnel regarding whether to open new matters and/or handle new or potential matters differently following the February 12, 2018 release of the FY 2019 President’s Budget.
- (3) Calendar entries (including invitations and any attachments to such calendar entries or invitations). For calendar entries created in Outlook or similar programs, the documents should be produced in “memo” form to include all invitees, any notes, and all attachments. Please do not limit your search to Outlook calendars; we request the production of any calendar—paper or

² Civil Rights Act of 1964, as amended, Title X, 42 U.S.C. § 2000g-2.

³ “About the Office,” Office of the Attorney General, <https://www.justice.gov/ag/about-office> (last visited Feb. 13, 2018).

electronic, whether on government-issued or personal devices—used to track or coordinate how DOJ personnel allocate their time on agency business.

Please provide all responsive records from January 20, 2017, to the date the search is conducted.

In addition to the records requested above, the Lawyers' Committee also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If DOJ uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searched, we also request any such records prepared in connection with the processing of this request.

The Lawyers' Committee seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. No category of material should be omitted from search, collection, and production.

Please search all records regarding agency business. You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts. Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.⁴ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; the Lawyers' Committee has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁵

In addition, please note that in conducting a "reasonable search" as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered DOJ's prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer

⁴ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149-50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955-56 (D.C. Cir. 2016).

⁵ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-sv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) ("The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official's] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work related email in the [personal] account was duplicated in [the official's] work email account." (citations omitted)).

reasonable to rely exclusively on custodian-driven searches.⁶ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians' files. For example, a custodian may have deleted a responsive email from his or her email program, but DOJ's archiving tools would capture that email under Capstone. Accordingly, the Lawyers' Committee insists that DOJ use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. The Lawyers' Committee is available to work with you to craft appropriate search terms. However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information "only if . . . disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."⁷ If it is your position that any portion of the requested records is exempt from disclosure, the Lawyers' Committee requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). As you are aware, a Vaughn index must describe each document claimed as exempt with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA."⁸ Moreover, the Vaughn index "must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information."⁹ Further, "the withholding agency must supply 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'"¹⁰

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹¹ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a Vaughn index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. The Lawyers' Committee intends to pursue all legal avenues to enforce its right of access under

⁶ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidentialmemorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, "Managing Government Records Directive," M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

⁷ FOIA Improvement Act of 2016 §2 (Pub. L. No. 114-185).

⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁹ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹⁰ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹¹ See *Mead Data Central*, 566 F.2d at 261.

FOIA, including litigation if necessary. Accordingly, DOJ is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, the Lawyers' Committee welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, we can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive materials in electronic format by email or in PDF or TIF format on a USB drive. Where possible, please provide responsive materials in machine readable formats—e.g., PDFs of documents should be in optical character recognition (OCR) format instead of picture format. Please send any responsive material being sent by mail to Lawyers' Committee for Civil Rights Under Law, 1401 New York Ave. NW, Suite 400, Washington, DC 20005. If it will accelerate release of responsive records, please also provide responsive material on a rolling basis.

Fee waiver request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k), the Lawyers' Committee requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way.¹² Moreover, the request is primarily and fundamentally for non-commercial purposes.¹³

The issue of government operations and civil rights enforcement as it relates to the very recent decision to propose to end funding to CRS in the FY 2019 budget is “in the public interest” and has generated significant attention from advocates, policy makers, and the general public, as indicated by the extensive media coverage of the issue. Disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding” of government operations and activities.¹⁴ The decision to end funding to CRS, an agency created by the Civil Rights Act of 1964 that provides critically needed services to communities to address tension associated with racial discrimination and to help communities prevent and respond more effectively to violent hate crimes at a time when hate crimes are increasing¹⁵ is of grave concern and significant public interest.

The public needs to know how DOJ could move the services of the Community Relations Service, an agency created by the Civil Rights Act to be a component that had no investigative and prosecutorial role, into the Civil Rights Division, a component that enforces federal statutes prohibiting discrimination through investigation and prosecution. Indeed, the Civil Rights Act of

¹² 28 C.F.R. § 16.10(k)(1).

¹³ *Id.*

¹⁴ 28 C.F.R. § 16.10(k)(1), (2)(i)-(ii).

¹⁵ 2016 Hate Crime Statistics, Criminal Justice Information Services Division, FBI, <https://ucr.fbi.gov/hate-crime/2016/hate-crime> (last visited Feb. 13, 2018).

1964 states that “[n]o officer or employee of the Service shall engage in the performance of investigative or prosecuting functions of any department or agency in any litigation arising out of a dispute in which he acted on behalf of the Service.” An officer or employee of CRS who violates this provision and makes public “in any manner whatever any information in violation of this subsection, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000 or imprisoned not more than one year.”¹⁶

This request is primarily and fundamentally for non-commercial purposes.¹⁷ As a 501(c)(3) nonprofit organization, the Lawyers’ Committee does not have a commercial purpose and the release of the information requested is not in the Lawyers’ Committee’s financial interest. The Lawyers’ Committee was founded in 1963 and is committed to full and fair enforcement of federal civil rights laws and ensuring equal justice under law for all. Criminal justice and law enforcement practices and part of the Lawyers’ Committee’s core areas of focus and the organization has a longstanding commitment to fighting for fair and just law enforcement practices. The Lawyers’ Committee will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. The Lawyers’ Committee may also make materials it gathers available on its public website and promote their availability on social media platforms, such as Facebook and Twitter.

Accordingly, the Lawyers’ Committee qualifies for a fee waiver.

Conclusion

The Lawyers’ Committee looks forward to working with DOJ on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Becky Monroe at bmonroe@lawyerscommittee.org or 202-662-8337. Also, if the request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

Kristen Clarke
President and Executive Director
Lawyers’ Committee for Civil Rights Under Law

¹⁶ Civil Rights Act of 1964, as amended, Title X, 42 U.S.C. § 2000g-2

¹⁷ 28 C.F.R. § 16.10(k)(1), (2)(iii).