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Description of document: Department of Justice (DOJ), Civil Division records concerning the impact on DOJ staffing requirements as a result of the substantial increase in FOIA litigation and the associated representation by DOJ attorneys, 2018

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Source of document: FOIA, Records, and E-Discovery Office
Civil Division
Department of Justice
Room 8314
1100 L Street, NW
Washington, DC 20530-0001
[Civil Division FOIA E-Request Form](#)

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U.S. Department of Justice

Civil Division

Washington, DC 20530

Via E-mail

October 3, 2018

Request No. 145-FOI-16253
HDK

This is the response of the Civil Division, Department of Justice to your Freedom of Information Act request for records concerning the impact on DOJ staffing requirements as a result of the substantial increase in FOIA litigation and the associated representation by DOJ attorneys. This Office received your request on August 13, 2018.

The Civil Division located four pages responsive to your request, which are being released to you in full. Please note the Civil Division removed 18 pages as non-responsive to your request.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact our FOIA Public Liaison at 202-514-2319 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://www.foiaonline.gov/foiaonline/action/public/home>.

Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink, appearing to read "Hirsh D. Kravitz". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Hirsh D. Kravitz
Senior Supervisory FOIA Counsel
Office of FOIA, Records, and E-discovery



*U.S. Department of
Justice*

Civil Division

**FY 2019 Budget
and Performance Plans**

Submitted to the Congress of the United States
February 2018

As previously mentioned, the increased caseload and burden on the Federal Programs Branch is tied to two different areas – FOIA Litigation and National Security.

FOIA Litigation. Across the Federal Government, there has been an explosion of FOIA requests and litigation¹. There are several reasons for this increase; first and foremost, a host of government watchdog groups now essentially seek to use FOIA requests and related litigation as a weapon in the political and advocacy process. This phenomenon has been widely noted over several years². These advocacy groups raise their profile whenever they trumpet a new FOIA lawsuit they file against the Federal Government. Second, many federal agencies have significant backlogs of FOIA requests, which prompts more requesters to sue in an effort to obtain their requested records more quickly.

Third, the costs to file a FOIA request are now much lower for many requestors. Historically, a requestor pays the costs an agency bears in responding to a FOIA request. There is, however, an exception for the press, and with the rise of new media (bloggers, twitter users, etc.), many more people now claim this press exemption, which also encourages more, and far broader, requests. Fourth, in FOIA litigation, there are generous attorney fee provisions available to attorneys filing against the Federal Government. Under the OPEN Government Act passed by Congress in 2007 (P.L. 110-175), attorneys may recover their fees in FOIA litigation based on the so-called “catalyst theory” (which essentially states that a plaintiff is eligible for attorney’s fees if his or her lawsuit served as a catalyst for a federal agency voluntarily changing its conduct). FOIA litigation is one of the few types of cases where this theory is permitted. Finally, FOIA litigation is different from other civil litigation in that the burdens are not shared by both sides. In most cases, there is an incentive for each side to negotiate and attempt to find an acceptable limit to the scope of their requests – if one side asks for unnecessary and voluminous requests then the other side may be emboldened to do the same thing. But in FOIA litigation, there is no reciprocity; the Federal Government is the only side turning anything over. Thus, the FOIA requestors (and plaintiffs) have little incentive to reduce the scope of their requests.

¹ See <http://foiaproject.org/2018/01/16/lawsuits-trump-first-year/>, reporting that the number of FOIA lawsuits nationwide has increased by 70 percent in five years, including 26 percent in the last fiscal year, and continues to climb.

² See the FOIA Project “Dramatic Rise in FOIA Lawsuits Filed by Nonprofit Advocacy Groups, July 26, 2017, available at <http://foiaproject.org/2017/07/26/nonprofit-advocacy-groups/>.

National Security and Other National Programs. The Federal Programs Branch also defends laws, regulations, policies, and executive orders related to national security and other high profile policies. These are among the highest profile cases handled by the Civil Division. Routinely, in these matters, Federal Programs attorneys must consult senior DOJ leadership, high ranking officials at other federal agencies, and the White House. Currently, the Federal Programs Branch is involved in defending challenges to numerous executive orders signed by President Trump, including Executive Orders 13,780 and 13,769 (both titled “Protecting the Nation From Terrorist Entry into the United States”), Executive Order 13,768 (“Enhancing Public Safety in the Interior of the US”), as well as Executive Order 13,771 (which requires the Executive Branch agencies to repeal two regulations when issuing a significant regulation and to ensure that the costs of the new regulation are fully offset by deregulatory actions).

These cases are almost always defensive in nature, which means that opposing counsel picks the timing and location of a suit. Regardless of its budget or its ability to take on additional work, Federal Programs Branch attorneys must defend these cases or risk important policies – which are often top priorities for the Department of Justice as well as the entire Administration – being reversed by the courts. Further, given the stakes and complexity of these cases it would be practically impossible for the cases to be delegated to the U.S. Attorneys.

Impact on Performance:

For these reasons, the Federal Programs Branch must hire additional staff. At this time, Civil seeks funding for 26 positions in the FY 2019 budget. A majority of the \$3.020 million requested for this increase provides for hiring and staffing of the 26 positions. The additional 22 attorney positions will allow the Branch to handle personally the exploding number of significant national security and FOIA matters, and the additional support staff will support that litigation. A small portion of the request allows for space alterations to Civil’s office space to accommodate the increase in staff.

Base Funding

<i>FY 2017 Enacted</i>				<i>FY 2018 President's Budget</i>				<i>FY 2019 Current Services</i>			
Pos	Agt/Atty	FTE	\$(000)	Pos	Agt/Atty	FTE	\$(000)	Pos	Agt/Atty	FTE	\$(000)
129	111	129	\$22,900	129	111	129	\$23,679	129	111	129	\$24,484

Personnel Increase Cost Summary

Type of Position/Series	Full-year Modular Cost per Position (\$000)	1 st Year Annualization	Number of Positions Requested	FY 2019 Request (\$000)	2 nd Year Annualization	FY 2020 Net Annualization (change from 2019) (\$000)	FY 2021 Net Annualization (change from 2020) (\$000)
Attorneys (0905)	212	112	22	\$2,470	97	\$2,130	\$131
Paralegals / Other Law (0900-0999)	100	54	4	216	57	228	12
Total Personnel	312	166	26	\$2,686	154	\$2,358	143

Non-Personnel Increase/Reduction Cost Summary

Non-Personnel Item	Unit Cost	Quantity	FY 2019 Request (\$000)	FY 2020 Net Annualization (change from 2019) (\$000)	FY 2021 Net Annualization (change from 2020) (\$000)
Buildout			\$334	-\$334	\$0
Total Non-Personnel			\$334	-\$334	\$0

Total Request for this Item

	Pos	Agt/Atty	FTE	Personnel (\$000)	Non-Personnel (\$000)	Total (\$000)	FY 2020 Net Annualization (change from 2019) (\$000)	FY 2021 Net Annualization (change from 2020) (\$000)
Current Services	129	111	129	\$24,484	-	\$24,484	\$27,504	\$29,528
Increases	26	22	14	\$2,686	334	\$3,020	\$2,024	143
Grand Total	155	133	142	\$27,170	334	\$27,504	\$29,528	\$29,671