

# The Identity Project

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August 4, 2016

Mr. Eric F. Stein  
Co-Director, Acting  
Office of Information Programs and Services  
A/GIS/IPS/CR/MPD, SA-2, Room 8100  
U.S. Department of State  
Washington, DC 20522-0218

**Re: FOIA request F-2011-03370 (submitted April 27, 2011)**  
**FOIA request F-2011-06118 (submitted July 14, 2011)**  
**FOIA request F-2014-09197 (submitted May 28, 2014)**  
**FOIA request P-2015-06585 (submitted March 12, 2015)**

Dear Mr. Stein:

I am writing in response to your "still interested" letter dated July 13, 2016.

**We are still interested in receiving responses to each of our FOIA requests, including requests F-2011-03370, F-2011-06118, F-2014-09197, and P-2015-06585.**

We have neither abandoned nor withdrawn any of these or any others of our requests, nor have we given any indication of intention or desire to do so. If we wish to withdraw a request, we could and would notify you in writing. We have not done so.

In the absence of any such indication, no inference of lack of continued interest would be warranted or authorized by law. The FOIA statute does not require periodic or repeated follow-up expressions of continued interest. Failure to provide such periodic or repeated indications of continued interest is not a lawful basis for failure to respond to a FOIA request. Your continuing duty is to respond to each of these requests.

Your letter and its suggested inference of lack of continued interest is especially inappropriate in these cases, since we have provided your agency with repeated, affirmative, written and verbal indications of our continued interest in these requests.

When we did not receive a response by the statutory deadline to the earliest of these requests, F-2011-03370, we appealed the constructive denial of this request. In response to our appeal, Lori Hartmann, Appeals Officer, Office of Information Programs and services, notified us by letter dated June 7, 2011, that "Your FOIA request is not subject to administrative appeal at this time, since no specific material has been denied in response to the request.... I have confirmed that your request is being processed, but I am unable to predict the length of time before action on it will be completed."

We have not filed administrative appeals of the constructive denial of our subsequent requests only because of this policy that such appeals will not be considered.

If your policy or practice has changed and you are now willing to entertain appeals of constructive denial by delay or non-response, please let us know.

We can scarcely imagine a clearer indication of continued interest than a formal administrative appeal of the lack of response. Having received this appeal, and having assured us in your written response that our request was being processed, any "inference" of lack of interest, or the sending of a "still interested" letter, was inappropriate.

It was obviously impossible for us to know how often we should follow up to make sure that our request had not been lost, forgotten, or (improperly) closed, especially after receiving the explicit written notice from Ms. Hartmann, as quoted above, that your agency was "unable" to comply with its statutory duty to provide, on request, an estimated date of completion of agency action with respect to each of our requests.

We have continued to make regular inquiries by e-mail and telephone as to the status of each of these requests. Our e-mail correspondence includes the following:

- On July 13, 2011, I requested the estimated date of completion of agency action with respect to request F-2011-03370, and requested the assistance of OGIS in obtaining an estimated date of completion of agency action (OGIS Case 2011-0309). Although your Department never responded to my request, on October 28, 2011, OGIS provided me with estimated dates of completion which they had obtained: "Regarding request no. 201106118... State Department FOIA professionals estimate a completion date of January 30, 2012. Regarding request no. 201103370 ... the estimated date of search completion is November 2011, with an estimated date of completion of April 20, 2012."
- On June 11, 2012, I requested the status including the estimated completion dates for F-2011-03370 and F-2011-06118 by e-mail to "FOIAStatus@state.gov". On June 14, 2012, I received a response by e-mail from Shamella Tribble, "According to our records, case number F-2011-06118 is pending searches and review of responses received. The estimated completion date is July 30, 2012. We are

awaiting response from the pending searches for F-2011-03370. The estimated completion date is December 31, 2012."

- On December 5, 2012, I again e-mailed to request the status and updated estimated dates of completion of action for each of these requests.
- On December 13, 2012, I received an e-mail message from Tewodros Makonnen, Senior Program Analyst, A/GIS/IPS/MPD, Office of Information Programs and Services, Management & Public Diplomacy, Statutory Compliance & Research Division, attaching a letter from Sheryl L. Water, Director, Office of Information Programs and Services, with respect to F-2011-06118. According to this letter, a search of one Department of State component "has been completed and has resulted in the retrieval of no documents responsive to your request. The remaining searches are still in progress."
- On December 13, 2012, I responded to Mr. Makonnen's e-mail message, "Thank you very much for e-mailing this. As previously requested, please advise the expected date of completion of agency action on this request."
- On December 31, 2012, I received an e-mail message from Charlotte W. Duckett, responding to my December 5, 2012, status request for request F-2011-06118: "The new estimated completion date has been determined to be August 31, 2013."
- On February 11, 2015, I again e-mailed "FOIAstatus@state.gov" to request the status, including the expected date of completion of agency action, with respect to each of these three requests. I received a response the same day by e-mail from Ms. Duckett: "Please be advised that a copy of your e-mail has been forwarded to the office that is processing your request. Case numbers F-2011-03370 and F-2011-06118 are being processed by the same team. Our office has requested status and an estimated completion date for your request. Information will be provided to you as soon as we receive a response. Case number F-2014-09197 is being processed by a different team. The estimated completion date for this case number is September 2015."
- On February 25, 2015, I received another e-mail message from Ms. Duckett responding to my February 11, 2015, status request: "A search of records was initiated with the Office of Passport Services, Office of the Legal Adviser and the Consular Affairs-Overseas Citizens Services for case number F-2011-06118. Those searches are continuing. The estimated completion date for this case F-2011-06118 is August 2015. Information pertaining to case number F-2011-03370 is currently in the reviewing process. Our office has requested an estimated completion date for case F-2011-03370. We will provide that date to you soon. The estimated completion date for case number F-2014-09197 is still September 2015. Additional information pertaining to each case will be provided

to you as soon as it becomes available."

- On February 25, 2015, I responded by e-mail: "Have any records responsive to any of these requests been processed? If so, given that these are all months (and in 2 of the 3 cases years) overdue, and that you expect a complete response to take many months longer, we request that interim releases be made of as many records as possible responsive to each of these requests, as soon as possible. Please reply to advise the first expected date for any interim release with respect to each of these 3 requests."
- On March 4, 2015, I received an e-mail message from Ms. Duckett: "This is in reference to your e-mail dated February 25, 2015 requesting interim releases. Please be advised that a copy of your e-mail has been forwarded to the appropriate case analyst for their records."
- On October 8, 2015, I again e-mailed: "We have received no response to our request (as copied below) for interim releases as records responsive to each of these requests are processed, and no response to these requests. Each of the estimated completion dates for these requests has passed. Please provide an estimated date for the first interim release of records responsive to each of these requests, and an updated estimated date of the completion of your response to each of these requests."
- On October 8, 2015, I received an e-mail message from Angela Burks with respect to request P-2015-06585, "The estimated completion date (ECD) for this case is June 2016."
- On October 16, 2015, I received an unsigned e-mail message, "We have contacted the Case Analysts working on all 3 cases and requested new estimated completion dates. The Analysts will contact the bureaus doing the searches and the individuals reviewing the material. This will take some time because each case is different."
- On October 19, 2015, I received an unsigned e-mail message, "RE: FOIA status request for Case Control Number F-2014-09197... The Department's electronic case notes indicate the case is still open. The searches are still pending.... The estimated completion date (ECD) for this case is: August 2016."
- On October 28, 2015, I received an e-mail with respect to FOIA case F-2011-03370: "The Department's electronic case notes indicate the case is still open.... The estimated completion date (ECD) for this case is: December 2015."

No competent and diligent person, acting in good faith, could possibly infer from this record that we had abandoned, withdrawn, or lost interest in any of these requests.

As you you no doubt are aware, both the Department of Justice Office of Information Policy (OIP) and the National Archives and Records Administration Office of Government Information Services (OGIS) have recently reviewed and issued updated guidance and recommendations for the use of "still interested" letters.

The letter you sent to us was, in multiple respects, clearly contrary to both the latest OIP guidance<sup>1</sup> and the OGIS recommendations<sup>2</sup>:

- "Agencies should also ensure that they limit their use of 'still-interested' inquiries to those situations where they have a reasonable basis to conclude that the requester's interest in the records may have changed... For example, an agency may have been in regular communication with a requester and as a result of those exchanges it would have a clear indication that the requester remains interested in the records despite the age of a request. A 'still-interested' inquiry would not be appropriate in such a case." This was, obviously, the situation with respect to our requests, making your "still interested" letter clearly contrary to the OIP guidance.
- "When an agency identifies the need to contact a requester for the purposes of determining whether he or she is 'still-interested' in the request, it should do so using the requester's preferred method of communication. For requesters who prefer to be contacted by phone or by email, agencies should first use those methods of communication to inquire about the requester's continued interest in the request, prior to sending a letter. In the absence of a stated preference, agencies should communicate electronically as their default." In our case, we had requested that responses be provided in electronic form, and we had repeatedly inquired by e-mail and telephone as to the status of our request. You ignored our clearly expressed preference for methods of communication, and used postal mail as your default, contrary to the OIP guidance.
- "Agencies should also ensure that there is a simple way for requesters to notify the agency if they are still interested in the continued processing of the request. There should be no rigid requirements imposed on the requester as to how they communicate their interest in having the request continued to be processed. For example, a simple response over the telephone, a reply to an email, or checking off a box on a self-addressed form are all examples of easy methods that agencies can make available to requesters so that they can most readily respond to the

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1 "Limitations on Use of 'Still-Interested' Inquiries", updated July 2, 2015, <<https://www.justice.gov/oip/oip-guidance-8>>, and "Implementation Checklist for OIP Guidance on 'Still-Interested' Inquiries", <<https://www.justice.gov/oip/oip-guidance-7>>.

2 "Compliance Review of the Use of 'Still Interested' Letters, Part 3: Recommendations To Improve Transparency of the Use of Still Interested Letters", May 11, 2016, <<https://ogis.archives.gov/Assets/Still-interested-part-3-final.pdf>>

inquiry." Contrary to this guidance, your letter failed to provide any e-mail address or telephone number, and requested a reply either by postal mail (the slowest and most expensive mode of reply) or by fax (the least widely used mode of communication; some law firms and large organizations still have fax machines, but far more individuals and organizations have e-mail).

It is particularly troubling that you disregarded the OIP guidance and OGIS recommendations so soon after providing both OIP and OGIS with assurances that you were complying with their guidance in your use of "still interested" letters.<sup>3</sup>

Please reply by e-mail to (1) confirm your receipt of this letter, (2) confirm that you have noted in each of these case files that we strongly prefer to be contacted by telephone and/or e-mail, and that we have requested that access to and copies of responsive records be provided in electronic form, and for records found in electronic form (such as e-mail messages, word processor or spreadsheet files, digital photographs, digital and video files, etc.) that copies be provided as bitwise copies of each complete file containing any responsive records, and for e-mail messages including both the raw message "source" file with all headers and bitwise copies of all attachments, (3) advise the status including the estimated date of completion of agency action with respect to each of these requests, and (4) advise the interval at which we should remind you of our continued interest. If you have any questions, please contact us by phone or e-mail.

If you are going to attempt to require periodic indications of continued interest in having your agency comply with its statutory duty to respond to FOIA requests – a requirement which we believe would be inconsistent with the FOIA statute – that requirement should be spelled out in a proposed rule to amend your FOIA regulations, through notice-and-comment rulemaking that would provide both notice to the public of what you expect, and an opportunity to challenge the improper proposed requirement.

Such a proposed rule should also specify the interval at which requesters are required to indicate our continued interest. Should we phone or e-mail you to indicate our continued interest, and to request a status update and written confirmation from you that each of our requests is still being processed, annually? Monthly? Weekly? Daily? Given the number of backlogged FOIA requests pending with your Department at any given time, what would be the implications for your FOIA staff of processing and responding to periodic expressions of continued interest and status requests from all those requesters?

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3 "The Department is in compliance with OIP's new guidance" (U.S. Department of State, Chief Freedom of Information Act Officer Annual Report, March 2016, <<https://foia.state.gov/Learn/Reports/Officer/2016.pdf>>); "the Department is aware of Office of Information Policy (OIP) guidance regarding the use of 'still interested' letters.... Specifically, all Department FOIA procedures and guidance are now compliant with the guidance issued by OIP" (letter to OGIS from Joyce A. Barr, Assistant Secretary of State for Administration, 15 June 2016, <<https://ogis.archives.gov/Assets/State+Response+re+Still+Interested.pdf>>).

We urge you to bring your procedures into compliance with the FOIA statute, the OIP guidance, and the OGIS recommendations. If you chose not to comply with that guidance and those recommendations, we strongly urge you to accurately report that fact to those agencies and the public, in your annual and other FOIA reports, and to spell out any requirements in your FOIA regulations, through notice-and-comment rulemaking.

Sincerely,

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