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ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT: CURRENT TRENDS

HEARING

BEFORE THE

SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT: CURRENT TRENDS

THURSDAY, MARCH 18, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:43 p.m. in room 2154, Rayburn House Office Building, Hon. Wm. Lacy Clay (chairman of the subcommittee) presiding.

Present: Representatives Clay, Norton, Chu, and McHenry.

Staff present: Darryl Piggee, staff director/counsel; Anthony Clark and Frank Davis, professional staff members; Yvette Cravins, counsel; Jean Gosa, clerk; and Charisma Williams, staff assistant; John Cuaderes, minority deputy staff director; Rob Borden, minority general counsel; Adam Fromm, minority chief clerk and Member liaison; Stephanie Genco, minority press secretary and communications liaison; Mark Marin, minority professional staff member; Charles Phillips, minority chief counsel for policy; and Jonathan Skladany, minority counsel.

Mr. CLAY. The subcommittee will come to order.

Good afternoon and welcome to the Information Policy, Census, and National Archives Subcommittee.

Without objection, the Chair and ranking member will have 5 minutes to make opening statements, followed by opening statements not to exceed 3 minutes by any other Member who seeks recognition.

Without objection, Members and witnesses may have 5 legislative days in which to submit a written statement or extraneous material for the record.

And welcome to today's oversight hearing on the administration of the Freedom of Information Act [FOIA], held during Sunshine Week, which is focused on educating the public on the importance of open government.

The purpose of today's hearing is to examine how agencies process and respond to FOIA requests and to receive a status report on current FOIA trends.

The FOIA is not perfect. In the 40 years since the bill's enactment, Congress has continually reexamined and strengthened it. This reflects the changing nature of government information, but it also reflects the changing nature of the public's relationship with the Government.

In his own FOIA memorandum on his first full day in office, President Obama made it clear that executive branch agencies should administer the FOIA with the presumption of openness, cooperating with the public to respond to requests for information promptly. And on Tuesday, the President reiterated his commitment to transparency, participation and accountability in a statement on Sunshine Week.

Another recent change also has the potential to improve the FOIA process. In 2007, Congress created and last year President Obama stood up the Office of Government Information Services [OGIS] at the National Archives. OGIS's mediation and training efforts will have a positive impact on FOIA.

We look forward to today's hearing to learning more about the state of the FOIA and about the trends toward improving services, increasing access, and making Government more transparent.

I want to make it clear that this is an oversight hearing on the administration of the FOIA and not a forum for any party to advance a pending litigation matter. My staff has spoken with all of the witnesses and all of the witnesses have agreed not to discuss any matters that currently are pending before any court. This hearing is not the appropriate venue to try to advance your case.

Witnesses are again asked to abide by the agreement that they made not to discuss pending court matters. I want to make sure that there is no confusion about this issue.

I now yield to the gentlewoman from—no, I now yield to the distinguished ranking member, Mr. McHenry of North Carolina. Hopefully Mr. McHenry will have an opening statement.

[The prepared statement of Hon. Wm. Lacy Clay follows:]

Statement
Of
Chairman Wm. Lacy Clay, Chairman
Information Policy, Census, and National Archives Subcommittee
Of the
Oversight and Government Reform Committee
Thursday, March 18, 2010
2154 Rayburn HOB
2:00 p.m.

"Administration of the Freedom of Information Act: Current Trends"

Welcome to today's oversight hearing on the administration of the Freedom of Information Act, or FOIA, held during Sunshine Week, which is focused on educating the public on the importance of open government.

The purpose of today's hearing is to examine how agencies process and respond to FOIA requests, and to receive a status report on current FOIA trends. We will consider the views of several FOIA experts, including the director of the office in the Department of Justice responsible for encouraging agency compliance with the FOIA; the federal FOIA ombudsman, responsible for mediating FOIA disputes; an agency FOIA officer; and long-time FOIA litigators and requesters.

The FOIA isn't perfect. In the forty four years since the bill's enactment, Congress has continually re-examined and strengthened it. This reflects the changing nature of government information. But it also reflects the changing nature of the public's relationship with the government.

We want to know more about what the government knows and what it is doing. And we want to do more with the information that we seek. And the government is rapidly producing not only more information but in a growing variety of formats. So it makes sense that we get frequent updates on the FOIA process.

In his own FOIA memorandum on his first full day in office, President Obama made it clear that executive branch agencies should administer the FOIA with the presumption of openness, cooperating with the public to respond to requests for information promptly. On Tuesday the President reiterated his commitment to transparency, participation and accountability in a statement on Sunshine Week.

Another recent change also has the potential to improve the FOIA process. In 2007, Congress created, and last year President Obama stood up, the Office of Government Information Services, or OGIS, at the National Archives. OGIS' mediation and training efforts will have a positive impact on FOIA.

We look forward in today's hearing to learning more about the state of the FOIA, and about the trends towards improving services, increasing access, and making government more transparent.

Mr. MCHENRY. I do have an opening statement. Thank you, Mr. Chairman, and sorry for my tardiness.

Thank you all for being here today. This is certainly an important issue the American people should be concerned about, about access to their Government. And we want to make sure that policies and procedures are being followed appropriately and that openness and accountability that we all seek from our Government is in fact taking place.

And so, Chairman Clay, I certainly appreciate your holding this timely and very important hearing. It is the primary responsibility of this committee to provide rigorous bipartisan oversight of the decisionmaking and spending of our Federal Government. And it is also the responsibility of this committee to ensure that ordinary citizens have the access to Federal records so that they, too, may hold our Government accountable for its actions.

The Freedom of Information Act [FOIA], was designed to do just that by providing our citizenry with the legal means to access Government information. On the President's first full day in office, he issued an official memorandum instructing executive departments and agencies to make more information public through FOIA as part of his administration's commitment to ushering in "a new era of open government."

The President's memo also specifically directed the Attorney General, Eric Holder, to issue new FOIA guidelines to each agency head. But the administration's message of openness and transparency has not translated into concrete improvements with FOIA. The memo's guidance also does not seem to have been communicated effectively or enforced throughout the Federal agencies.

A report recently, on Sunday, by a private research group, National Security Archive, found that after nearly 14 months, only 13 of 19 agencies that were audited appear to have taken any real steps to implement the administration's order. Specifically, only four agencies including Holder's own Justice Department, show both an increase in approved FOIA requests and decrease in denials.

The audit also found "ancient" requests dating as far back as 18 years that are still pending in the FOIA system. Additionally, 35 agencies reported that they had no internal documents showing how or whether the new FOIA policies are being implemented. It was truly troubling to find that the typically secretive Treasury Department and the SEC are actually on that list. As a member of the Financial Services Committee, just like the chairman, that is of a particular policy concern on the Hill as well.

In light of their role in the allocation of billions of dollars in taxpayer money through the TARP Program and the distressed banks, and the GSEs, Fannie Mae and Freddie Mac, we should also be very alarmed to hear this about the Treasury Department.

While in many cases, the handling of FOIA requests has not changed, in others it has actually gotten worse. The Associated Press conducted its own review of FOIA reports filed by 17 major agencies and found that the use of nearly every one of the FOIA law's nine exemptions to withhold information from the public actually rose in the fiscal year 2009.

For example, one FOIA exemption allows the Government to hide records that detail its internal decisionmaking. The President specifically instructed Federal agencies to stop using that exemption so frequently, but his message appears to have been ignored. Major agencies cited that exemption at least 70,779 times during fiscal year 2009, up from 47,395 times during President Bush's final year in office, according to the annual FOIA reports filed by Federal agencies.

It is clear that President Obama's instructions have been widely disregarded, but the administration still maintains that it has been making "clear progress" in turning around the FOIA process at Federal agencies that have often been adverse to public disclosures.

Progress may, indeed, be slow, but over a year into his administration, the American people should be seeing more transparency than this, especially from agencies that are the most spendthrift with their tax dollars.

It is my hope that our witnesses in this first panel will be able to shed some light on this over-reliance on certain FOIA exemptions and the delay in implementing the President's directives.

Thank you, Mr. Chairman, for your leadership of this committee and your work across the aisle and even within your own caucus to make sure that we have good oversight over this administration and the Government generally.

Thank you.

Mr. CLAY. Thank you, Mr. McHenry, for that opening statement.

If there are no additional opening statements, the subcommittee will now receive testimony from the witnesses before us today.

I would now like to introduce our first panel, but before I do that, I would like to also welcome our newest panel member here, our newest committee member here, Ms. Judy Chu from the great State of California, who took Ms. Watson's place. So thank you for being willing to serve, Ms. Chu. I appreciate it.

Our first witness will be Ms. Melanie Pustay, Director of the Office of Information Policy [OIP], at the U.S. Department of Justice. Ms. Pustay started in the Department in 1983 and became Director of OIP in 2007.

She manages the Department's responsibilities related to FOIA, including ensuring compliance with the FOIA, adjudicating all Department appeals from denials under the FOIA, and handling FOIA litigation matters. She has received the Attorney General's Distinguished Service Award for her role in providing legal advice, guidance and assistance on records disclosure issues.

She graduated from American University's Washington College of Law and received her B.A. from George Mason University.

Welcome.

Our next witness is Ms. Miriam Nisbet, the Director of the Office of Government Information Services at the National Archives and Records Administration. She serves as the Federal FOIA ombudsman, providing mediation services to resolve disputes between FOIA requesters and administrative agencies.

Previously, she was Special Counsel for Information Policy at the National Archives and Deputy Director of the Office of Information and Privacy at the Department of Justice.

Ms. Nisbet received a B.A. degree from the University of North Carolina at Chapel Hill and a J.D. degree from the University's School of Law. She is a Tarheel.

Mr. MCHENRY. And if I may interject there, though they are not in the NCAA tournament this year, at least they got a win against William & Mary.

Mr. CLAY. Well, the ACC is well represented. OK? [Laughter.]

Our next witness is Ms. Mary Ellen Callahan, Chief Privacy and FOIA Officer at the U.S. Department of Homeland Security. She could not be with us today. Without objection, her written statement will be entered into the record. In addition, Ms. Callahan has agreed to respond to Members' questions for the record.

[The prepared statement of Ms. Callahan follows:]

Statement for the Record by
Mary Ellen Callahan
Chief Freedom of Information Act Officer
U.S. Department of Homeland Security

Statement for the House Committee on Oversight and Government Reform, Subcommittee on Information Policy, Census and National Archives hearing concerning the Freedom of Information Act and Other Disclosure Initiatives

March 18, 2010

I want to thank the subcommittee for holding this hearing during Sunshine Week. Because my schedule would not allow for me to testify in person today, I want to thank the committee for the opportunity to submit this statement for the hearing record. I am extremely proud of what the Department of Homeland Security has accomplished in making itself more open and accountable to the public and I look forward to continuing to make great strides in the future. The following statement outlines a number of our accomplishments. I would be happy to answer any questions you have in writing, and hope to have the opportunity to testify before your subcommittee in the future.

In Attorney General Holder's March 19, 2009 Memorandum on the Freedom of Information Act (FOIA), he stressed that the involvement of the agency Chief FOIA Officer is imperative for improving departmental FOIA programs. Each Chief FOIA Officer is accountable for ensuring his or her agency efficiently and appropriately complies with FOIA, which includes making recommendations to top agency officials regarding any necessary modifications to agency policies, practices, personnel and funding to do so. Those who accept the statutorily mandated role of Chief FOIA Officer must take the obligations associated with the position very seriously.

It is my duty to ensure that the Department of Homeland Security (DHS) embraces the Administration's presumption of openness, and our disclosure program has instituted definitive measures to mandate proactive record posting, adopt the "foreseeable harm" standard, and reduce the DHS request backlog. Through training, coordination calls and meetings, DHS FOIA professionals are working in the spirit of cooperation with the requester community and to ensure that all DHS employees recognize unnecessary bureaucratic hurdles have no place in the 'new era of open Government' that the President has proclaimed.

The DHS FOIA Office is actively implementing sweeping policy changes in support of transparency and open government. Last May, my office issued a department-wide overview memorandum[1] pertaining to FOIA, highlighting the important changes in the application of FOIA under the current Administration. In August 2009, I issued guidance to all operational and support component heads reminding them of their responsibility to embrace this new era of openness and implementing a Department-wide policy of proactive disclosure of several categories of documents.[2] In October 2009, I disseminated further guidance specifically addressing the proactive posting of the Department's senior officials' calendars online.[3] Lastly, during Sunshine Week 2010, I am issuing a department-wide memorandum reminding employees that Sunshine Week, dedicated to open government and government transparency, is an excellent opportunity for DHS to review our FOIA operations and renew our commitment to openness.

I. Steps Taken to Reduce the DHS FOIA Backlog

[1] Overview of the Freedom of Information Act Memorandum, available at http://www.dhs.gov/xlibrary/assets/foia/foia_overview_of_the_freedom_of_information_act.pdf

[2] Proactive Disclosure and Departmental Compliance with Subsection (a)(2) of the Freedom of Information Act (FOIA) Memorandum, available at http://www.archives.gov/ogis/dhs-foia.pdf

[3] Calendar Format for Proactive Disclosure, available at http://www.dhs.gov/xfoia/editorial_0424.shtm

The FOIA Program at DHS was created at the same time the Department was stood up. The 22 component agencies that were merged into DHS had pre-existing, established FOIA operations. Elements of those decentralized operations continue today. DHS' components are responsible for establishing and maintaining their own FOIA programs and operationally decide whether to establish a centralized or decentralized FOIA program at the component or directorate level.

DHS began its operations with a large, inherited FOIA backlog due to the legacy agencies' backlogs. Additionally, when the new department stood up, it generated a flood of requests because of its status and mission. The result was a 98,396-request backlog at the end of fiscal year (FY) 2006—the largest federal FOIA backlog in history. Despite constraints, and the fact that from 2006 to 2009 the number of total requests to the Department held relatively constant, in the last three years DHS reduced its backlog by over 80 percent. At the end of FY 2009, the DHS-wide backlog was 18,787. As of February 2010, the DHS-wide backlog was 12,038. This incredible progress is a result of the ongoing dedication of the DHS FOIA professionals. To support the backlog elimination effort, I am working with component leadership to ensure the Department's components devote adequate resources to their FOIA programs.

Although the Open Government Directive calls for an annual 10 percent backlog reduction, my office established a 15 percent reduction goal for FY 2010.[4] In order to stay on track to meet this goal, each component strives to hit a monthly processing target, calculated using variables such as the number of requests received per month and the component's processing capacity. Additionally, DHS is striving to close the 10 oldest cases detailed in the FY 2009 Annual FOIA Report.

DHS FOIA Backlog History[5]

	Number of Backlogged Requests at End of FY 2006	Number of Backlogged Requests at End of FY 2007	Number of Backlogged Requests at End of FY 2008	Number of Backlogged Requests at End of FY 2009
USCIS	89,214	72,048	67,545	16,801
CBP	581	264	4,794	88
CRCL	*	4	5	11
USCG	*	937	1,044	385
FEMA	236	280	544	803
FLETC	0	3	7	36
I&A	95	38	0	8
ICE	7,346	1,069	8	10
MGMT	N/A	2	1	4
NPPD	N/A	8	13	11
US-VISIT	5	1	2	1
OIG	94	91	23	7

[4] M-10-06, Open Government Directive (December 8, 2009), available at www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf

[5] DHS started collecting backlog information from the components in June 2006. The FY 2006 and FY 2007 numbers above are derived from that data. DOJ required backlog reporting effective FY 2008. The above FY 2008 and FY 2009 information is from DHS *Annual FOIA Reports to the Attorney General.*

	Number of Backlogged Requests at End of FY 2006	Number of Backlogged Requests at End of FY 2007	Number of Backlogged Requests at End of FY 2008	Number of Backlogged Requests at End of FY 2009
OGC	3	*	5	17
OPS	9	2	0	0
PLCY	N/A	12	7	30
PRIV	22	37	22	66
S&T	16	22	6	2
USSS	730	618	504	426
TSA	45	213	349	212
AGENCY OVERALL	**98.396**	**75,649**	**74,879**	**18,918**

*Information not provided by the component

II. Steps Taken to Apply the Presumption of Openness at DHS

The basic purpose of FOIA is to ensure a fundamental principle of a democratic society—that the public has a right to access and be informed about the activities of its government. Under this Administration, agencies are to process FOIA requests with a presumption of disclosure and are further encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged. If full disclosure of a record is not possible, any portion of that record that is not subject to an exemption will be disclosed. The Department of Homeland Security shows an overwhelming increase in the number of requests where records have been released in full or where records have been released in part when compared with those numbers in the previous year's Annual FOIA Report.

III. Steps Taken to Increase Proactive Disclosures at DHS

In accordance with *Transparency and Open Government Memorandum for the Heads of Executive Departments and Agencies* (Transparency and Open Government Memorandum),[6] and in the *Freedom of Information Act Memorandum for the Heads of Executive Departments and Agencies* (FOIA Memorandum), in August 2009, I directed DHS employees to proactively publish the following categories of information:

1. Historical daily schedules of the most senior agency officials (notated to reflect that officials may have deviated from the posted schedule and abridged as appropriate for security and privacy concerns)
2. Executed contracts and grants
3. Management directives and instructions
4. Congressional correspondence under DHS control
5. FOIA logs

[6] Transparency and Open Government Memorandum, 74 Fed. Reg. 4,685 (Jan. 21, 2009) available at http://edocket.access.gpo.gov/2009/pdf/E9-1777.pdf.

6. Any records released pursuant to a FOIA request that have been, or are likely to become, the subject of three or more requests[7]

DHS has made significant enhancements to its online FOIA Reading Rooms to support the proactive disclosure initiative. New information is posted to many of the sites on a weekly basis, with over 500 documents proactively disclosed by the Department and more planned in the near future. In addition, the Department has significantly increased its disclosures of 5 U.S.C. § 552(a)(2)(D) documents. The following are examples of proactive disclosures being processed by the Department:

- CBP posted more than 80 documents including Congressional correspondence, contracts, final opinions, FOIA logs, manuals and instructions, policies and procedures, and significant records of interest.

- FEMA is working with its Grants Program Directorate to develop a process to proactively post grant awards.

- FLETC posted its strategic plan, organizational structure, and financial reports. In addition, training material not considered law enforcement sensitive is posted for public use. These include student handbooks, sample tests, and reference materials.

- The Privacy Office (for DHS Headquarters) posted Volumes 8000-11000 of Departmental Directives, as well as FOIA logs for FY 2004-FY 2009.

- ICE posted detention facility reviews, government contracts, 287(g) audits, Intergovernmental Service Agreements (IGSAs), agreements with state and local jails, policy memoranda, as well as their Standard Operating Procedures.

- MGMT provides all DHS Management Directives for posting to the DHS FOIA Reading Room; to date, 181 have been posted.

- OIG is regularly updating its website proactively with management reports, audit reports, inspection reports, FOIA Logs, and procurement-related records. OIG posted the Inspector General's Calendar, OIG contracts, Congressional correspondence, and OIG's FOIA log.

- TSA posted 155 Management Directives and frequently-requested executed contracts. TSA also made available its Claims Management database, which enables the public to view the status and disposition of claims for lost or damaged items.

- USCG posted Management Directives and Instructions and FY 2009 FOIA logs. USCG also recently posted records regarding the following incidents: 1) CG Defender-class response boat mishap in Washington State Investigation, 2) CG 9/11/09 Potomac River response exercise in the District of Columbia Investigation, and 3) Loss of CG Dolphin helicopter in Hawaii Investigation.

[7] 5 U.S.C. § 552(a)(2)(D).

- USCIS posted Statements of Policy and interpretations that have been adopted, final written determinations of administrative proceedings related to the Immigration and Nationality Act, administrative manuals, operating instructions and handbooks that affect the public, and FOIA Request logs.

By mid-2010, the DHS components intend to implement the following website improvements:

- CBP will add the abridged daily historical schedule of the Commissioner biannually, and will regularly update the frequently requested documents, Congressional correspondence, contracts, final opinions, FOIA logs, manuals and instructions, policies and procedures, and other significant records of interest.

- USCIS will post historical FOIA logs and existing contracts.

- FEMA will develop an electronic test site designed to provide the public information such as contracts that have been requested more than three times in the past year and hyperlinks to HQ Grants and Policies web pages.

- ICE will establish processes to post currently awarded contracts and senior officials' calendars.

- OIG will establish processes to post historical calendars of the IG and Congressional Correspondence Logs on a quarterly basis; and FOIA logs annually.

- OPS will establish processes to post historical FOIA logs and the Director's calendar.

- S&T will post Acting Under Secretary Buswell's and Under Secretary O'Toole's calendar from Aug. 31, 2009, to present when deemed Section 508-compliant.

IV. Steps Taken to Increase Utilization of Technology

The Government Accountability Office (GAO) audited the Department's FOIA program and issued a report on March 20, 2009, entitled *Freedom of Information Act: DHS Has Taken Steps to Enhance Its Program, but Opportunities Exist to Improve Efficiency and Cost-Effectiveness*.[8] The technological improvements recommended by GAO in the report have already been implemented in varying degrees by the components. Additionally, DHS HQ FOIA is working with the components to ensure consistent application of technological tools. Currently, all of the components receive, track, and process requests electronically.

For example, CBP's FOIA Division began a pilot of an in-house redaction tool for TECS law enforcement records to increase consistency in applying exemption codes office-wide to TECS records. This is a scripting program to allow for redaction within the TECS browser. The

[8] Freedom of Information Act: DHS Has Taken Steps to Enhance Its Program, but Opportunities Exist to Improve Efficiency and Cost-Effectiveness, available at http://www.gao.gov/products/GAO-09-260

system sits "on top" of TECS and allows for consistent exemptions and the ability to update as changes may occur to exemptions applied to TECS data; improves production or processing time; and increases the security of any documents released electronically since there is no text behind the redaction codes applied and, therefore, no way to undo an applied redaction. The system is expected to reduce actual TECS-record processing time of entry and exit records by 50-70 percent. Approximately 150 pages can be processed and redacted in 10-15 minutes versus several hours with other redaction software.

As mentioned above, all components updated their FOIA websites to accommodate increased postings. They have also added elements to improve customer service. My office in DHS headquarters performs regular maintenance of the DHS site, such as keeping components' contact information up to date, revising the "how to submit" pages to make them more user-friendly, and re-designing the layout of FOIA pages to make them easier to navigate. Ample IT support makes it possible for DHS to regularly update postings, such as the Chief FOIA Officer's FOIA-related memos, Secretary Napolitano's calendars, and Congressional correspondence. Each office is responsible for assuring any documents they process and post are Section 508 compliant.

V. Steps Taken to Ensure DHS has an Effective System for Responding to Requests

At the Headquarters level, as the DHS Chief FOIA Officer, I have agency-wide policy responsibility for efficient and appropriate compliance with FOIA. I am assisted by the DHS Deputy Chief FOIA Officer and Director of Disclosure and FOIA, who has responsibility for agency-wide policy development and FOIA/Privacy Act compliance and program oversight. She also provides daily supervision of the DHS Headquarters FOIA Office, housed in the DHS Privacy Office, which processes most Department Headquarters FOIA requests and provides response coordination among components.

Two key positions related to transparency and disclosure at DHS Headquarters are the Associate Director of Disclosure & FOIA Operations and Associate Director of Disclosure Policy & FOIA Program Development. The Associate Director for Operations is responsible for processing FOIA and Privacy Act requests for records maintained by DHS Headquarters offices and coordinating responses involving records from multiple components. The Associate Director for Policy and Program Development is responsible for Department-wide disclosure training, identifying and remedying policy and program deficiencies, serving as the DHS FOIA Public Liaison[9] and managing the DHS FOIA web presence.

At the component level, FOIA operations at DHS are decentralized. Currently, seven operational components and 10 Headquarters components at DHS have appointed FOIA Officers and staff.[10]

[9] As required by 5 U.S.C. § 552(l).

[10] The seven Operational Components and 10 HQ components with FOIA officers and staff: Transportation Security Administration (TSA), Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), United States Coast Guard (USCG), United States Citizenship and Immigration Services (USCIS), and Federal Emergency Management Agency (FEMA), Office for Civil Rights and Civil Liberties (CRCL), Directorate for Management (MGMT), National Protection and Programs Directorate (NPPD), Office of the General Counsel (OGC), Office of Intelligence and Analysis (I&A), Office of Inspector General (OIG), Office of Operations Coordination (OPS), Office of Policy (PLCY), Directorate for Science and Technology (S&T), US-VISIT.

Although the FOIA Officers do not report to the DHS Headquarters FOIA Office, the DHS Headquarters FOIA Office continues its efforts to better coordinate and systematize the FOIA processes throughout the Department.

Examples of steps taken to ensure effective and efficient operations:

- Due to increased online postings, HQ FOIA processors attended DHS hands-on Section 508 of the Rehabilitation Act of 1973, as amended by 29 U.S.C. § 794 (d), compliance training in February 2010. Each processor is responsible for assuring any documents they process are Section 508 compliant if the documents will be posted online.

- Several components, including USCIS and ICE, implemented online tools for customers to access information pertaining to the status and location of their request in the queue.

- The Chief FOIA Officer and her Deputy met with each component FOIA Officer to discuss specific component operational concerns and component progress on implementation of transparency initiatives detailed in Section I.

- The Chief FOIA Officer hosts a bi-weekly FOIA Officer conference call to discuss current processing issues. The calls are a means to proactively resolve any issues that could delay processing of requests and assure that the components have a forum to share ideas and best practices.

- The Associate Director of Disclosure Policy & FOIA Program Development also serves as the DHS FOIA Public Liaison. Handling customer concerns in the Liaison role provides heightened insight into the component FOIA programs. When working the other portion of the job, the Associate Director can address the exposed issues with program development assistance, such as employee training or an operational site evaluation.

- By taking an aggressive approach to proactive disclosure, DHS reduces the number of requests received because the information is already publicly available.

I am very pleased with the progress made by the DHS disclosure program and look forward to even greater improvement in the coming year.

Mr. CLAY. And after Ms. Nisbet, we will hear from Mr. Larry F. Gottesman, the National Freedom of Information Officer for the U.S. Environmental Protection Agency. He is responsible for the day to day operations of the Agency's National FOIA Program, providing policy direction on Agency-wide FOIA matters, and guidance to the Agency's FOIA officers and coordinators.

During his tenure, the Agency has reduced its FOIA backlog by more than 96 percent. Previously, he was an Attorney at the U.S. Department of Labor, providing legal counsel and policy advice on FOIA, the Privacy Act, Federal Records Act, Federal Advisory Committee Act, Administrative Procedures Act, and congressional oversight requests.

Thank you for being here.

Our next witness will be Ms. Valerie C. Melvin, Director of Information Management and Human Capital Issues within the U.S. Government Accountability Office's Information Technology Team. She is primarily responsible for studies of issues concerning health information technology, IT human capital, and access to government information.

Ms. Melvin graduated from the University of Maryland with a B.S. degree in business administration and a master's degree in management information systems. And I must say that she picked a great college.

Welcome back. She is a certified government financial manager.

And I thank all of our witnesses for appearing today and look forward to their testimony.

It is the policy of the Oversight and Government Reform Committee to swear in our witnesses before they testify.

Would you all please stand and raise your right hands?

[Witnesses sworn.]

Mr. CLAY. Thank you. You may be seated. And let the record reflect that the witnesses answered in the affirmative.

I ask that each of the witnesses now give a brief summary of their testimony. Please limit your summary to 5 minutes. Your complete written statement will be included in the hearing record.

Ms. Pustay, please begin with your opening statement.

STATEMENTS OF MELANIE PUSTAY, DIRECTOR, OFFICE OF INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE; MIRIAM NISBET, DIRECTOR, OFFICE OF GOVERNMENT INFORMATION SERVICES, U.S. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; LARRY F. GOTTESMAN, NATIONAL FREEDOM OF INFORMATION ACT OFFICER, OFFICE OF ENVIRONMENTAL INFORMATION, U.S. ENVIRONMENTAL PROTECTION AGENCY; AND VALERIE C. MELVIN, DIRECTOR, INFORMATION MANAGEMENT AND HUMAN CAPITAL ISSUES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

STATEMENT OF MELANIE PUSTAY

Ms. PUSTAY. Good afternoon, Mr. Chairman and Ranking Member McHenry and members of the subcommittee. I am pleased to be here this afternoon to address the subject of the Freedom of Information Act and the efforts of the Department of Justice to im-

plement the President's memorandum on the FOIA, as well as the Attorney General's FOIA guidelines.

As the lead Federal agency responsible for implementation of the FOIA, we at the Department of Justice are especially committed to encouraging compliance with the act by all agencies, and to fulfilling President Obama's goal of making his administration the most open and transparent in history.

The Attorney General issued his new FOIA guidelines 1 year ago on March 19th during Sunshine Week. The new FOIA guidelines address the presumption of openness that the President called for in his FOIA memoranda, the necessity for agencies to create and maintain an effective system for responding to requests, and the need for agencies to proactively and promptly make information available to the Government.

The guidelines discussed the critical role that is played by agency Chief FOIA Officers and they stressed that improving FOIA performance requires their active participation. The Attorney General called on all agency Chief FOIA Officers to review their agency's FOIA administration each year, and then to report to the Department of Justice on the steps taken to achieve improved transparency. These reports, which were just completed for the very first time this week, will serve as the means by which each agency will be fully accountable for its FOIA administration.

My office, the Department's Office of Information Policy, has been actively engaged in a variety of initiatives to inform and educate the agency personnel on the new commitment to open government. Just 2 days after the President issued his FOIA memorandum, OIP sent initial guidance to agencies informing them of the significance of the President's memorandum and advising them to immediately begin applying the presumption of disclosure to all decisions regarding the FOIA.

Then, after the Attorney General issued his FOIA guidelines, OIP held a Government-wide training conference which was filled to capacity with over 500 agency personnel attending. To further assist agencies in implementing the new guidelines, OIP issued extensive written guidance which we posted publicly on FOIA Post. Significantly, OIP provided agencies with concrete steps to use and approaches to follow in applying the presumption of openness. OIP described ways to apply the foreseeable harm standard and discussed the factors to consider in making discretionary releases.

Now, beyond these principles of applicable to responding to individual FOIA requests, OIP also provided guidance to agencies on achieving transparency in new ways. Further, OIP emphasized the need to work cooperatively with requesters and to make timely disclosures of information.

Last, OIP discussed the key role to be played by those agency Chief FOIA Offices and we encouraged FOIA professionals to work closely with those officials.

OIP has also included a discussion of the President's and Attorney General's memoranda in the 2009 edition of our Department of Justice Guide to the FOIA. This book is a comprehensive reference volume on the FOIA. It is compiled by OIP every 2 years, and it is also available online. You can see that this year we chose sunshine yellow for the cover, which we thought was very fitting.

In addition to issuing written guidelines and guidance to agencies, OIP has conducted numerous additional agency-specific training sessions specifically focused on the new transparency initiative. We regularly provide training to agency personnel on aspects of the FOIA and those training programs now all include sessions on the new FOIA guidelines.

OIP has also reached out to the public and to the FOIA requester community. OIP hosted a requester roundtable over the summer where we invited any interested members of the FOIA requester community to meet with OIP and to share their ideas for improving FOIA administration. There have been numerous followup sessions and continued dialog with the requester community, which has been very productive.

In direct response to concerns raised by the requester community concerning difficulties they had in reaching agency personnel, just this month on March 4th, OIP issued guidance to all agency personnel, emphasizing the need for good communication with FOIA requesters and requiring agencies to provide an agency point of contact to all requesters, as well as to take a number of other steps designed to improve communication with requesters.

These simple steps have the potential to go a long way to imbuing a spirit of cooperation into the FOIA process as the President has called for. These training programs and requester outreach activities will be ongoing in the months and years ahead.

Now, I am pleased today to be testifying with Miriam Nisbet, the Director of the Office of Government Information Services. Our two offices began collaborating immediately. Resolution of disputes before they reach litigation is a goal shared by both our offices. Given that shared interest, OIP has teamed with OGIS to help educate agency personnel on methods they can employ to resolve disputes.

In upcoming months, OIP will be conducting an extensive review of those agency Chief FOIA Officer reports that were just completed. The items required to be addressed by each Chief FOIA Officer are directly tied to the important transparency principles enunciated by the President and the Attorney General in their FOIA memoranda. OIP will make an assessment of where agencies stand.

In keeping with the President's and the Attorney General's call for all agencies to increase their use of technology, the Department required Chief FOIA Officers to report on their agency's use of technology in the administration of the FOIA. This is the very first time such data has been collected across the Government.

Mr. CLAY. The witness' time has expired. Would you like to sum up?

Ms. PUSTAY. Yes. I have lots of news to report for you.

Mr. CLAY. I know.

Ms. PUSTAY. Looking ahead, in addition to our review of the Chief FOIA Officer reports, we plan to continue our outreach on the important issue of transparency, which will include additional training and further guidance to agencies, as well as one on one assistance and continued outreach to requesters.

As I have stated previously, we are very committed to achieving the President's goal of improved transparency.

Thank you.

[The prepared statement of Ms. Pustay follows:]

Department of Justice

Testimony
Of
Melanie Ann Pustay
Director of the Office of Information Policy
Department of Justice

Information Policy, Census, and National Archives Subcommittee
Of The
Oversight and Government Reform Committee

Thursday, March 18, 2010
2154 Rayburn HOB
2:00 p.m.

"Administration of the Freedom of Information Act: Current Trends"

March 16, 2010 (OMB Cleared)

Testimony of Melanie Ann Pustay,

Director of the Office of Information Policy

United States Department of Justice

As the Director of the Office of Information Policy of the Department of Justice, I am pleased to be here this morning to address the subject of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, further amended by Open FOIA Act of 2009, Pub. L. No. 11-83, 123 Stat. 2142, 2184, and the efforts of the Department of Justice to implement the President's January 21, 2009 Memorandum on the FOIA, as well as the Attorney General's March 19, 2009 FOIA Guidelines. As the lead federal agency responsible for implementation of the FOIA across the government, we at the Department of Justice are especially committed to encouraging compliance with the Act by all agencies and to fulfilling President Obama's goal of making his Administration the most open and transparent in history.

As you know, in a historic first, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act on his first full day in office. In and of itself, this action sent a powerful message to agencies and the public alike about his commitment to transparency. In doing so, the President called on agencies to "usher in a new era of open Government." He directed agencies to administer the FOIA "with a clear presumption: In the face of doubt, openness prevails." Moreover, the President instructed agencies that information should not be withheld merely because

"public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Agencies were directed to apply the presumption of disclosure "to all decisions involving FOIA." The President also emphasized that this presumption "means that agencies should take affirmative steps to make information public" and should utilize "modern technology to inform citizens about what is known and done by their Government." He stressed that disclosures should be timely. Lastly, the President directed the Attorney General to issue new FOIA guidelines to the heads of all executive departments and agencies which reaffirm the government's commitment to accountability and transparency.

The Attorney General issued those FOIA Guidelines one year ago, on March 19, 2009, during Sunshine Week. The new FOIA Guidelines address the presumption of openness that the President called for in his FOIA Memorandum, the necessity for agencies to create and maintain an effective system for responding to requests, and the need for agencies to proactively and promptly make information available to the public.

First, as to the presumption of openness, the Attorney General's FOIA Guidelines strongly encourage agencies to make discretionary releases of records. They also direct agencies not to withhold records simply because a FOIA exemption may technically apply. Moreover, whenever full disclosure of a record is not possible, agencies are directed to consider whether a partial disclosure can be made.

At the same time, the Attorney General recognized that the "disclosure obligation under the FOIA is not absolute." The statute provides exemptions from mandatory disclosure to protect, for example, national security interests, personal privacy, privileged

records, and law enforcement interests. Still, the Guidelines stress that the President has directed agencies not to withhold information merely to prevent embarrassment to public officials, or because "errors and failures might be revealed, or because of speculative or abstract fears."

A key element of the Attorney General's FOIA Guidelines is the creation of a new defensibility standard to be applied by the Department of Justice whenever agency FOIA determinations are challenged in court. Attorney General Holder formally rescinded the October 12, 2001 Attorney General Memorandum on the FOIA and established a new standard for defending agency decisions to withhold information. A denial of a FOIA request is now defended by the Department of Justice "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."

Second, the Attorney General emphasized that utilizing the "proper disclosure standard is only one part of ensuring transparency." Achieving open Government also requires "an effective system for responding to FOIA requests." He stressed that the responsibility for effective FOIA administration belongs to all agency personnel, not just FOIA professionals. He highlighted two key impediments cited by agency personnel in the past as negatively impacting their ability to administer the FOIA, specifically, competing agency priorities and lack of sufficient technological support. He called on agencies to "address the key roles played by a broad spectrum of agency personnel who work with agency FOIA professionals in responding to requests."

The Attorney General also emphasized the need for agencies to work cooperatively with requesters, to utilize technology to make information available to the

public proactively, and to make timely responses to requests a priority. He declared that "[l]ong delays should not be viewed as an inevitable and insurmountable consequence of high demand."

Lastly, the Guidelines discuss the critical roles played by agency Chief FOIA Officers and stress that improving FOIA performance requires their active participation. The Attorney General called on agency Chief FOIA Officers to review their agencies' FOIA administration each year, with a focus on the concerns highlighted in his Guidelines, and to report to the Department of Justice on the steps taken to achieve improved transparency. These reports, which were just completed for the first time this month, will serve as the means by which each agency will be "fully accountable" for its FOIA administration as directed by the Attorney General.

The Department of Justice is fully committed to helping agencies achieve the "new era of open Government" that the President envisions. My Office, the Department's Office of Information Policy (OIP) has been actively engaged in a variety of initiatives to inform and educate agency personnel on the new commitment.

Just two days after the President issued his FOIA Memorandum, on January 23, 2009, OIP sent initial guidance to agencies informing them of the significance of the President's Memorandum and advising them to begin applying the presumption of disclosure immediately to all decisions involving the FOIA. OIP also added a new training session on the President's Memorandum at its FOIA training seminar for attorneys and access professionals held on Feb. 24, 2009.

On March 20, 2009, the day after the Attorney General issued his FOIA Guidelines, OIP highlighted their key features for agencies in an article posted on *FOIA*

Post, the Department's online publication featuring FOIA guidance and news. That same day OIP also announced that it would hold a training session to provide guidance to agencies on the new directives. The following week, on March 26, 2009, OIP held a governmentwide training conference which was filled to capacity with over five hundred agency personnel attending. At that conference I thoroughly discussed the President's FOIA Memorandum and the Attorney General's FOIA Guidelines and provided guidance to agencies on implementing them. In keeping with the new focus on proactive disclosures and increased use of technology, I posted on the Department's website the slides used in that presentation so that they would be readily available to the public.

To assist agencies in implementing the new FOIA Guidelines, on April 17, 2009, OIP issued extensive written guidance to all agencies which it posted on *FOIA Post*. This guidance discussed the new approaches for responding to requests and working with requesters; the new, more limited standards for defending agencies when they deny a FOIA request; the new requirements to maximize the use of technology to disclose information; the new requirement to post information online proactively; the new focus on the broad array of agency personnel whose actions impact the FOIA; and also the new accountability requirements for agency Chief FOIA Officers.

Significantly, OIP provided agencies with concrete steps to use and approaches to follow in applying the presumption of openness. OIP described ways to apply the foreseeable harm standard and discussed the factors to consider in making discretionary releases.

Beyond these principles applicable to responding to individual FOIA requests, OIP also provided guidance to agencies on achieving transparency in new ways. Further,

OIP emphasized the need to work cooperatively with requesters and to make timely disclosures of information. Lastly, OIP discussed the key role to be played by agency Chief FOIA Officers and encouraged FOIA professionals to work closely with those officials.

OIP has also included a discussion of the President's and Attorney General's FOIA Memoranda in the 2009 edition of the Department of Justice Guide to the Freedom of Information Act. The FOIA Guide is a comprehensive reference volume on the FOIA that is compiled by OIP every two years. It serves as the principal resource manual for agency personnel working with the FOIA.

In addition to issuing written guidance to agencies, since the issuance of the Attorney General's FOIA Guidelines, OIP has conducted numerous additional, agency-specific training sessions specifically focused on the President's and Attorney General's transparency initiative. Training sessions have been held at the Departments of the Army, Commerce, Navy, Energy, Treasury, Labor, Transportation, as well as the SEC, EPA, GSA, and the United States Trade Representative, and the United States Postal Service. OIP has also conducted a special training session for the litigators in the United States Attorneys Office for the District of Columbia and has reached out to each of the remaining United States Attorneys Offices to ensure that they are fully apprised of the new Attorney General FOIA Guidelines.

In addition, OIP has added new sessions on the Attorney General's FOIA Guidelines to its existing FOIA training programs. OIP regularly provides training to agency personnel on all aspects of the FOIA, including the law's procedural

requirements, the nine exemptions, the fee and fee waiver provisions, and the requirements to make proactive disclosures.

OIP has also reached out to the public and the requester community. I am a regular speaker at events sponsored by the American Society of Access Professionals, an association of public and private sector officials and individuals interested in issues relating to transparency. OIP hosted a Requester Roundtable over the summer where we invited any interested members of the FOIA requester community to meet with OIP and to share their ideas for improving FOIA administration. There have been numerous follow-up sessions and continued dialogue with the requester community, which has been very productive.

For example, in direct response to concerns raised by the requester community concerning difficulties in reaching agency personnel, just this month, on March 4th, OIP issued guidance to all agency personnel emphasizing the need for good communication with FOIA requesters and requiring agencies to provide an agency point of contact to all requesters, as well as to take a number of other steps to improve communication with requesters. These simple steps have the potential to go a long way to imbuing a "spirit of cooperation" into the FOIA process, as the President has called for. These training programs and requester outreach activities will be on-going in the months and years ahead.

I am pleased to be testifying today with Miriam Nisbet, the Director of the Office of Government Information Services. Our two offices began collaborating immediately. Our partnership will bring benefits both within government and to the citizens who seek information about how their government works. Resolution of disputes, before they

reach litigation, is a goal shared by both OGIS and the Department of Justice. Given that shared interest, OIP has teamed with OGIS to help educate agency personnel on methods they can employ to resolve disputes. In December of 2009, and again just last week, OGIS's Director joined OIP's Director and OIP's Chief of Staff at a training program on the roles of FOIA Public Liaisons. Later this month we will team again at conflict-resolution training seminar designed to give FOIA Public Liaisons exposure to mediation skills.

In addition, as the Department works directly with agencies in FOIA litigation, OGIS will be mediating and resolving agency-requester disputes to avoid that litigation. As the Department fulfills its obligation to encourage agency compliance with the FOIA, we look forward to OGIS's reviews of where agency compliance currently stands. Indeed, the Department looks forward to working with OGIS on those compliance reviews, so that the President may provide recommendations to Congress in the future.

In the upcoming months OIP will be conducting an extensive review of agency Chief FOIA Officer Reports, which the Department now requires agencies to complete and which were due for the first time just this week. OIP issued guidance to agencies last fall concerning the content of these reports. The items required to be addressed by each Chief FOIA Officer are directly tied to the important transparency principles enunciated by the President and Attorney General in their FOIA Memoranda. In particular, each agency Chief FOIA Officer was required to describe the steps being taken at their agency: 1) to apply the presumption of disclosure, 2) to ensure that there is an effective and efficient system in place for responding to requests, 3) to increase proactive disclosures, 4) to increase utilization of technology, and 5) to reduce backlogs and

increase timeliness in responding to requests. OIP will conduct a comprehensive review of the information contained in these Chief FOIA Officer Reports in order to make an assessment of where agencies stand in terms of implementing the presumption of openness called for by the President and Attorney General. That review will specifically examine the issue of backlogs of FOIA requests.

Last year, the Department added several additional reporting requirements to agency Annual FOIA Reports, beyond those called for in the OPEN Government Act, in an effort to target more specifically the issue of backlogs of FOIA requests. In particular, the Department added a requirement that agencies report on their number of backlogged requests and backlogged administrative appeals, i.e., those requests or appeals that were pending at the agency at the end of the fiscal year and that are beyond the statutory time period for a response. Starting with the Annual FOIA Report for Fiscal Year 2009, agencies were required to give a comparison of the backlogged numbers from year to year. For any agency facing a backlog of requests, the Department required the Chief FOIA Officer Report to contain a description of the steps being taken by the agency to reduce the backlog.

In keeping with the President's and Attorney General's call for agencies to increase their use of technology, the Department also required Chief FOIA Officers to report on their agency's use of technology in the administration of the FOIA, including whether their agency currently receives FOIA requests electronically. This is the first time such data has been collected across the government. OIP intends to use this data as a baseline to determine how many agencies are taking advantage of technology to assist them in their administration of the FOIA and to determine what types of technological

solutions are being employed. For any agency not utilizing technology, they were required to explain in their Chief FOIA Officer Report what the impediments are to doing so. All this information will form the foundation for OIP's analysis, review, and subsequent outreach to agencies going forward.

Increasing proactive disclosures is a critical element of the Attorney General's FOIA Guidelines. We have asked agencies to provide examples of such disclosures in their Chief FOIA Officer Reports. Within OIP we are especially focused on making proactive disclosures of information about how the FOIA itself is working. For example, agencies are required to include in their Annual FOIA Reports a listing of all the Exemption 3 statutes that they relied on during the preceding fiscal year to withhold information. To increase transparency on that issue, OIP has compiled a comprehensive list of all the Exemption 3 statutes cited by agencies in their Annual FOIA Reports for Fiscal Year 2008 and is in the process of compiling such a list from the Fiscal Year 2009 reports. OIP has also created a chart of all statutes that have been recognized by the courts as proper Exemption 3 statutes and has posted that list on its webpage, along with descriptions of the material covered by the statutes, as well as the corresponding case citations.

Facilitating the public's ability to review and analyze agency data on FOIA is also a priority for OIP. In connection with the issuance of OMB's Open Government Directive, OIP made available, for the first time ever, on "data.gov," twenty agency Annual FOIA Reports which we had recompiled into an open format. All agency Annual FOIA Reports are now required to be prepared in an open format and for Fiscal Year

2009 OIP is posting all those reports on data.gov to facilitate public access to the information they contain.

Looking ahead, OIP plans to continue its outreach on the important issue of transparency. This will include additional training seminars and further guidance to agencies, specialized training sessions, as well as one-on-one assistance through OIP's FOIA Counselor service. As I've stated previously, the Department is committed to achieving the new era of open Government that the President envisions.

In closing, the Department of Justice looks forward to working together with the Committee on matters pertaining to the Governmentwide administration of the Freedom of Information Act. I would be pleased to address any question that you or any other Member of the Committee might have on this important subject.

Mr. CLAY. Thank you so much for your testimony, Ms. Pustay. Ms. Nisbet, you are up.

STATEMENT OF MIRIAM NISBET

Ms. NISBET. Thank you. Good afternoon, Mr. Chairman, Ranking Member McHenry and members of the subcommittee.

Thank you for the opportunity to appear today during Sunshine Week to tell you more about the Office of Government Information Services [OGIS]. We are honored to be part of a Government-wide effort to improve the administration of FOIA.

As you know, our Office was created through the Open Government Act of 2007 and we opened our doors just 6 months ago, in September 2009. Since then, we have been working to fulfill our congressional mandates.

One of those is to review Federal agencies' FOIA policies, procedures and compliance so that we may make policy recommendations to Congress and the President. The second mandate is to offer mediation services to resolve FOIA disputes. In addition, we have been serving as a FOIA ombudsman soliciting assistance from Federal agencies and the public to improve the FOIA process generally.

The right of the public to access information from its government is fundamental. FOIA is a strong mechanism allowing citizens to exercise that right, and in the more than 40 years since FOIA was first enacted, Congress has consistently worked to make it stronger. We hope that OGIS will be an important component of FOIA's strengthening process, even though we are a somewhat small part, with a staff of six, to reach across the entire executive branch.

The U.S. Government received more than 600,000 FOIA requests in fiscal year 2008. We are, of course, just compiling the numbers for fiscal year 2009. Only 1.5 percent of those resulted in an administrative appeal and only 0.05 percent of the total requests were litigated. By those measures, the law works reasonably well.

But the cost of those 321 lawsuits to the requesters, to the agencies, for the courts and passed along to the public are significant. OGIS has been working closely with the Office of Information Policy at the Justice Department, as well as with other Federal agencies and FOIA requesters and advocates to develop solutions to help FOIA work more effectively and efficiently. For example, our experience confirms that simple communication between a FOIA requester and an agency FOIA professional can go a long way in preventing disputes.

To enhance communication and provide mediation services, something that has not been done before in the administrative process, we are taking five different paths. One has been to work with agency FOIA public liaisons whose role it is to resolve disputes. In fact, as Melanie mentioned, our first dispute resolution skills training for FOIA public liaisons is set for next Tuesday, and we had more than 60 RSVP requests in the few hours after announcing the event to fill 30 slots. We have 130 on our waiting list, so we know that there is a strong interest.

Second, we are developing a pool of trained mediators who will formally mediate cases. Third, OGIS staff members are currently informally mediating cases and have resolved 84 of the 110 cases brought to us since our doors opened last September. Fourth, we

are exploring whether online dispute resolution may be a viable avenue, allowing us to use technology in the same way as many commercial entities do.

Finally, we are utilizing existing alternative dispute resolution programs [ADR], within agencies to work with their FOIA professionals. Specifically, we have met with representatives from the Departments of Defense, Interior and Veterans Affairs, as well as the Federal Energy Regulatory Commission who is co-hosting next Tuesday's event with OGIS and Justice to set up pilot FOIA and ADR mediation programs.

To fulfill the second prong of the Office's mission, OGIS is also reviewing agency FOIA policy, procedures and practice to determine areas of the law that may need attention. As directed by the law, we will report on agencies' compliance to Congress and the President at the end of the fiscal year. We are already seeing much greater attention throughout the agencies to the importance of improving FOIA performance as a result of the President's memoranda on openness in FOIA, the Attorney General's efforts and OMB's Open Government Directive.

Finally, as you know, many people have referred to OGIS as the FOIA ombudsman. That is a term that was first coined by Senators Leahy and Cornyn. As an impartial office devoted to FOIA, we have embraced this informal role as well. OGIS has engaged in regular outreach through presentations, informal meetings, press briefings and through its Web site.

Finally, there is no question but there is a role for the Office of Government Information Services to assist Federal agencies and members of the public, to resolve disputes, to learn where improvement can be made, and generally to better navigate the FOIA process. There is a lot of work ahead of us yet, but in 6 short months, agencies and the public have expressed a deep appreciation for the services we provide.

With all of this setting the state in the Office's early days, we look forward to becoming instrumental in making FOIA as strong and effective a tool in public oversight as Congress intended.

Thank you.

[The prepared statement of Ms. Nisbet follows:]

TESTIMONY OF MIRIAM NISBET

DIRECTOR OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

BEFORE THE SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

ON

"ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT: CURRENT TRENDS"

MARCH 18, 2010

Good Afternoon, Mr. Chairman, Ranking Member McHenry and members of the Subcommittee. I am Miriam Nisbet, Director of the Office of Government Information Services at the National Archives and Records Administration.

Thank you for the opportunity to appear before you today to tell you more about the Office of Government Information Services. I am especially happy that you called this hearing today, during Sunshine Week. We are honored to be a part of a government-wide effort to improve the administration of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended. As you know, our office was created through the OPEN Government Act of 2007 (P.L. 110-175) and we opened our doors just six months ago, in September 2009. Since then, we have been working to fulfill our statutory mandates. One is to review Federal agencies' FOIA policies, procedures and compliance, so that we may make policy recommendations to Congress and the President. The second mandate is to offer mediation services to resolve FOIA disputes. In addition, we have

been serving as a FOIA ombudsman (a term coined by Senators Leahy and Cornyn, original sponsors of the legislation creating OGIS) soliciting assistance from Federal agencies and the public to improve the FOIA process generally.

The right of the public to access information from its government is fundamental. FOIA is a strong mechanism that allows citizens to exercise that right and, in the more than 40 years since FOIA was enacted, Congress has consistently worked to make it stronger. We hope that the Office of Government Information Services, or OGIS, will become an instrumental component of FOIA's strengthening process. We are a somewhat small part, with a staff of six to reach across the entire executive branch. We hope that we can grow our capabilities within the next year within existing resources to better serve both the general public and the Federal agencies that use us.

The United States government received more than 600,000 FOIA requests in 2008; only 1.5% of those were appealed and only .05% of the total requests were litigated — by those measures, the law works reasonably well. But the costs of those 321 lawsuits — for the requesters, for the agencies, for the courts and passed onto the public — are significant. And any person who requests information from our government and cannot receive a response in a reasonable amount of time — or who is improperly denied those records and feels that bringing a lawsuit against the government is the only recourse -- is not being served by FOIA in the way Congress intended. OGIS has been working closely with the Office of Information Policy at the Justice Department as well as with other Federal agencies and FOIA requesters and advocates to identify FOIA's shortcomings and to develop solutions to help FOIA work more effectively and efficiently. For

example, our experience confirms that simple communication between a FOIA requester and an agency FOIA professional can go a long way in avoiding frustration and preventing disputes at an early stage or even before they arise.

To enhance communication and provide mediation services, we are taking five different paths, including working with agencies' FOIA Public Liaisons whose role it is to resolve disputes; developing a pool of trained mediators to draw on to formally mediate disputes; informally mediating disputes using OGIS staff; exploring whether online dispute resolution may be viable; and using existing alternative dispute resolution programs, or ADR, within agencies to begin handling FOIA disputes.

The ADR and FOIA professionals at the Federal Energy Regulatory Commission (FERC) volunteered to collaborate with us to develop dispute resolution skills training for FOIA Public Liaisons and officers within the agencies. Our first offering of this course at FERC, co-hosted with the Justice Department, is set for next Tuesday, March 23, with space for 30 FOIA professionals. Within a few hours of announcing the training, we had received more than 60 RSVP requests. Such a demonstration of interest underscores the need to provide specialized training on dispute resolution to the "front line" agency individuals who are responsible for carrying out this important law. We already are trying to schedule additional dates to accommodate the demand and to reach as many FOIA professionals as possible. This is because we see that FOIA Public Liaisons in their new statutorily enhanced role can be the most effective way to prevent disputes, to remove obstacles to access and to provide good FOIA customer service.

OGIS also has met with representatives from several agencies, including the Departments of Defense, the Interior, and Veterans Affairs, which, like FERC, have volunteered to serve as pilots in extending their existing mediation and dispute resolution programs to include assisting with FOIA disputes. OGIS is also working to develop a pool of trained mediators from inside and outside of government to formally mediate cases as needed.

As we work to create these formal mediation programs, OGIS has been providing informal mediation to resolve the disputes brought to us. In the last quarter of 2009, we opened 30 cases and have resolved all but six of them as of March 12. In January 2010 alone, we opened 31 cases and have added another 49 cases since, totaling 80 as of March 12. We have resolved 60 of the 2010 cases thus far. We expect this pattern to continue and our caseload to grow. In terms of the types of cases we are seeing, many of them involve requesters who are experiencing delays in the process with the agencies. This is not a new problem – indeed, it has persisted since the early days of the FOIA -- and is one that agencies are working hard to remedy. The Chief FOIA Officers have just submitted their Chief FOIA Officer Reports to the Attorney General. But as the agencies work to reduce their backlogs and get caught up, their FOIA professionals can help avoid disputes by keeping the lines of communication open with the requesters. The training we have developed with FERC will hopefully encourage open dialogue and reduce the need for OGIS to get involved to help requesters who simply want to determine how and why their request or appeal is stalled.

We also have seen many cases in which documents were denied in whole or in part. In some instances, after hearing from us, agencies have voluntarily re-reviewed the responses and found that more information could be released without causing harm to the government or that more records may exist than were initially provided. In other cases, the agency has held to its position, but at least provided the requester with more of a rationale for why the agency could not make the release. In all of the cases we have resolved, we have been able to give the requester the answers he or she previously was unable to obtain from the agencies — even if it is not always the solution the requester was hoping to reach.

The category of cases OGIS has seen most, however, has to do with basic requests for information. Often, FOIA requesters do not know where to go to find the information they need to make a FOIA request. They may not know how to draft the request, or where to send it, or what types of information they should expect to be released. They may not be sure who within an agency would be the best point of contact to answer their questions. Just as there is an important education component for FOIA professionals in the agencies — DOJ has been providing substantial training for nearly 30 years — there is a need to educate the public about FOIA as well. We envision OGIS' Web site as a resource and tool to provide that information and we are developing it for that purpose. We intend to offer step-by-step aid to requesters throughout the process so they can help themselves. We also plan to document good agency FOIA practices and provide basic tips to both agencies and requesters. And as an interface between the public and the government, OGIS plans to make the site as interactive as possible, to solicit questions, comments and suggestions from anyone. To that end, we are conducting a

feasibility study to see whether technology can assist in our mission, through online dispute resolution (ODR) such as is used every day by commercial entities.

Along with the mediation component of the office, OGIS is also reviewing agency FOIA policy, procedures and practice to identify areas of the law that may need attention, to fulfill the second prong of the office's mission. We plan to provide Congress and the President with recommendations for those changes at the end of the fiscal year.

To determine agencies' strengths and weaknesses with respect to FOIA, OGIS will review the agencies' Annual FOIA Reports as well as the new Chief FOIA Officers' Reports, which are both filed with the Justice Department. We also will continue to rely on the insights and assessments of the requester community, which, as this Subcommittee knows, are indispensible in getting a complete picture of access to government information. As directed by the law, we will report on agencies' compliance with FOIA. In that regard, I can say now that we already are seeing much greater attention throughout the agencies to the importance of improving FOIA performance, as a result of the President's memoranda on openness and FOIA, the Attorney General's efforts, and OMB's Open Government Directive. OGIS has been pleased to be part of the collaborative inter-agency work on Federal agencies' Open Government Plans. The criteria for those Plans include strengthening the focus on FOIA and increasing agencies' commitments to transparency and public access.

Finally, as you know, many people, including the Congress, have referred to OGIS as the "FOIA Ombudsman," though this is not a term used in the statute. As an impartial office devoted to

FOIA, we have embraced this informal role as well as acting as a mediator (assuming that a FOIA requester has not already decided to go to court) and as a source of information. OGIS has engaged in regular outreach to members of the public through presentations, informal meetings, press briefings, and through its Web site. We have reached out in equal part to members of the Federal government community. OGIS has met with agency FOIA and legal staffs to brief them on the office's activities and goals, staff members have provided training and presentations to FOIA professionals on OGIS's role, and the office is constantly looking for input from those individuals to find the best ways to serve them.

There is no question but that there is a role for the Office of Government Information Services: to assist Federal agencies and members of the public to resolve disputes, to learn where improvement can be made and generally to better navigate the FOIA process. There is a lot of work ahead of us yet, but in six short months, agencies and the public have expressed a deep appreciation for the services we provide. With all of this setting the stage in the office's early days, we look forward to becoming instrumental in making FOIA as strong and effective a tool in public oversight as Congress intended.

Mr. CLAY. Thank you so much for that testimony.

Mr. Gottesman, you are up.

STATEMENT OF LARRY F. GOTTESMAN

Mr. GOTTESMAN. Thank you. Good afternoon, Chairman Clay, Ranking Member McHenry and members of the subcommittee. I am pleased to appear before you today to discuss EPA's FOIA program during Sunshine Week.

Let me assure you that EPA is committed to the letter and spirit of the Open Government Act of 2007, the administration's open government and transparency goals. EPA recognizes that emerging technologies create new opportunities for improving the FOIA processes throughout the Federal sector, and the Agency continues to collaborate with other Federal agencies in this regard.

Administrator Jackson issued a memorandum to all employees on April 23, 2009 that communicated her commitment to transparency in all of EPA's operations. The Administrator said that, as President Obama stated, the FOIA should be administered with a clear presumption of openness and that all Agency personnel should ensure that this principle of openness is applied.

Administrator Jackson also stated that in accordance with guidance issued by Attorney General Holder, EPA offices should exercise their discretion in favor of disclosing documents whenever possible under FOIA and take steps to make information publicly available on the Agency's Web site without waiting for a request.

I would like to take a few minutes to explain how EPA is addressing the FOIA backlog embracing the mandates of greater transparency. First and foremost, the Agency has worked very hard to reduce its backlog of FOIA requests. In July 2001, there were 23,514 overdue FOIA requests. EPA formed a task force and began aggressive steps to address the situation. The backlog started to decrease.

In 2006, the Agency committed to reducing its backlog to not more than 10 percent of new requests received in any fiscal year. EPA surpassed this aggressive milestone the very next year and continues to meet it every year thereafter. In fact, at the end of fiscal year 2009, EPA's backlog was just 332 requests, or just slightly over 3 percent of all incoming requests. The Agency has also significantly reduced its overdue appeals.

The Agency embraced the mandate for greater transparency. EPA made data bases available through its Web site because of information frequently requested through FOIA. For example, EPA's Office of Pesticide Programs completely redesigned its electronic FOIA reading room to make tens of thousands of highly sought after pesticide science and regulatory records publicly available without the need to file a FOIA request. The Office established a dual component electronic reading room by making documents available on its FOIA Web site. Other parts of the Agency are exploring opportunities to use similar technology to proactively disclose records.

In conclusion, EPA is proud of its accomplishments and continues to look for other opportunities to proactively disclose information to the public and reduce the need to file a FOIA request.

I would be pleased to answer any questions from the subcommittee.

[The prepared statement of Mr. Gottesman follows:]

TESTIMONY
OF
LARRY F. GOTTESMAN
NATIONAL FREEDOM OF INFORMATION OFFICER
OFFICE OF ENVIRONMENTAL INFORMATION
U.S. ENVIRONMENTAL PROTECTION AGENCY

Information Policy, Census, and National Archives Subcommittee
Of the
Oversight and Government Reform Committee

Thursday, March 18, 2010
2154 Rayburn HOB
2:00 p.m.

"Administration of the Freedom of Information Act: Current Trends."

Good afternoon Chairman Clay, Ranking Member McHenry, and Members of the Subcommittee. My name is Larry Gottesman, the U.S. Environmental Protection Agency's (EPA's) Freedom of Information (FOI) Officer. I am pleased to appear before you today to discuss EPA's Freedom of Information Act program during Sunshine Week.

EPA is committed to the letter and spirit of the Administration's Open Government and Transparency goals. EPA demonstrates this commitment by constantly striving for reductions in processing time for initial FOIA requests and administrative appeals. EPA recognizes that emerging technology creates new opportunities for improving the FOIA processes throughout the federal sector, and continues to collaborate with other federal agencies in this regard.

Administrator Jackson issued a memorandum to all employees on April 23, 2009 that communicated her commitment to "Transparency in EPA's Operations". The Administrator said, "As President Obama stated, the Freedom of Information Act should be administered with a clear presumption that openness prevails. All Agency personnel should ensure that this principle of openness is applied to the extent possible when responding to a FOIA request. Managers should give their staffs and the Agency's FOI professionals the support needed to satisfy FOIA's transparency requirement in as timely and efficient a manner as possible. In accordance with guidance issued by Attorney General Holder on March 19, 2009, EPA offices should exercise their discretion in favor of disclosing documents whenever possible under the FOIA. Offices should assert an exemption to disclosure only where the Agency reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law. Offices should also take steps to make information public on the Agency's Web site without waiting for a request from the public to do so."

I would like to take a few minutes to explain how EPA is addressing the FOIA backlog, striving to improve timeliness, exploring new technology, and embracing the mandate for greater transparency.

Backlog

First and foremost, the Agency's FOIA backlog has decreased dramatically. In July 2001, there were 23,514 overdue FOIA requests. EPA took aggressive steps to address this situation. EPA revised FOIA procedures and processes, deployed updated information technology tools, and collaborated with subject matter experts across the

Agency to eliminate overdue FOIA requests. In a 2006 report to the Department of Justice (DOJ), the Agency stated that it may always have a backlog given the number and complexity of FOIA requests that it receives. Nevertheless, EPA committed to reducing its backlog to not more than 10 percent of new FOIA requests each year. EPA has met this aggressive milestone since 2007 and continued to exceed this performance level in all subsequent years. EPA received 10,404 requests in FY 2009; however, its total backlog was just 332 at the end of fiscal year 2009, or just over 3% of all incoming requests. Furthermore, the number of overdue FOIA appeals has decreased significantly even though the number of appeals has increased. At the end of FY 2009, the number of overdue appeals was reduced to 79. The lessons learned over the years have positioned EPA to maintain low backlog and high customer service that are integral to open government.

Timeliness

In spite of EPA's dramatic reduction of overdue requests, the Agency continues to seek innovative ways to improve its responsiveness. For example, each year the Agency receives thousands of FOIA requests seeking information on specific parcels of land as part of the due diligence in real estate transactions. The Agency is creating an online-searchable database that will make this information readily available to the public, thereby reducing the need for FOIA requests. By proactively disclosing environmental information before it becomes the subject of a FOIA request, EPA will significantly reduce the time required for the public we serve to access the information we maintain.

EPA also reduced the response time for issuing decisions on fee waivers, and expedited processing requests by centralizing these processes within its headquarters National FOI staff. The consolidation ensures that the same high standards of timeliness and law are applied to each decision issued by the Agency. EPA conducts annual FOIA trainings for its employees. Monthly meetings are held with the Agency's headquarters and regional FOI contacts by the Agency FOI Officer.

Technology

The Agency continues to look at new technologies to assist the processing of FOIA requests, particularly the processing of email and electronic records. EPA developed a software application for processing large e-mail searches and responses. The application allows for duplicate email messages to be identified and removed, facilitating more timely review and processing. In addition, the National FOI Program currently is collaborating with Agency information technology staff to improve the efficiency for conducting key word searches on the Agency's e-mail servers. This service will expedite FOIA searches and assure that all responsive e-mails maintained on the Agency's e-mail system are identified.

EPA also deployed redaction software to help process electronic records. The application uses "pixel" replacement to permanently remove information being withheld from disclosure, eliminating the risk associated with technologies that electronically "white out" information which can later be restored. The redaction software expedites the processing of FOIA responses while protecting information that should not be released.

Transparency

The Agency embraced the mandate for greater transparency. EPA posted data bases to its Web site containing information frequently requested under FOIA. For example, an individual desiring to export an automobile is required to produce a certificate issued by EPA. In the past, the individual had to make a FOIA request for the certification and then wait for the Agency to respond to the request. Promoting transparency, quicker access and accountability, EPA's FOI Officer worked with the Agency's Office of Air and Radiation to make the database available online. The public can now go directly to EPA's FOIA Web site (epa.gov/foia) and print the certificate(s) in seconds without having to file a FOIA request; previously, the public had to wait days or weeks to obtain the necessary documentation after submitting a request. In addition, the Agency recently launched a Web page in March 2009 that allows requesters to easily obtain the status of their FOIA requests on the "Status of My FOIA Request" site at http://www.epa.gov/foia/foia_request_status.html.

EPA's Office of Pesticide Programs (OPP) completely redesigned its electronic FOIA reading room to make tens of thousands of highly sought after pesticide science and regulatory records publicly available without the filing of a FOIA request. OPP established a dual component electronic reading room by making documents available on its FOIA Website and on the *Regulations.gov* Web site. The OPP FOIA Web site provides access to approximately 13,000 OPP scientific reviews on 300 pesticide active ingredients. The *Regulations.gov* regulatory repository contains approximately 800 pesticide product registration working files comprising some 150,000 pages. Since making these highly sought after records available on the Web, FOIA requests for this

information have plummeted from twenty percent to three percent of all FOIA requests received by this office. The high demand scientific reviews and pesticide registration information are vital to industry, interest groups, state, local, and foreign governments, and many other stakeholders. Other parts of the Agency are exploring opportunities to use similar technology in proactively disclosing records.

EPA publishes extensive information on its Web site and continues to look for additional information to publish. Additionally, EPA continues to engage the public through FOIA Requester Forums held in conjunction with National and Regional training sessions. In the aftermath of Hurricane Katrina, EPA created a Web site to allow the public access to Hurricane-related information as soon as it became available at http://www.epa.gov/katrina/. While this site is no longer being updated it is still available to the public for reference purposes. Currently EPA is actively participating in the Data.gov effort by making datasets -- which have been accessible through Envirofacts and My Environment -- available now in open, downloadable formats that enhance access and support user creation of customized reports by individuals and businesses, reducing the need to file FOIA requests. The requested reports are often used for real estate transactions as part of the due diligence package. It is anticipated that this tool may reduce the number of Agency FOIA requests by 20 percent by allowing the public direct access to this environmental information.

Conclusion

In conclusion, EPA is proud of the accomplishments with its FOIA administration responsibilities and continues to proactively disclose information and reduce FOIA

requests for publicly available information. I would be pleased to answer any questions from the Subcommittee.

* * *

Mr. CLAY. Thank you so much for that testimony.

Ms. Melvin, you may proceed.

STATEMENT OF VALERIE C. MELVIN

Ms. MELVIN. Thank you, Mr. Chairman, Ranking Member McHenry and members of the subcommittee.

I appreciate the opportunity to participate in today's hearing on implementation of the Freedom of Information Act. As you have noted, this important statute establishes that Federal agencies must provide access to Government information so that the public can learn about Government operations and decisions.

Given its significance, the Congress included reporting requirements in the act to allow its implementation to be monitored. As you know, under the act, agencies are to develop annual reports providing numerous statistics on their FOIA processing. Since 2001, we have conducted reviews that draw on these annual reports to describe the status of reported implementation and any observable trends. My statement today briefly discusses our previous work in this area, as well as selected changes in the FOIA landscape resulting from legislation, policy and guidance.

In our earlier work, we examined the annual reports from major agencies, generally noting increases in FOIA requests received and processed and impending requests carried over from 1 year to the next. We also examined agency improvement plans developed in response to a 2005 Executive order that was aimed at improving FOIA implementation and included a major focus on reducing backlogs of overdue requests.

We found that the agency improvement plans under review mostly included goals and timetables as required by the Executive order. Also, in later reporting on agency efforts to reduce backlogs, we found signs of progress in certain agencies as of September 2007. However, we could not present a complete Government-wide picture because agencies varied in how and what they were tracking as part of their improvement plans.

The Open Government Act of 2007, which was passed in December 2007, amended FOIA in several ways, including setting up the FOIA Ombudsman Office within the National Archives and Records Administration, as has already been discussed. Regarding the statistics required in the annual reports, the act introduced several changes, including additional statistics on timeliness and backlog.

For instance, agencies must break down their response times in much greater detail, that is, how many requests were responded to within the first 20 days; how many in the next 20 days, and so on in 20-day increments up to 200 days, and in 100-day increments up to 400 days, and finally those that took longer than 400 days. These new requirements were first reflected in the annual reports for fiscal year 2008.

These annual reports also reflected a significant change in guidance that the Justice Department provided to agencies on preparing the reports. Specifically, Justice's May 2008 guidance directed agencies to omit from their statistics Privacy Act requests which had previously been included. In a Privacy Act request, the requester asked for information on himself or herself. This change

had a major impact on the statistics for certain agencies such as the Social Security Administration, whose reported requests dropped by more than 18 million in fiscal year 2008.

In the immediate, these changes to the reported statistics make year to year comparisons with earlier years problematic. However, in the future the increased details should help provide a clearer picture of FOIA implementation at individual agencies and Government-wide.

Further, this type of information will be important in assessing the effect on FOIA processes of plans that are called for in the recent Open Government Directive issued by OMB. Each agency's plan, due in April, is to describe measures to strengthen this FOIA program, including milestones for reducing any pending backlog of outstanding FOIA requests by at least 10 percent each year.

Overall, the increased reporting requirements should allow greater insight into FOIA program performance, which is important for agencies, for Congress and the public to ensure improved implementation of this important statute.

Mr. Chairman, this completes my prepared statement. I would be pleased to respond to any questions that you or other members of the subcommittee may have.

[The prepared statement of Ms. Melvin follows:]

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, House of Representatives

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FREEDOM OF INFORMATION ACT

Requirements and Implementation Continue to Evolve

Statement of Valerie C. Melvin, Director
Information Management and Human Capital Issues

GAO-10-537T

March 18, 2010

GAO
Accountability· Integrity· Reliability
Highlights

Highlights of GAO-10-537T, a testimony before the Subcommittee on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, House of Representatives

FREEDOM OF INFORMATION ACT

Requirements and Implementation Continue to Evolve

Why GAO Did This Study

The Freedom of Information Act (FOIA) establishes that federal agencies must provide the public with access to government information, enabling them to learn about government operations and decisions. To help ensure proper implementation, the act requires that agencies annually report specific information about their FOIA operations, such as numbers of requests received and processed and other statistics. In work reported from 2001 to 2008, GAO examined the annual reports for major agencies, describing the status of reported implementation and any observable trends. GAO also reported on agency improvement plans developed in response to a 2005 Executive Order aimed at improving FOIA implementation, including reducing backlogs of overdue requests.

GAO was asked to testify on its previous work on FOIA implementation, as well as on selected changes in the FOIA landscape resulting from legislation, policy, and guidance.

To develop this testimony, GAO drew on its previous work, as well as publicly available information.

View GAO-10-537T or key components. For more information, contact Valerie C. Melvin at (202) 512-6304 or melvinv@gao.gov.

What GAO Found

In reporting on annual report statistics over the years, along with agencies' improvement plans and backlog reduction efforts, GAO previously noted general increases in requests received and processed, as well as growing numbers of backlogged requests reported. GAO also found that the improvement plans of the agencies reviewed mostly included goals and timetables as required by the Executive Order. In subsequent reporting on backlog reduction efforts, GAO found that selected agencies had shown progress in decreasing their backlogs of overdue requests as of September 2007; however, GAO could not present a complete picture, because of variations such as differences in agencies' metrics and ability to track backlogs of overdue requests. GAO recommended that the Department of Justice issue guidance to address this issue. Justice agreed with the recommendation and issued further guidance in 2008. In addition, GAO made recommendations to selected agencies regarding the reliability of their FOIA data, with which the agencies generally agreed.

The Congress took steps to address FOIA issues by enacting the OPEN Government Act of 2007, which amended FOIA in several ways. Among other things, the act requires additional statistics on timeliness and backlog in the annual reports—including information on average processing times and ranges, as GAO had previously suggested to the Congress. In addition, the act requires agencies, among other things, to break down their response times in much greater detail: how many requests in the fiscal year reported on were responded to within the first 20 days, how many in the next 20 days, and so on in 20-day increments up to 200 days, in 100-day increments from 200 up to 400 days, and finally those that took longer than 400 days. These new requirements were reflected for the first time in the reports for fiscal year 2008.

These reports also reflected a significant change in the guidance that the Justice Department provided to agencies (in May 2008) on preparing the annual reports. In addition to providing information on the new statistics required by the OPEN Government Act, this guidance directed agencies to omit certain Privacy Act requests from their statistics, which had previously been included. (In a Privacy Act request, a requester asks for information on him- or herself.) This change had a major impact on the statistics for certain agencies, such as the Social Security Administration, whose reported requests dropped by more than 18 million from fiscal year 2007 to fiscal year 2008.

Currently, agencies are preparing Open Government plans, due in April 2010, in response to an administration directive issued in December 2009. Among other things, each plan is to describe measures to strengthen the agency's FOIA program, including milestones for reducing any significant pending backlog of outstanding requests by at least 10 percent each year. Assessing the effect on FOIA processes of these plans may be facilitated by the increased detail required in the annual reports, which should provide a clearer picture of FOIA implementation at individual agencies and governmentwide.

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to participate in today's hearing on the implementation of the Freedom of Information Act (FOIA). Generally speaking, FOIA[1] establishes that federal agencies must provide the public with access to government information, thus enabling them to learn about government operations and decisions. Specific requests by the public for information through the act have led to the disclosure of waste, fraud, abuse, and wrongdoing in the government, as well as the identification of unsafe consumer products, harmful drugs, and serious health hazards.

Since 2001, we have issued several reports on FOIA implementation, which generally examined the annual FOIA reports of major agencies. Today, as agreed with your offices, I will discuss our previous work in this area, as well as selected changes in the FOIA landscape resulting from legislation, policy, and guidance. My comments today are based on our previous work, all of which was conducted in accordance with generally accepted government auditing standards. We supplemented this work with information contained in publicly available government documents, following appropriate GAO quality assurance processes.

Background

FOIA establishes a legal right of access to government records and information, on the basis of the principles of openness and accountability in government. Before the act (originally enacted in 1966), an individual seeking access to federal records had faced the burden of establishing a right to examine them. FOIA established a "right to know" standard for access, instead of a "need to know," and shifted the burden of proof from the individual to the government agency seeking to deny access.

FOIA provides the public with access to government information either through "affirmative agency disclosure"—publishing

[1] 5 U.S.C. § 552.

information in the *Federal Register* or the Internet, or making it available in reading rooms—or in response to public requests for disclosure. Public requests for disclosure of records are the best known type of FOIA disclosure. Any member of the public may request access to information held by federal agencies, without showing a need or reason for seeking the information.

Not all information held by the government is subject to FOIA. The act prescribes nine specific categories of information that are exempt from disclosure: for example, trade secrets and certain privileged commercial or financial information, certain personnel and medical files, and certain law enforcement records or information (attachment I provides the complete list). In denying access to material, agencies may cite these exemptions. The act requires agencies to notify requesters of the reasons for any adverse determination (that is, a determination not to provide records) and grants requesters the right to appeal agency decisions to deny access.

In addition, agencies are required to meet certain time frames for making key determinations: whether to comply with requests (20 business days from receipt of the request), responses to appeals of adverse determinations (20 business days from receipt of the appeal), and whether to provide expedited processing of requests (10 calendar days from receipt of the request). Congress did not establish a statutory deadline for making releasable records available, but instead required agencies to make them available promptly.

Annual FOIA reports are required by the act under amendments that the Congress passed in 1996 to provide for public access to information in an electronic format (among other things). Under the amended act, agencies are required to submit a report to the Attorney General on or before February 1 of each year that covers the preceding fiscal year and includes information about agencies' FOIA operations, such as numbers of requests received and processed, and requests pending at the end of the fiscal year.[2]

[2] 5 U.S.C.§ 552(e)(1).

Agencies are to make the reports available to the public in electronic form, and the Attorney General is required to make the reports from all agencies available online at a single electronic access point.[3]

In December 2005, agencies were given additional requirements by an Executive Order[4] that introduced several innovations. The order required, among other things, that agency heads designate Chief FOIA Officers to oversee their FOIA programs, as well as establishing FOIA Requester Service Centers and FOIA Public Liaisons to ensure appropriate communication with requesters. The Chief FOIA Officers were directed to conduct reviews of the agencies' FOIA operations and develop improvement plans. These plans were to include specific activities that the agency would implement to eliminate or reduce any backlog of overdue requests—that is, requests for which agencies had not responded within the statutory time limit with a determination (generally, 20 business days).[5] Note that this number is not necessarily the same as the pending requests reported in the annual reports, which may include requests that are less than 20 days old and thus not overdue.[6]

Our Work on Agency Annual Reports and FOIA Improvement Plans Has Noted Areas for Improvement

After the Executive Order was issued, we reported and testified on both annual report statistics and agency improvement plans, focusing on their responsiveness to the Executive Order and

[3] This electronic access point is www.usdoj.gov/oip/04_6.html.

[4] Executive Order 13392, *Improving Agency Disclosure of Information* (Washington, D.C., Dec. 14, 2005).

[5] This time may be extended by 10 days in "unusual circumstances," such as when requests involve a voluminous amount of records or require consultation with another agency.

[6] In reports that we issued before the Executive Order was issued, we used the term "backlog" to refer to pending cases reported in the annual reports. After the Executive Order was issued, we distinguished "pending cases" from "overdue cases" where the distinction was relevant.

backlog reduction efforts.[7] We found that the improvement plans submitted by the agencies in our scope mostly included the goals and timetables required by the Executive Order. We also made recommendations to selected agencies regarding the reliability of their FOIA data; the agencies generally agreed with our recommendations.

In addition, we noted certain limitations in the statistics reported in the annual reports. In discussing the fiscal year 2005 annual report data,[8] for example, we observed, among other things, that agencies showed great variations in the median times to process requests (less than 10 days for some agency components to more than 100 days at others). However, the ability to determine trends in processing times was limited because these times were reported in medians[9] only, without averages (that is, arithmetical means) or ranges. Although medians have the advantage of providing representative numbers that are not skewed by a few outliers, it is not statistically possible to combine several medians to develop broader generalizations (as can be done with averages or arithmetical means).[10] We suggested that to improve the usefulness of the statistics in agency annual FOIA reports, the Congress consider amending the act to require agencies to report additional statistics on processing time, which at a minimum should include

[7] GAO, *Freedom of Information Act: Agencies Are Making Progress in Reducing Backlog, but Additional Guidance Is Needed*, GAO-08-344 (Washington, D.C.: Mar. 14, 2008); *Freedom of Information Act: Processing Trends Show Importance of Improvement Plans*, GAO-07-441 (Washington, D.C.: Mar. 30, 2007); *Freedom of Information Act: Processing Trends Show Importance of Improvement Plans*, GAO-07-491T (Washington, D.C.: Feb. 14, 2007); and *Freedom of Information Act: Preliminary Analysis of Processing Trends Shows Importance of Improvement Plans*, GAO-06-1022T (Washington, D.C.: July 26, 2006).

[8] GAO-07-441.

[9] In an ordered set of values, the median is a value below and above which there is an equal number of values; if there is no one middle number, it is the arithmetic mean (average) of the two middle values.

[10] To find an arithmetic mean, one adds all the members of a list of numbers and divides the result by the number of items in the list. To find the median, one arranges all the values in the list from lowest to highest and finds the middle one (or the average of the middle two if there is no one middle number). Thus, medians cannot be summed. Deriving a median for two sets of numbers, for example, requires knowing all numbers in both sets. Only the source data for the medians can be used to derive a new median, not the medians themselves.

average times and ranges. (These additional statistics were later required by the FOIA amendments enacted in December 2007 as the Openness Promotes Effectiveness in Our National Government Act—OPEN Government Act—of 2007, which I discuss further later in my statement.)

Reporting on annual report data from fiscal years 2002 to 2006,[11] we noted that although the numbers of FOIA requests received and processed continued to rise, the rate of increase had flattened.[12] The number of pending requests carried over from year to year had also increased, although the rate of increase had declined. This increase in pending requests was primarily attributable to increases at the Department of Homeland Security (DHS). With the DHS numbers removed, the number of pending cases at the other agencies in our scope remained almost flat from 2003 to 2006.[13] In particular, increases occurred at DHS's Citizenship and Immigration Services, which accounted for about 89 percent of DHS's total pending requests in fiscal year 2006. However, the rate of increase at DHS from fiscal year 2005 to 2006 was slightly less than it had been from fiscal year 2004 to 2005.

We also observed that following the emphasis on backlog reduction in the Executive Order and agency improvement plans, several agencies showed progress in decreasing their backlogs of overdue requests. In response to our query, selected agencies provided

[11] We based our analysis on data from 21 of the 24 major agencies covered by the Chief Financial Officers Act. Data from the General Services Administration and the Departments of Agriculture and Housing and Urban Development were omitted from our analysis because we could not be assured that the data were accurate and complete. Agencies included were the Agency for International Development, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of the Interior, Department of Justice, Department of Labor, Department of State, Department of the Treasury, Department of Transportation, Department of Veterans Affairs, Environmental Protection Agency, National Aeronautics and Space Administration, National Science Foundation, Nuclear Regulatory Commission, Office of Personnel Management, Small Business Administration, and Social Security Administration.

[12] GAO-08-344.

[13] The comparison is from 2003, rather than 2002, because DHS had not yet been established in 2002.

information on their progress in addressing these backlogs as of September 2007. Notably, according to this information, DHS was able to decrease its backlog of overdue requests by 29,972, or about 29 percent.[14] However, we could not present a governmentwide picture of progress in backlog reduction, because not all agencies provided data and not all data provided were comparable. For example, some agencies were unable to track overdue requests as opposed to pending requests. (Although FOIA requires agencies to report pending requests at the end of each fiscal year in their annual reports, neither the act nor the Executive Order required agencies to track and report numbers of overdue cases.) We recommenced that, to help agencies achieve the backlog reduction goals planned for future years and to ensure that comparable statistics on backlog are available governmentwide, the Department of Justice provide additional guidance to agencies on plans to achieve these goals and on tracking and reporting backlog. The department agreed with our recommendation and issued additional guidance in 2008.

Changes in Law, Guidance, and Policy Have Affected FOIA Implementation

As I mentioned earlier, the passage of the OPEN Government Act (enacted December 31, 2007) addressed the limitations of using median numbers by increasing the statistics that agencies are required to report.[15] It also requires much more detailed breakdowns of timeliness statistics: for instance, agencies are required to report how many requests were responded to within the first 20 days, how many in the next 20 days, and so on in 20-day increments up to 200 days, in 100-day increments from 200 up to 400 days, and finally

[14] In GAO, *Freedom of Information Act: DHS Has Taken Steps to Enhance Its Program, but Opportunities Exist to Improve Efficiency and Cost-Effectiveness*, GAO-09-260 (Washington, D.C.: Mar. 20, 2009), we noted that DHS reported making progress in reducing backlog. According to DHS's annual FOIA report for fiscal year 2009, the department has continued to make progress in this area: it reported that pending requests at the end of the fiscal year had gone from 84,096 at the beginning of fiscal year 2009 to 27,182 at the end of the fiscal year.

[15] Openness Promotes Effectiveness in Our National Government Act of 2007, Public Law 110-175.

those that took longer than 400 days. Requiring agencies to track processing at this level of detail should help provide additional insight into backlog issues, including overdue requests.

The new requirements resulting from the OPEN Government Act were first reflected in the annual FOIA reports for fiscal year 2008. These reports also reflected a significant change in the guidance that the Justice Department provided to agencies on preparing the annual reports. In addition to providing information on responding to the requirements of the OPEN Government Act, this guidance (issued May 2008) directed agencies to omit certain Privacy Act requests from their statistics, which had previously been included.[16] (In a Privacy Act request, a requester asks for information on him- or herself.) This change is significant for certain agencies, such as the Social Security Administration (SSA), that process large numbers of Privacy Act requests. This change led to a drop in SSA's reported requests of more than 18 million in fiscal year 2008.

Besides increasing reporting requirements, the OPEN Government Act includes several other provisions, including codifying the requirement for agencies to designate Chief FOIA Officers and Public Liaisons (introduced by the 2005 Executive Order) and providing specific definitions and criteria to be used in administering FOIA. (For example, the act provides additional criteria for determining the time period for processing FOIA requests, and it provides a definition of "a representative of the news media," which affects the kinds of fees that agencies are permitted to charge requesters.) It also established the Office of Government Information Services within the National Archives and Records Administration. This new office, also known as the "FOIA Ombudsman," is to review agency FOIA activities and recommend changes to the Congress and the President, as well as offering mediation services to FOIA requesters as a "non-exclusive

[16] Specifically, according to the guidance, "In order to provide a clear report of agency FOIA activities, agencies shall only include Privacy Act (PA) requests in their Annual FOIA Reports if the FOIA is utilized in any way to process the request. ... [W]hen an agency conducts a PA search exclusively (i.e., within a 'system of records') and does not claim a PA exemption for any records located, that request should not be included in this Report."

alternative to litigation." This new office may also "issue advisory opinions if mediation has not resolved the dispute."

Recently we have seen further changes affecting the FOIA landscape. Among the first steps taken by President Obama on taking office was to issue two memorandums: one on Open Government and one on FOIA. Both included a focus on increasing the amount of information made public by the government. In particular, the FOIA memo directed agencies to adopt a presumption in favor of disclosure in all FOIA decisions, take affirmative steps to make information public, and use modern technology to inform citizens. This echoed the Congress's finding, in passing the OPEN Government Act, that the Freedom of Information Act establishes a "strong presumption in favor of disclosure."

Further, as is traditional at the beginning of a new administration, the Attorney General issued a FOIA policy memo, which also promotes this "strong presumption." In particular, the Attorney General's memo encouraged agencies to make "discretionary" releases of records: that is, to disclose information even if it technically falls into one of nine categories of information exempt from FOIA.[17] Under the new policy, the Department of Justice undertakes to defend an agency's denial of a FOIA request only if the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions (or if disclosure is prohibited by law).[18]

Most recently, on December 8, 2009, the Office of Management and Budget issued the Open Government Directive (Memorandum 10-06), in accordance with the President's Open Government memorandum. This directive encourages openness through

[17] As the memo points out, the act provides a number of permitted exemptions; see attachment 1.

[18] This "foreseeable harm" standard replaced the previous standard, under which the department would defend agency decisions to withhold records "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."

promoting transparency, participation, and collaboration. It requires agencies to take steps toward the goal of creating a more open government by, for example, publishing government information online and improving the quality of government information. It also directs agencies to establish Open Government plans by April 2010; these plans are to include proposed changes, technological resources, or reforms needed to strengthen FOIA response processes. In addition, agencies with a significant pending backlog of outstanding FOIA requests are directed to take steps to reduce such backlog by 10 percent a year and include in their plans milestones detailing how they will do so.

To sum up, as our work has reflected, addressing backlogs in FOIA request processing is a continuing concern. The changes made to the requirements for reported statistics have made year-to-year comparisons of past years problematic, but the increased detail should provide a clearer picture of FOIA implementation in the years ahead, both at individual agencies and governmentwide. This type of information will be important in assessing the effect on FOIA processes of the Open Government plans called for in the recent Open Government Directive.

Mr. Chairman, this completes my prepared statement. I would be pleased to respond to any questions you or other Members of the Subcommittee may have at this time.

Contact and Acknowledgments

If you should have questions about this testimony, please contact me at (202) 512-6304 or melvinv@gao.gov. Other major contributors include Barbara Collier, Lee McCracken, and J. Michael Resser.

Attachment I. Freedom of Information Act Exemptions

The act prescribes nine specific categories of information that are exempt from disclosure:

Exemption number	Matters that are exempt from FOIA
(1)	(A) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order.
(2)	Related solely to the internal personnel rules and practices of an agency.
(3)	Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
(4)	Trade secrets and commercial or financial information obtained from a person and privileged or confidential.
(5)	Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.
(6)	Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
(7)	Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
(A)	could reasonably be expected to interfere with enforcement proceedings;
(B)	would deprive a person of a right to a fair trial or impartial adjudication;
(C)	could reasonably be expected to constitute an unwarranted invasion of personal privacy;
(D)	could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by confidential source;
(E)	would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
(F)	could reasonably be expected to endanger the life or physical safety of an individual.
(8)	Contained in or related to examination, operating, or condition of reports prepared by, on behalf of, or for the use of an agency responsible for the regulation of supervision of financial institutions.
(9)	Geological and geophysical information and data, including maps, concerning wells.

Source 5 U S C § 552(b)(1) through (b)(9)

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Mr. CLAY. Thank you so much, Ms. Melvin.

And I thank the entire panel for their testimony.

We will begin the 5-minute questioning period with our newest Member, Ms. Chu.

You may proceed.

Ms. CHU. Thank you, Mr. Chair.

So there were 600,000 requests of the U.S. Government, according to Ms. Nisbet. I was wondering how many of them or what percentage of them were denied.

Ms. NISBET. Those were the figures for fiscal year 2008, and in terms of the denials, I am going to ask my colleague here, Ms. Pustay, to answer if I may, because she has the reporting on all of those figures.

Ms. PUSTAY. In terms of releases of information for last year, for 2009, we had a significant increase from 2009 to 2008 in the number of requests where information was released either in full or in part. And that, to me, is one of our first measures of improvement, of significant improvement across the Government in implementing the Attorney General's FOIA guidelines.

Ms. CHU. So in other words, you are trying to get a handle on the statistics now, but you don't know how many of them were denied at this point?

Ms. PUSTAY. I don't have memorized how many were denied, but we have done a comparison for the key agencies between fiscal year 2008 and fiscal year 2009 and releases in full or in part were up in this past fiscal year, which is an indication of greater focus on transparency as a result of the guidelines.

Ms. CHU. And a change in policy.

Ms. PUSTAY. Yes, exactly.

Ms. CHU. And has there been a change in the backlog? Do you know what?

Ms. PUSTAY. Yes, it is another really wonderful indicator. I think backlogs has always been a very vexing issue for agencies and the public alike. And again, by looking at the key agencies, backlogs have gone down almost by half. It is really a dramatic number. This number I did write down, from 125,000 to about 69,000, so almost a 50 percent reduction in backlog requests from 2009 versus 2008. So the idea that the focus that we have had on backlogs and improving timeliness, again this past year, as a result of the guidelines, has really taken hold in agencies.

Ms. CHU. That is excellent.

Given the current presumption of openness, has the Justice Department reviewed any agency denials of FOIA requests that the Bush Justice Department defended in court? And are there any cases where the Justice Department has decided to reverse the decision on those denials?

Ms. PUSTAY. Once the guidelines were issued last year, there was a review conducted and of course that has been an ongoing process of all pending litigation cases to identify any case where there was good potential for additional releases of information as a result of application of the new guidelines. And there certainly have been cases where additional information was disclosed as a result of the re-review.

We had on Monday a Sunshine Week event at the Department of Justice, and we had some speakers highlighting significant accomplishments at their agencies. And the U.S. Trade Representative was one of those speakers. And one of the specific things they highlighted was the discretionary release that they made in litigation after the guidelines were issued of never before released trade negotiation documents. So it was really, I thought, a very nice example of additional disclosure that was made.

Ms. CHU. Very good.

Let me talk about a concern that was raised to me from the Asian American Legal Defense and Education Fund. They had some concerns. I mean, I think this policy of openness is great, but they had concerns about whether private information from census forms could be released in response to a FOIA request.

Can you assure me that there is no reason for them to be concerned about this information coming out in a FOIA request?

Ms. PUSTAY. Right.

Ms. CHU. And how is the privacy of those particular forms protected, which is an especially sensitive subject right now?

Ms. PUSTAY. Right at this moment in time. We just filled out our form at home.

This is a really excellent question because the challenge with implementing the FOIA and increasing openness is that agencies have to take into account legitimate interests that need protection from public disclosure, and personal privacy is obviously at the top of the list of interest that needs protection.

And so the key to successful implementation of FOIA is properly balancing the public's interest in transparency, with individuals' interests in protecting personal privacy. And that is what agency officials do every day and that is a big part of what we give training on is how to conduct privacy analysis and make sure that privacy is being protected.

Now, specifically with census forms, though, in addition to privacy protection, which would be very readily and easily applied to the people who fill out a census form, there is also a statute that gives protection to information gathered under the census. So there would be an additional even stronger way to protect that information. You have a statute that protects it. You also have overlapping protection of a privacy exemption. So it is very, very strongly and easily protectable.

Ms. CHU. Thank you.

Mr. CLAY. Thank you so much.

Mr. McHenry.

Mr. MCHENRY. Thank you, Mr. Chairman.

Thank you all for your testimony. I certainly appreciate you being here.

Ms. Pustay, how much is this decline in the backlog of FOIA requests natural at the end of administrations?

Ms. PUSTAY. Oh, I don't think it is natural at all. I think, in fact, the opposite would be true. I think that to have a reduction in backlogs so early in a new administration is quite remarkable. And to have a nearly 50 percent reduction in backlog is just quite a good accomplishment. We are not done with our work on reducing backlogs, and certainly all these elements of transparency, espe-

cially I work with agencies to encourage them to make improvements on. We still have work to be done. There is no doubt about it. But to have done this much on backlog reduction in 1 year I think is quite a big accomplishment. And I directly tie it to our focus on this as part of the new transparency initiatives.

Mr. MCHENRY. OK.

Ms. Melvin, with the GAO, has there been research on what is sort of the natural ebb and flow of these requests?

Ms. MELVIN. We have not looked at the requests recently. Our work primarily was between 2001, for the annual reports, it was 2002 and 2006. In that timeframe, we did see increases in the backlogs up through 2006, although we did see a decrease, if you will, in terms of the rate of increase in the backlogs that were pending, the pending backlog, I should say. But since then, we have not seen more recent numbers relative to the actual numbers for backlog at this time.

Mr. MCHENRY. Ms. Nisbet, your office was created by legislation in 2007 and you opened I believe in 2009.

Ms. NISBET. September 2009, just about 6 months.

Mr. MCHENRY. OK. So we are still early.

Ms. NISBET. Yes.

Mr. MCHENRY. Where are you in this process of getting up and running?

Ms. NISBET. Well, we now have our full complement of six staff members, so that is great. Our sixth member arrived just a few weeks ago. We are already handling cases and have been handling cases for a number of months now. We are seeing quite an increase in our backlog. I am sorry, not our backlog. Oh, we don't have a backlog. [Laughter.]

In our caseload. We have in 2010 already more than twice as many cases as came to us in the last few months of 2009. Now, granted, a lot of people didn't know we existed and that is one reason we really appreciate the attention of this subcommittee to our office. It helps to let people know that our services are out there and that we are available.

Mr. MCHENRY. So have you begun the process of mediation yet? Or where are you in that process?

Ms. NISBET. We are handling cases ourselves in what we would call an informal way. We are putting together a pool of trained mediators. They will be people who are both with the Government and also outside the Government so that we have a pool of neutral trained mediators to handle cases. So far, we are doing pretty well just in using our staff, but we do know that there will be cases that really require much more time in terms of hours and days, and we will need to actually devote people just to working on those cases, but we are getting ready for that.

Mr. MCHENRY. OK. So when does mediation begin? Do you have your first case?

Ms. NISBET. We would be ready to start just about any time. We do have a number of people who are sort of ready and standing and ready to go, but we have not had a case yet that really requires that.

Mr. MCHENRY. OK.

Ms. NISBET. So far, we have been able to do it with our own staff as opposed to hiring trained mediators to come in and handle cases on an ad hoc basis.

Mr. MCHENRY. And in the 6-months you have been up and running how many requests have you had?

Ms. NISBET. We have had about 110 cases. We have resolved 84 of those. We do still have some right now that are pending that we are working on. But so far, we have had a very good reception from the agencies that we have worked with. And we are finding that we are able to handle them pretty well so far.

Mr. MCHENRY. And who are you intending to help? Just so people understand.

Ms. NISBET. Well, we are intending to help both FOIA requesters and the agencies to whom they have made requests in overcoming obstacles that may be keeping the request from being fulfilled in a timely fashion, or because of substantive reasons. We have had requests mostly for help from FOIA requesters so far, but let me tell you, we also have had some requests for assistance from agency personnel as well who have asked us to help intervene when they have had a particularly difficult problem with a requester.

So our intention is to do all of that. I mentioned that we are going to be offering starting next week dispute resolution skills training. That is something we are doing with the Justice Department, with the help of the Federal Energy Regulatory Commission. They have a very good ADR, alternative dispute resolution program.

We are doing skills training for FOIA personnel, Government personnel, to help them better be able to work with requesters and really just improve customer service. So in that respect, we have some training that is going to be targeted directly for Government personnel to help them.

Mr. MCHENRY. Very good. Thank you. Thank you for your service.

Ms. NISBET. Thank you.

Mr. CLAY. Thank you, Mr. McHenry.

Ms. Melvin, do you see any trends emerging over the last year with FOIA requests or with the agencies?

Ms. MELVIN. The last time that we did a report that actually talked about trends was in 2008. At that time, as I mentioned earlier, we did see some increase in the pending requests, although that increase was slowing. We also had seen an increase in the number of requests that were being received by the agencies, and that also was flattening out a bit.

Since then, we have not done a study. At that time, it was at a point when the guidance was changing and we felt that we needed to give some time to the agencies to really implement new requirements, if you will, in terms of numbers and statistics that they needed to really assess and report on their progress. That being the case, I believe that we are now in the process of actually putting together plans to try to look at this again, but that would have been the last time that we saw such a trend.

Mr. CLAY. Thank you.

Mr. Gottesman, we don't often get to hear directly from someone so directly involved in the FOIA process at an agency. What are

some of the misconceptions you think the public has about the work of FOIA officers?

Mr. GOTTESMAN. The work of FOIA officers. I think some of the misperceptions that we see is really not necessarily our role as a FOIA officer in helping process and helping create policies to be more transparent. What we see more and more as an agency is individuals who think that the open Government and the President's policies and the Attorney General's guidelines means everybody gets everything they want no matter what it is.

And we have seen in the beginning lots of requests that the Agency protected information because it was confidential business information or exemption for material. Now, can we please have it because the President has said give us everything.

And we see people like that who just read about it in the newspaper and just feel that it shouldn't, just because it is commercial business information, if it is covered by a Trade Secrets Act, we want it; we should get it.

And the Agency has made great strides to try to work with those requesters.

Mr. CLAY. Give me an example of what the Agency has been doing to reduce the backlog. I mean, I think it is very impressive that you reduced it at such a dramatic rate. And how has that improved services to requesters?

Mr. GOTTESMAN. We looked at our process. We looked at available data bases. A good example a little while ago is if you want to export a car to certain foreign countries, you need to get a certificate of conformity from EPA. It is a printout, literally a document that is on a data base. We worked with the office that maintains the data base and actually the data base on our Web site so individuals who need to get this information don't have to wait 3 or 4 days or a week or 2 weeks to get the information. With any internet access, they can go into our data base and within 5 or 10 seconds print out the certificates they need. Of course, for those individuals who don't have Internet access, of course we will still make that available to them.

At EPA, we get a lot of requests, probably almost half the requests we get are what we call due diligence requests, where someone is doing a real estate transaction and they need to know what does EPA know about my property. We are working with our program offices and hopefully we will have it deployed next month or so where individuals can go on our Web site, put an address in, and find out what EPA knows about your property.

As it turns out, almost half our requests are no record responses because people want us to have no information about your property, no adverse information. So if you look at our requests, half are almost no record responses, and that is what the public wants. But instead of having to make a request, they will be able to get that information on their own when they want, anytime they want.

Mr. CLAY. Thank you for that response.

Ms. Nisbet, I can imagine that for an individual FOIA requester after a lengthy process of not getting access to the information they seek, your mediation services must be very welcome. Can you give us a sense of the impact of mediation on agency FOIA officers? And do they view the process as positive?

Ms. NISBET. Mr. Chairman, I will go with the end of your question first because I would like to reiterate that we have gotten a really good strong response from agencies who seem to really welcome our services.

One way that the 2007 amendments to FOIA envisioned not only that mediation would be provided not only by our office, but there would be a statutorily recognized role for the FOIA public liaisons at the agencies to resolve disputes. We believe that with that added specific responsibility for the FOIA public liaisons throughout the agencies, working with us, working with the Justice Department, emphasizing the importance of preventing disputes, to head them off, to improve communication and to have good FOIA customer service from the very beginning, that will definitely have an impact.

Thank you.

Mr. CLAY. Let me also ask you, one of OGIS's responsibilities is to recommend policy changes to Congress and the President to improve the administration of FOIA. When do you think you will have enough experience and data to make your initial recommendations to us?

Ms. NISBET. We believe, sir, that we will be able to make at least a report on what we are seeing within the first year, by the end of fiscal year 2010. So we are aiming for having a report to you all by the end of September this year with at least what we are seeing now, and some recommendations.

Mr. CLAY. Very good. I look forward to receiving it. Thank you.

Ms. NISBET. Thank you.

Mr. CLAY. Ms. Pustay, the Sunshine in Government initiative has found that agencies have cited at least 250 statutes on the books to deny information under exemption three of the FOIA which prohibits release of information that is specifically exempted from disclosure by another statute.

A recent American University study concluded that just 153 statutes qualify under exemption three, suggesting that 40 percent of the statutes claimed by agencies are invalid. To avoid further litigation, what else could the administration and Congress do to rein in the use of this exemption? Do you have any opinions about that?

Ms. PUSTAY. I have actually a couple of reactions to it. First of all, I think to put transparency on this issue, in fact we have compiled a chart of all exemption three statutes that have been found to qualify by the courts as exemption three statutes, and have published that on our Web site so that agencies have a ready spot to go to see statutes that have been found to qualify.

But I guess I would question part of the premise of that question because until a court rules on the validity of an exemption three statute, all you have is presumption or guess as to whether something is a proper exemption through statute or not. Ultimately, a court decides what is a proper statute. That is why what we have done is compile the statutes that courts have found to qualify.

And then, of course, the FOIA was just recently amended to require that any statute passed by Congress that is an attempt to be an exemption three statute specifically says that is what it is, and cites to exemption three. So that should make it a lot easier for agencies to spot these statutes in the future.

Mr. CLAY. Thank you for that response.

We have no further questions for this panel. Let me thank you all for your indulgence, for your time today, and this panel is dismissed. Thank you.

I now would like to introduce our second panel. And our first witness will be Mr. David Sobel, senior counsel at the Electronic Frontier Foundation, which he directs the FOIA Litigation for Accountable Government Project. He has handled numerous cases seeking the disclosure of Government documents on privacy. In 2006, Mr. Sobel was inducted into the First Amendment Center's National FOIA Hall of Fame.

He was formerly counsel to the National Security Archive and cofounder of the Electronic Privacy Information Center. He is a graduate of the University of Michigan and the University of Florida College of Law.

Welcome.

Our next witness is Ms. Sarah Cohen, the Knight Professor of Journalism at the Sanford School, Duke University. Ms. Cohen worked for 15 years as a reporter and editor, most recently for the Washington Post. She shared the 2002 Pulitzer Prize for investigative reporting for the Post series, the District's Lost Children, and that was quite a series, which uncovered failures by child welfare agencies that contributed to dozens of children's deaths.

She has taught journalism courses at the University of Maryland and is the author of Numbers in the Newsroom: Using Math and Statistics in News.

Ms. Cohen earned her undergraduate degree in economics at the University of North Carolina-Chapel Hill, and her master's degree in journalism at the University of Maryland.

Does that make you a Terp or a Tarheel?

Ms. COHEN. Tarheel, of course.

Mr. CLAY. OK. [Laughter.]

After Ms. Cohen, we will hear from Ms. Adina Rosenbaum, an attorney at Public Citizen Litigation Group. Many of her cases involve access to records under the FOIA. She also serves as the director of the Freedom of Information Clearinghouse, providing assistance to journalists, academic organizations and others seeking information from the Government under FOIA and other open government laws.

Ms. Rosenbaum received her J.D. from New York University School of Law and her undergraduate degree from Harvard University.

And welcome.

Our next witness will be Dr. David Cuillier, an assistant professor at the University of Arizona School of Journalism. He is chairman of the Society of Professional Journalists' National Freedom of Information Committee. He gathered public records as a government reporter and city editor for a dozen years at daily newspapers in the Pacific Northwest.

Mr. Cuillier was awarded the 2007 Nafziger White Dissertation Award by the Association for Education in Journalism and Mass Communication for the top dissertation in the field. He received his B.A. from Western Washington University and his M.A. and Ph.D. from Washington State University.

And welcome to the committee.

Our final witness today will be Mr. Thomas Fitton, the President of Judicial Watch, a conservative nonpartisan educational foundation that promotes transparency, accountability and integrity in government, politics and the law. He has 20 years of experience in conservative public policy. Previously, he worked for America's Voice, National Empowerment Television, and was a talk radio and television host and analyst.

And welcome, Mr. Fitton.

And let me thank all of our witnesses for appearing today. I look forward to their testimony.

It is the policy of the subcommittee to swear in all witnesses before they testify. Would you please stand and raise your right hands?

[Witnesses sworn.]

Mr. CLAY. Thank you, and you may be seated.

Let the record reflect that the witnesses answered in the affirmative.

And before we go to the witnesses' testimony, I want to reiterate that we will hold the witnesses to their agreements not to discuss any pending court matters. And I ask that each of the witnesses now give a brief summary of their testimony. Please limit your summary to 5 minutes. Your complete written statement will be included in the hearing record.

Mr. Sobel, please begin with your opening statement.

STATEMENTS OF DAVID SOBEL, SENIOR COUNSEL, ELECTRONIC FRONTIER FOUNDATION; SARAH COHEN, KNIGHT PROFESSOR OF JOURNALISM, DUKE UNIVERSITY, ON BEHALF OF SUNSHINE IN GOVERNMENT INITIATIVE; ADINA H. ROSENBAUM, DIRECTOR, FREEDOM OF INFORMATION CLEARINGHOUSE, PUBLIC CITIZEN; DAVID CUILLIER, ASSISTANT PROFESSOR, UNIVERSITY OF ARIZONA SCHOOL OF JOURNALISM; AND TOM FITTON, PRESIDENT, JUDICIAL WATCH

STATEMENT OF DAVID SOBEL

Mr. SOBEL. I would like to thank you, Mr. Chairman and the ranking committee member, Mr. McHenry, for granting me the opportunity to appear before the subcommittee and share my views on implementation of Freedom of Information Act policy throughout the Government.

As senior counsel to the Electronic Frontier Foundation, I am engaged in submitting and litigating requests for information dealing with a fairly wide range of agency information concerning technology policy and how Government use of new technologies potentially impacts individual rights.

In addition to my work on behalf of EFF, I also serve on the Steering Committee of the OpenTheGovernment.org Coalition, and I have also represented a fairly wide variety of public interest and news media organizations during the course of 25 years of litigating cases.

Given that time span, I have had experience litigating cases challenging withholding under both Democratic and Republican admin-

istrations, so I feel that I have a fairly broad view of the issue, and I would like to emphasize the fact that I have never seen this as a partisan issue. I think we have seen some of the rhetoric from different administrations kind of ebb and flow, but primarily the issue is one of bureaucratic culture and limited resources. And I think those are the two really most significant factors in how, from the requester perspective, the Freedom of Information Act actually works.

Certainly in assessing trends over the past year, I think everyone must acknowledge the very positive statements that have emanated from the highest levels of the administration, starting with the President on January 21st of last year, Attorney General Holder's memorandum which was issued a year ago tomorrow, and as Ms. Pustay referenced, the more specific policy guidance that was issued by her office, the Office of Information Policy. I think all of those statements have been very positive and there is not much to fault in any of the things that have been said. I think the right message has been conveyed.

The problem is that for one reason or another that message does not seem to have filtered down to the front lines. I know that the whole panel is going to speak about issues that the requester confronts. I would like to speak specifically about issues that arise in the litigation context. And for that reason, I would like to focus on experiences that I have had that indicate that front line litigating attorneys in the Department of Justice have not received the message that there is a new pro-transparency policy.

At the time that the President took office, EFF had about a half dozen pending cases in the Federal courts. These cases had arisen first under the Bush administration, and I thought that these cases were interesting opportunities to see what effect, if any, the newly articulated policy might have. In all of those cases, once the President made his statement and the Attorney General issued his memorandum, we suggested to the DOJ attorneys handling the cases that perhaps the cases should be stayed to give the agencies an opportunity to consider whether the new policy would have an impact on the disclosures at issue in that case.

Not only did the DOJ attorneys in all but one of those cases reject the suggestion, but they actively opposed motions that we filed with the courts to stay the cases to allow for that reconsideration.

Once the policies were in fact considered to whatever extent they were, we were able to discern no real difference, which is to say that despite the emphasis that the President and Attorney General put on agencies making discretionary releases of information, we saw virtually no additional information released in our cases after the new policy went into effect.

I have cited in my written testimony one specific example in one of our cases of information that was withheld, in that case by the FBI, under circumstances where we were subsequently able to look at the actual information that was withheld, comparing a released version of the documents with the withheld version. And I would refer you to my testimony for the details of that, which is detailed on my organization's Web site with a side by side comparison of documents.

I think on this point, in terms of litigation posture, it is important to emphasize that one of the key points of Attorney General Holder's memo was the claim that the Justice Department's position with respect to litigating and defending cases was going to change. He specifically rescinded the policy that had previously been established by Attorney General Ashcroft and suggested that the Justice Department was going to be taking a harder look at cases when it came to deciding whether or not to defend.

As I say, I have not seen any change, but we would like to be in a position where we can really specifically quantify whether there has been a change. So we have suggested to top Justice Department officials that the Department consider releasing a list of cases that they have declined to defend. This would give us concrete information. This would be the transparent way to see whether that policy is in effect having an impact.

Mr. CLAY. You can go ahead and summarize.

Mr. SOBEL. The Justice Department has refused that request, and I would urge the committee to consider asking the Department for that information, a list of cases that they have declined to defend under the Holder policy.

I just want to emphasize one point that hasn't been raised yet today. I would like to note that in the Senate the other day, Senators Leahy and Cornyn introduced new legislation, the Faster FOIA Act, to establish an advisory committee to look at the problem of FOIA processing delays. I think it is past time that issue be studied and I would urge this subcommittee to look at that issue as well.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Sobel follows:]

Testimony of

David L. Sobel

Senior Counsel
Electronic Frontier Foundation

Information Policy, Census, and National Archives Subcommittee
Of the Oversight and Government Reform Committee

Thursday, March 18, 2010 2154 Rayburn HOB 2:00 p.m.

"Administration of the Freedom of Information Act: Current Trends"

I would like to thank Chairman Clay and Ranking Member McHenry for permitting me the opportunity to appear before the Subcommittee to share my perspective on recent trends in the federal government's administration and implementation of the Freedom of Information Act (FOIA). I am Senior Counsel for the Electronic Frontier Foundation (EFF), a non-profit public interest organization that examines the potential impact of cutting-edge information technology on individual liberties and strives to inform the public about these issues. In that capacity, I direct EFF's FOIA Litigation for Accountable Government Project, through which we pursue transparency requests that focus on, among other things, government collection and use of personal information about Americans and federal agencies' development and use of new information technologies. EFF makes information obtained through such requests available to the public, the media, and policymakers.

In addition to my work on behalf of EFF, I serve on the steering committee of the OpenTheGovernment.org coalition and have represented a variety of public interest and new media organizations. My experience in litigating cases under the FOIA spans more than 25 years, so I have been involved in challenges to official secrecy during both Democratic and Republican administrations. As such, I believe my perspective on these issues is relatively broad, in terms of both the concerns of the FOIA requester community and the manner in which the Act has been implemented for the past quarter century.

The Pro-Transparency Obama Policy Statements

Any assessment of current trends in the administration of FOIA must begin by acknowledging the sea-change we have experienced with respect to official statements of policy emanating from the highest levels of the government. Much has been said about the historic commitment to transparency President Obama

made on his first full day in office,[1] as well as the policy memorandum issued by Attorney General Holder[2] a year ago tomorrow, amplifying the President's directive that a "presumption of openness" should control all agency actions respecting the FOIA. While it has received somewhat less notice than those two highly-visible pronouncements, the fairly detailed guidance issued last April by the Justice Department's Office of Information Policy (OIP)[3] as a follow-up to the Attorney General's memorandum was a very important contribution to the Administration's stated commitment to greater transparency.

EFF has joined with its colleagues in the open government advocacy community in welcoming these developments and applauding the Obama Administration for elevating transparency as a policy priority. While the President and other top officials have said the right things and attempted to convey the right message, implementation of their stated objectives remains unfulfilled and there are strong indications that bureaucratic resistance to transparency in general – and FOIA in particular – continues to pose significant challenges to the realizations of their goals. Unfortunately, among those who appear somehow to have not heard the pro-transparency message are frontline attorneys in the Justice Department who, despite the Attorney General's pronouncements, continue reflexively to defend the withholding of government information when FOIA requesters find it necessary to bring cases to the federal courts.

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[1] Barack Obama, "Memorandum for the Heads of executive Departments and Agencies: Freedom of Information Act," (Jan. 21, 2009).

[2] Eric Holder, "Memorandum for Heads of executive Departments and Agencies: Freedom of Information Act," (March 19, 2009).

[3] Department of Justice, FOIA Post, OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a "New Era of Open Government," (April 17, 2009), http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm.

No Discernible Impact on Pending Cases

When President Obama assumed office in January 2009 and announced a new disclosure policy for the Executive Branch, EFF had a half dozen FOIA lawsuits pending. We believed that these cases presented a unique opportunity to assess the impact of the new administration's recently articulated presumption in favor of disclosure. The cases, which sought information on a range of government activities, including the FBI's collection of billions of records in its Investigative Data Warehouse[4] and the Department of Homeland Security's use of its data-heavy Automated Targeting System,[5] initially arose under the Bush Administration's pro-withholding policies.[6] Assuming that the words of the President and the Attorney General would have a tangible impact on the agencies' positions in these cases, we suggested to the DOJ attorneys handling the cases that further proceedings should be stayed to permit the agencies to re-evaluate their withholding decisions in light of the newly-announced policy shift. In all but one of these cases, the defendant agencies rejected our suggestion and actively resisted any requirement that they take into account the guidance issued by the President and the Attorney General.

Ultimately, despite the direction of the Attorney General and OIP that agencies make "discretionary releases" of information where no foreseeable harm would result – even if the material was technically exempt from disclosure – our pending lawsuits resulted in the discretionary disclosure of virtually no substantive information, even in cases where tens of thousands of pages of records were at issue. As such, we were unable to discern any real difference between the manner

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[4] *EFF v. Dep't of Justice*, Civ. No. 06-1773-RBW (D.D.C.).

[5] *EFF v. Dep't of Homeland Sec.*, Civ. No. 06-2154-RBW (D.D.C.).

[6] *See, e.g.*, John Ashcroft, "Memorandum for Heads of all Federal Departments and Agencies: The Freedom of Information Act," (Oct. 12, 2001).

in which the disputed information was handled first under the Bush policy, and later under the Obama policy.

A Rare Glimpse Behind an Agency's Withholding Decision

One case in particular offers an interesting glimpse into the continuing failure of many agencies to implement the Obama Administration's transparency directives.[7] Over the years, we have grown accustomed to receiving agency documents with large amounts of information blacked out – or "redacted" in the official parlance. While we often suspect that much of these deletions are made to conceal innocuous, or perhaps embarrassing, information, it is usually impossible to confirm those suspicions. But we were recently able to learn precisely what a recalcitrant agency improperly withheld from public view.

This opportunity arose when the Washington Post published a series of internal FBI e-mail messages concerning the Bureau's abuse of national security letter (NSL) authority. NSLs are used to obtain, among other things, telephone toll billing records and subscriber information and electronic communication transactional records. In a report issued in March 2007, the Justice Department's Inspector General concluded that the FBI had systematically violated the law by improperly issuing hundreds of NSLs without proper authorization.[8] Within days of the IG's report, EFF submitted an FOIA request to the FBI for documents detailing these abuses. Of the tens of thousands of pages of material that the Bureau eventually identified as responsive to our request, the vast majority of the relevant information was redacted.

The e-mail messages published by the Washington Post were obtained from an FBI whistleblower who had been directly involved in the Bureau's handling of

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[7] *EFF v. Dep't of Justice*, Civ. No. 07-656-JDB (D.D.C.).

[8] Department of Justice, Office of Inspector General, A Review of the Federal Bureau of Investigation's Use of National Security Letters, Special Report, March 2007.

NSLs. Through a careful comparison of the redacted material released to EFF by the FBI with the recently published messages, we were able to see precisely what the Bureau withheld. We were particularly struck by the fact that the FBI redacted all references to a proposal that had been floated within the Bureau to legitimize questionable demands for communications records – a plan that the DOJ Inspector General clearly described in his report. According to the IG's report, a review of e-mail exchanges revealed that Bureau attorneys had proposed the establishment of "generic" or "umbrella" investigations that the FBI could use to issue NSLs "when there were no other pending investigations to which the request could be tied."

A side-by-side comparison of the redacted and full-text e-mail messages shows that the FBI withheld all references to its proposal to use "generic" or "umbrella" investigations as a rationale to justify questionable demands for sensitive information relating to private communications.[9] The FBI continued to withhold this information even after the President and Attorney General announced that a new "presumption of openness" should guide agency FOIA implementation. Despite the fact that the Attorney General had directed that the Justice Department only defend an agency's decision to withhold information if it could demonstrate a "foreseeable harm" from disclosure, in this instance DOJ attorneys defended the FBI's withholding of information that, as we now know, was revealed by the Department's own Inspector General three years ago. This episode does not generate a great deal of confidence in DOJ's willingness (or perhaps ability) to fulfill the Attorney General's promise.

DOJ's Defense of Agency Withholdings Appears Unchanged

I believe it's important to emphasize this last point. One of the significant differences between the Ashcroft policy and the Holder policy was the altered standard for DOJ defense of agencies in FOIA litigation. While Mr. Ashcroft told

[9] *See* http://www.eff.org/pages/sunshine2010

agencies that "[w]hen you . . . decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis." Mr. Holder expressly rescinded that policy. In its place, he directed that DOJ "will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."

While this change was lauded by the transparency community – especially those of us who actively litigate FOIA cases – we have not witnessed any notable change in the Justice Department's reflexive willingness to defend every FOIA lawsuit aggressively. In response to this concern, several organizations that often find it necessary to resort to the courts for relief made a simple suggestion to top officials at DOJ: in the spirit of transparency, the Department should periodically publish a list of FOIA lawsuits it has declined to defend under the Holder standard.[10] Only by making such information public, we argued, will recalcitrant agencies be put on notice that the policy of the Executive Branch has, indeed, changed. We were disappointed to find that DOJ officials rejected this suggestion and appear unwilling to account for the manner in which the supposedly revised FOIA case defense policy is being implemented. I would urge this Subcommittee to request this information from the Justice Department and consider making it publicly available. Tomorrow marks the first anniversary of the issuance of the Attorney General's memorandum on FOIA policy, and I believe it is an appropriate time for the American people to be put in a position to assess the true impact of the changes announced in that document.

Make Transparency a "Critical Element" of Job Performance

Allowing agencies to see that DOJ is not going to defend every withholding decision would be just one way to begin changing the ingrained culture favoring secrecy that pervades many agencies. The high-level pro-disclosure message

[10] *See, e.g.*, http://www.openthegovernment.org/otg/FOIAissuesDOJ.pdf

needs to filter down to the frontlines, where agency employees handle FOIA requests on a daily basis. Training sessions and policy memos can only achieve limited results in changing the culture; agency personnel need to know that there are now high expectations with respect to their support of, and compliance with, transparency goals, and that their work in furtherance of those goals will be measured along with other "critical elements" of their jobs. Serious consideration should be given to incorporating transparency elements into the annual performance review process, to create incentives for exceptional achievement in this area.

Study – and Solve – The Processing Delay Problem

Congress should also consider the issue of resources made available for agency FOIA compliance. I am not unsympathetic to the burden that many agency employees encounter when they attempt to be diligent in responding to FOIA requests in a forthcoming and timely fashion. Nonetheless, as a requester, it is frustrating to know that the statutory deadline of twenty working days for response to a request has become one of the longest running jokes within the federal government. It is not uncommon for agencies to take many months, if not years, to complete their processing of requests. Indeed, even when tardy agencies are sued for lengthy processing delays, they often ask for – and receive – so-called *Open America* stays that allow them even more time to complete their work. In one of EFF's cases, the FBI requested a *six-year* stay[11] – a delay that would be shocking if it was not relatively commonplace.

The problem of delay has been with us for a long time, but has not, in my view, ever been examined in a serious way. To that end, many of us in the transparency community have, for several years, advocated the creation of a federal advisory committee to address the issue. I am pleased to note that, earlier this week, Senators Leahy and Cornyn introduced the "Faster FOIA Act," bi-partisan legislation that would establish an advisory panel to examine agency

[11] *EFF v. Dep't of Justice*, 563 F. Supp. 2d 188 (D.D.C. 2008).

backlogs in processing FOIA requests. Under the legislation, the panel – the Commission on Freedom of Information Act Processing Delays – would be required to provide to Congress recommendations for legislative and administrative action to enhance agency responses to FOIA requests and identify methods to reduce processing delays. I strongly urge the Subcommittee to take up this issue and support establishment of the Commission.

The White House Should Lead By Example

As noted, the Obama Administration deserves a great deal of credit for elevating the goal of transparency to an unprecedented level within the Executive Branch. The White House itself has also taken steps to make its own activities more open to public view, most notably in its decision to release the names of individuals visiting the White House complex for official purposes. While this high-profile example of greater transparency is certainly a step in the right direction, there remain other instances in which the current administration is, in fact, less transparent than many of its predecessors with respect to White House operations.

In the early days of the Obama Administration, EFF submitted requests directly to the White House for information concerning two technology issues that had generated a significant amount of public attention. In a letter sent to then-White House Counsel Gregory Craig on January 27, 2009, we requested information about the use of visitor-tracking cookies on the WhiteHouse.gov website, noting the controversial privacy implications of the practice.[12] While recognizing that the Counsel's Office is not subject to mandatory disclosure requirements under FOIA, we asked Mr. Craig, in keeping with the President's stated commitment to transparency, to nonetheless make relevant information public. After not receiving a response to our initial request, we followed up several times, reiterating the public interest in information about the privacy practices of

[12] http://www.eff.org/files/EFF_letter_craig.pdf

federal websites. More than a year after submitting our request, we have received no response.

On February 12, 2009, we sent a request letter to the White House's Office of Administration seeking disclosure of information about the President's "BlackBerry" (or whatever type of handheld device he uses) and policies governing the use of various electronic communications devices and systems by the President, Vice President, and White House staff.[13] We noted that electronic messaging raises a host of issues under federal open records laws, and our belief that the public has a right to know about the policies and procedures that have been put in place to ensure compliance with those laws. As we also noted in our letter, the Bush Administration took the position (for the first time in history) that the White House Office of Administration is not subject to FOIA. Although the courts have upheld the previous administration's position on the issue,[14] we noted in our request letter that, if President Obama intends (as he has said) to "usher in a new era of open Government" and "creat[e] an unprecedented level of openness in Government," it seems that a good place to start is in the White House by reversing the Bush policy that banished FOIA from the premises. We have never received a response to our request, nor has the counsel's office responded to a letter submitted by 37 open government advocates urging a reversal of the Bush Administration policy with respect to the status of the Office of Administration.[15]

Earlier this week, in recognition of Sunshine Week, President Obama declared that his administration "will continue to work toward an unmatched level of transparency, participation and accountability across the entire

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[13] http://www.eff.org/files/OA_FOIA_request.pdf

[14] *Citizens for Responsibility & Ethics in Washington v. Office of Admin.*, 566 F.3d 219 (D.C. Cir. 2009).

[15] http://www.politico.com/static/PPM116_office_admin.html

Administration."[16] To that end, the open government community urges the President to return to the practice of many of his predecessors and restore FOIA access to the records of the Office of Administration. Through such action, the White House can lead by example and send a strong message that the rhetoric of transparency must be made a reality in the everyday operations of the Executive Branch, from the highest levels on down.

Thank you for your consideration of my views, and I would be glad to respond to your questions.

[16] http://www.whitehouse.gov/the-press-office/statement-president-sunshine-week

Mr. CLAY. Thank you for your testimony and suggestions.

Ms. Cohen, you may proceed, 5 minutes.

STATEMENT OF SARAH COHEN

Ms. COHEN. Thank you, Chairman Clay, Ranking Member McHenry and members of the subcommittee. I also want to thank you for the opportunity to talk about FOIA today on behalf of the Sunshine in Government Initiative. And I would also like to thank you for your continued interest in the ability of the public to access important Federal records and information.

In 15 years as an investigative reporter and editor, mainly at the Washington Post, I frequently depended on the law to gain access to important administrative and program records. Last year, I joined the faculty of Duke University as its Knight Chair in journalism. And while I am still close to daily journalism, I am now more free to report on my own experiences and those of colleagues who are still in the business.

Mr. Chairman, we have seen some improvements in transparency in government, but in general, the FOIA process has remained largely unchanged. President Obama's day one transparency initiative raised the hopes of those who depend on FOIA to inform citizens of the activities of Government taken in the public's name and with the public's money.

There have been some improvements, starting with the President's decision to voluntarily release White House visitor logs, largely as a sign to other agencies and to ease the path to requesting financial disclosures. Some reporters are saying that some agencies, in particular EPA, are opening up records without requiring FOIAs anymore. But based on my own experience and reports from other journalists and others who work with public records, transparency for the purpose of Government accountability has changed very little.

I would like to suggest four areas in which the FOIA doesn't work the way it was intended, and hasn't for the generation in which I have been a reporter. The first is that delays seriously inhibit FOIA's promise of disclosure. The ability to wait out a FOIA request remains the most glaring power imbalance between requesters and agencies and releases are often irrelevant by the time they are completed.

One reporter in Texas recently has not received documents promised from an agency for more than a year. And I would like to mention that I have never received a FOIA request in the time required by law.

In 1996, Congress recognized that administrative records held in electronic form had become one of the most difficult sticking points in the law, and enacted several changes, but few agencies have kept the promise of those reforms. Agencies are required to post online frequently requested records, yet the correspondence of Treasury Secretary Geithner, details on reconstruction spending in Iraq and Afghanistan, and original nursing home inspection reports often can't be accessed on the Web.

In addition, the required tools to help requesters, such as indexes of information systems, are obsolete or poorly documented. And finally, a growing number of agencies are refusing to release infor-

mation in the requested data form, even though the 1996 amendments require agencies to make them available in the form requested when they exist that way.

Third, when Congress mandates transparency, agencies only sometimes comply. Congress has enacted law to ensure release of important records on a timely basis, but those laws are sometimes twisted to do just the opposite, and I detail several examples of those in my written testimony.

And finally, requesters don't know where to turn when FOIAs have stalled. Few agencies make the job of Chief FOIA Officer a primary function and few requesters are aware of OGIS. Last year, for example, a reporter requested of an agency all correspondence regarding human trafficking. Several months later, he received a letter with a cost estimate to reproduce 700 responsive documents, but he could never tell anyone how to proceed. Numerous phone calls and emails were never answered and his story eventually ran without the information that might have been provided in those documents. A phone call to OGIS might have helped, but the Office can't be expected to resolve every case.

Congress could do several things to help. First, it could clarify the definitions of frequently requested records and ask agencies to review FOIA logs at least once a year for classes of records that should be proactively disclosed.

Second, Congress could also build transparency into new laws and new computer systems. And third, Congress could encourage agencies to proactively release information of interest to the public such as agency correspondence, calendars, lists of political appointees, and grant audits.

Journalists expect that the needs for records and transparency will sometimes conflict with other priorities such as personal privacy and national security, but I think most reporters would be happy to disagree on those substantive matters if the Government readily released common documents, reduced delays and offered a more effective path to resolution.

Thanks for the opportunity to present these views on the state of FOIA.

[The prepared statement of Ms. Cohen follows:]

Testimony
Of
Sarah Cohen
On Behalf of
Sunshine in Government Initiative

Information Policy, Census, and National Archives Subcommittee
Oversight and Government Reform Committee

Thursday, March 18, 2010
2154 Rayburn HOB
2:00 p.m.

"Administration of the Freedom of Information Act: Current Trends."

Chairman Clay, Ranking Member McHenry and Members of the Information Policy, Census, and National Archives Subcommittee, I would like to thank you for the opportunity to discuss the state of the federal Freedom of Information Act (FOIA) on behalf of the Sunshine in Government Initiative, a coalition of media associations promoting open government. I would also like to thank you for your continued interest in the ability of the public to access important federal records and information.

After 15 years as an investigative reporter at the Washington Post, where I frequently depended on the law to gain access to important administrative and program records, last year I joined the faculty of Duke University's Sanford School of Public Policy. While I am still close to daily journalism and will continue to pursue stories, I am more free to report on my own experiences and those of colleagues who are still pursuing important public affairs journalism.

Mr. Chairman, the past year has seen several improvements in transparency in government, but the FOIA process has remained largely unchanged.

A year ago, the promise of President Obama's "day one" initiatives to re-embrace the values of open government raised the hopes of those of us who work in the realm of government accountability – investigative reporters, open government experts and a range of public interest organizations who depend on the Freedom of Information Act and transparency to inform citizens about the activities of government taken under the public's name and with the public's money.

There have been some improvements, starting with the President's decision to voluntarily release the White House visitor logs and to ease the path to requesting financial disclosure information for high-level officials. The Open Government Directive may help spur more changes, while centralizing the most basic government statistics and data products at data.gov is a convenience. Some agencies have begun posting important data products, especially those concerning financial institutions, available without the need for FOIA.

But many of the new initiatives and policies have been geared at two prongs of the administration's transparency agenda: collaborative and responsive government. The third prong – transparency for the purpose of government accountability – has changed little, based on my

own experience and reports from journalists and others who work with public records.

One issue is that the nature of the records required for accountability are largely administrative. These are records such as inspections and compliance reports; agency correspondence; calendars of public officials; or grant audits. Most are documents that will require extraction from administrative databases or document searches. Unlike the records typically found on agency websites, such as statistical compilations, consumer service information or basic demographic data, these are records that are requested from deep within the agency.

It was unreasonable a year ago to think we could be magically transported into a world in which problems in FOIA could be fixed overnight.

Even if a single administration could change current practices, subsequent administrations would still be free to turn off the flow of information, important documents and administrative data at the stroke of a pen.

I would like to suggest four areas in which the FOIA law does not appear to work as intended – and hasn't for the generation in which I've been a reporter.

Delays

Receiving documents and data under FOIA remains a path to information that can be used only for the most forward-thinking and patient requesters. I have *never* received a response to federal FOIA request in the time frame outlined in the law, except the form letter telling me that the agency received my letter. One reporter in Texas has not received documents promised from an agency for more than a year. Another was informed before Christmas that his FOIA was almost ready, but now cannot convince the agency to release any records nor negotiate for any release. The ability to wait out a FOIA request remains the most glaring power imbalance between requesters and agencies, and releases are sometimes irrelevant by the time they are completed.

FOIA web sites and proactive disclosures

In 1996, Congress recognized that administrative records held in electronic form had become one of the most difficult sticking points in the law, and addressed it by requiring agencies to post "frequently requested records" on an Internet site; provide basic information on major information systems; and release information in the form requested if it existed in that form, such as a database rather than a printout.

Few agencies have kept the promise of these reforms. For example, the correspondence of Treasury Secretary Geithner has not been posted on its website even though news organizations have received it; detailed records on reconstruction spending in Iraq and Afghanistan are not on Defense's website; and original nursing home inspection reports, including the reviewer's notes, are not on the website at the Centers for Medicare and Medicaid. Correspondence logs, desk calendars of cabinet members and lists of political appointees are three of the most commonly requested classes of records for accountability reporting, but I know of no agency that routinely posts these records, nor any that release them without FOIA requests – a practice that, if followed, could reduce the workload of FOIA offices.

Many agencies still reference the defunct system called the Government Information Locator Service, or "GILS," for documenting their information systems. Other required indices are obsolete or so poorly documented that it is unclear whether the systems have been replaced or are still in use. These documents can help reduce backlogs and confusion in the FOIA process because requesters can, in advance, identify whether the records are likely to exist, which part of the agencies hold them, and can identify them more precisely in a request.

Finally, a growing number of agencies are refusing to release information in its original data form, arguing that a requester could conceivably change, corrupt or otherwise misuse the records. Creating these proprietary printouts costs extra money and can create more errors than simply releasing the data in its raw form, especially when they are reverse-engineered back into a database.

Compliance with Congressional mandates for transparency

In other areas, recognizing that FOIA does not work as well as it should, Congress has enacted laws to ensure release of important records on a timely basis, but those laws are sometimes twisted to do just the opposite. A current issue in the news – defective drywall used throughout the South – is the subject of thousands of complaints to the Consumer Product Safety Commission. The relevant law – the Consumer Product Safety Improvement Act of 2008 – and its implementing regulations require that the commission alert a manufacturer to complaints within five days and publicly publish the information and any responses from the company within 10 in a searchable database. However, the commission has declined FOIA requests for records that include the company names. The Coburn-Obama bill promised that spending records, in particular, would be available online through the

Office of Management and Budget and provided a deadline by which information on sub-contracts and sub-awards would be posted on usaspending.gov. That deadline has long passed, but the Office of Management and Budget exercised an option to delay its implementation for 18 additional months.

Paths to resolution remain unclear

Responding to the delays and the difficulties in resolving disputes, this committee provided leadership and support to amendments to the FOIA enacted in 2007 that, among other things, created the Office of Government Information Services (OGIS) to mediate disputes and recommend improvements to FOIA's implementation, and codified the creation of chief FOIA officers in each agency to monitor and oversee the agency's implementation.

Although the chief FOIA officers have been named, few agencies make the job a primary function. Reporters still often find themselves in a hall of mirrors, in which a FOIA request has stalled. Few know about OGIS, which in its first 6 months of operation has begun mediating cases but hasn't begun to reach the broader array of requesters who might benefit from its services. Last year, for example, a reporter requested of an agency all correspondence regarding human

trafficking. Several months later, he received a letter with the cost estimate for reproducing 700 responsive documents and was asked how he would like to proceed. He was never able to tell anyone – numerous phone calls and emails were never answered, and his story eventually ran without the information that might have been provided in those records. A phone call to OGIS may have helped, but these problems cannot be left to a single office to fix.

There are several steps that Congress might take in its oversight of FOIA to assure its intent is more closely met:

- Clarify definitions of "frequently requested records," and ask agencies to review FOIA logs at least once a year for classes of records that should be proactively disclosed.
- Build transparency into the oversight of new computer systems, new information systems, and revisions of laws. Currently, agencies work to assure the security and the ability to protect privacy into systems, but do not similarly assure that public information can be extracted from them. The transparency requirements of the Recovery Act resulted in unprecedented openness in the administration of that law. Similar rules could spur better openness across government.

- Encourage compliance with existing law by encouraging agencies to proactively publish online information of interest to the public, such as agency correspondence, calendars and grant audits.

Journalists expect that the needs for records and transparency will sometimes conflict with other priorities, such as protecting personal privacy and national security. However, the issues in FOIA go beyond these relatively straightforward conflicting priorities. I believe most reporters would be happy to disagree on these matters if the government readily released common documents, reduced delays and offered some more effective path to resolution broadly available to FOIA requesters. OGIS is a promise of that, but it needs to develop and grow to have a chance of being effective.

Thank you for the opportunity to present these views on the state of the nation's FOIA.

Mr. CLAY. Thank you so much, Ms. Cohen.
Ms. Rosenbaum.

STATEMENT OF ADINA H. ROSENBAUM

Ms. ROSENBAUM. Thank you, Mr. Chairman, Ranking Member McHenry and members of the subcommittee for inviting me to testify today. I am an attorney at Public Citizen, a nonprofit consumer advocacy organization, and director of Public Citizen's Freedom of Information Clearinghouse.

Since its inception, Public Citizen has worked to promote Government transparency. Through the Clearinghouse and our Public Interest FOIA Clinic, we provide assistance to individuals and organizations seeking information under open Government laws. My comments today are based primarily on trends in processing FOIA requests that we have noticed in our own experience and through conversations with FOIA requesters over the past year.

As has been noted already, from his first full day in office, President Obama has expressed a commitment to creating an unprecedented level of openness in Government and emphasized that a presumption of disclosure should apply to FOIA. We applaud President Obama's new policies in favor of transparency.

But the administration has often focused more on affirmative disclosure and tools for interaction between Government and the public than on FOIA itself, and I don't want to downplay the importance of proactive disclosure of records and particularly the usefulness of making records available on agency Web sites.

At the same time, though, FOIA's request and response process plays an important role in ensuring that the public is informed about the Government's activities, and we have found FOIA processing to be inconsistent.

Although I have spoken to requesters who have had better experiences with FOIA in the past year than in previous years, I have also spoken to many requesters who have faced serious problems accessing records. And I want to focus today on four categories of problems faced by requesters: persistent delays, communication misunderstandings, problems due to interagency referrals, and over-withholdings.

First, the problem that requesters mention to us the most is the long amount of time it takes agencies to respond to requests. Although FOIA requires agencies to respond within 20 business days, agencies often take months or even years to respond. Just yesterday, for example, I received a record in response to a FOIA request I made in July 2006.

These sorts of delays both keep requesters from being able to use the records as effectively as possible, but also engender mistrust in the Government. Most requesters I talk to assume that a long delay indicates that the agency is trying to hide something.

As Mr. Sobel mentioned, earlier this week, Senators Leahy and Cornyn introduced the Faster FOIA Act, which would establish a commission to study and make recommendations about methods to reduce delays, and we support the establishment of such a commission.

Congress should also consider creating incentives for agencies to improve response times, such as the loss of the right to claim that

records are exempt under the deliberative process privilege if the agency has not timely processed them.

Another problem we see is breakdowns in communication between requesters and agencies. Over the past year, we have seen increased efforts by agencies to communicate with requesters, which is a step in the right direction. Too often, though, requesters in these conversations feel that they are being pressured into narrowing their requests. They get asked questions like, what is it you really want, when they feel that they have already stated what they really want. They want the records listed in their FOIA request.

We have also heard a number of stories about FOIA requests being rejected based on technicalities and of organizations being asked to provide a burdensome amount of details to justify their fee waiver requests.

In addition, interagency referrals sometimes create problems. When agencies have responsive records that originated with another agency, they generally refer those records to the other agency for processing. From the FOIA requester perspective, these records are essentially sent into a black hole.

For example, last June Public Citizen sent a request to the U.S. Trade Representative, which released some records, but referred others to the Federal Reserve and the Departments of Treasury, Commerce, Transportation and State, some of which further transferred the records to sub-agencies. At each stage, the responsible staff member and tracking number would change without Public Citizen being kept up to date of those changes.

Requesters should be able to track a referred request and know who in the new agency is responsible for the request. Agencies also should be required to process and return referred records quickly so as not to multiply delays. An interagency committee devoted to referrals should be established to develop mechanisms that would reduce delay and allow requesters to be able to follow their referred requests.

Finally, problems persist even after agencies respond. Too often, records are redacted or withheld when no exemption applies or when no foreseeable harm would result from release. Continued training and emphasis on the presumption of disclosure is needed to combat these problems.

Further, targeted FOIA amendments would promote Government transparency. For example, we believe that exemption five should include a presumption that older records are not protected under the deliberative process privilege. Targeted changes could make an important difference in allowing the public to understand its Government's activities.

Thank you very much, and I am happy to respond to questions.

[The prepared statement of Ms. Rosenbaum follows:]

Statement of Adina Rosenbaum
Staff Attorney, Public Citizen
Director, Freedom of Information Clearinghouse
on
Administration of the Freedom of Information Act: Current Trends
before the
Information Policy, Census, and National Archives Subcommittee,
Oversight and Government Reform Committee,
United States House of Representatives

March 18, 2010

Thank you Mr. Chairman, Ranking Member McHenry, and members of the Information Policy, Census, and National Archives Subcommittee for inviting me to testify before you today about the Freedom of Information Act (FOIA).

I am an attorney at Public Citizen, a national non-profit consumer advocacy organization, and the Director of Public Citizen's Freedom of Information Clearinghouse. Recognizing that meaningful citizen participation depends on the public's ability to access information, Public Citizen has since its inception been devoted to promoting openness in government. Through the Freedom of Information Clearinghouse, we provide assistance to individuals, organizations, journalists, and academics seeking to obtain information under FOIA and other open government laws. We also run the Public Interest FOIA Clinic, which assists and represents community groups and other non-profit organizations seeking government-held records for advocacy, research, or community service purposes.

Through the Clearinghouse and Clinic, we regularly speak to individuals and organizations that have requested information from the government under FOIA. My comments today are based primarily on trends in processing FOIA requests that we have noticed in our own experience and through our conversations with FOIA requesters over the past year or so.

Perhaps the most striking change in FOIA's operation has been in this Administration's attitude towards government openness: On his first full day in office, President Obama expressed a commitment "to creating an unprecedented level of openness in Government." The President issued a memorandum underscoring the importance of transparency and explaining that FOIA should be "administered with a clear presumption" that in "the face of doubt, openness prevails." On March 19, 2009, Attorney General Holder issued a memorandum on FOIA encouraging agencies to discretionarily release records, rescinding Attorney General Ashcroft's memorandum that took a more narrow view of advisable FOIA disclosure, and announcing that the Department of Justice would defend a denial of a FOIA request only if the law prohibits disclosure or if "the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions."

We applaud President Obama's stated commitment to openness and his new policies in favor of transparency. In promoting transparency, however, the Administration has often focused more on

proactive disclosure and tools for interaction between the government and the public than on the administration of FOIA. I do not want to downplay the need for affirmative disclosure of records and, particularly, the usefulness of making more agency records readily available on agency websites. At the same time, the FOIA request-and-response process, as opposed to unilateral disclosure by agencies, plays an important role in ensuring that the public is informed about the government's activities—particularly about those activities that the government would rather keep hidden—and we have found that the implementation of the Administration's open government goal in response to FOIA requests has been inconsistent.

Over the past year, I have spoken to some requesters who report that their requests are being responded to more quickly than they used to be; that they are receiving documents that used to regularly be withheld; and that they are receiving responses that are more helpful than before. But I have also spoken to many requesters who have faced serious problems accessing records through FOIA requests: Their requests have been followed by months of agency silence; they have found their interactions with agency FOIA personnel frustrating; and the records they have eventually received have contained unsupportable redactions. And with regard to pending litigation, we have found agencies reluctant to reconsider their litigation positions.

I want to focus today on four categories of problems that are often faced by requesters: persistent delays and backlogs, communication misunderstandings with agencies, problems due to inter-agency referrals, and over-withholding and redaction.

I. Persistent Delays and Backlogs

The problem that requesters mention to us the most is the long amount of time it generally takes agencies to respond to requests. FOIA requires agencies to respond to requests within 20 business days, but, in reality, it often takes months, or even years, for agencies to respond. In Fiscal Year 2009, for example, the median amount of time it took the Food and Drug Administration to respond to complex requests was 293 business days.

I hear regularly from requesters who file a request and then, after receiving a letter saying that the request was received, encounter months of silence from the agency. People within my own organization have had similar experiences. For example, in early March, I called an agency about a FOIA request that a colleague of mine made last November and was told that, although the agency hoped to have a response within 60 days, it could not make any promises. In other words, although the statute requires the agency to respond within 20 business days, the agency was not willing to promise that it would respond within six months of when we made the request.

People who call us because they have received no response to their FOIA requests tend to be frustrated and are looking for ways to make the agency respond. They look at the statute, see that the agency has violated the law in taking more than 20 days to respond, and assume they can do something to force a response. Unfortunately, they have little power. If the agency does not respond to a request in the statutory time limits, the requester is deemed to have exhausted her administrative remedies and can go to court, and the process of filing a lawsuit sometimes leads to the production of

records. For example, my office recently represented a woman whose administrative appeal of a FOIA denial had been pending for over eleven months. After we filed a lawsuit, the agency released the requested record. However, litigation is expensive and often has its own delays, and individual lawsuits do not resolve the underlying problem of agency backlogs.

The long periods of time people wait to receive records keep the requesters from using those records as effectively as they could. For example, if Public Citizen's Health Research Group has identified a health safety issue that it believes is harming the public, it wants the records it needs to alert the public about that problem now, not in six months, one year, or two years. But the problem of delay goes beyond whether records can be used effectively. When people do not receive responses in a timely manner, they assume that the agency is hiding something. Most requesters I talk to assume that a long delay indicates that the agency is trying to cover up something or purposefully keep the requester from trying to enter into a policy debate. In this way, delay engenders mistrust in the government and its activities.

The problem of delay and backlog is one that has plagued FOIA for years, and efforts should be taken to try to solve it. Earlier this week, Senators Leahy and Cornyn introduced a bill in the Senate, the Faster FOIA Act of 2010, that would establish a Commission to study methods of reducing delays. The Commission would report back to Congress within a year with recommendations of steps that could be taken to reduce delays. We support the establishment of such a commission to give serious thought to methods of combating delay in responding to FOIA requests. Congress should also consider greater incentives for agencies to respond in a timely manner, such as the loss of the right to claim that records are protected by the deliberative process privilege if the agency has not timely processed them.

Overall, until the problems with delays and backlogs are fixed, FOIA will not be able to fulfill its full potential of ensuring that the government remains open and accessible to the American people, and too many people will come out of the FOIA process believing that the process is driven by a desire for secrecy rather than openness.

II. Communication Between Agencies and Requesters

Over the past year, we have seen increased attempts by agencies to communicate with requesters. Many requesters have reported to us that agencies are calling them after receiving requests to talk about the requests and to get a better sense of where to look for records. Also, requesters seem to be receiving more interim letters letting them know that the agency is in the process of processing their requests. This increase in communication from agencies to requesters is a step in the right direction.

At the same time, there are breakdowns in these communications between agencies and requesters. To begin with, although in general we encourage agencies to get in touch with requesters to better understand requests, requesters too often feel that they are being pressured to narrow their requests in these conversations. An agency will call a requester and ask, "What is it that you really

want?" when the requester feels that he has already laid out what he really wants: He wants the records he requested in his FOIA request. He does not want to limit the request to some subset thereof, and he does not want to have repeated conversations with officials in which he feels that he is being pressured to narrow or withdraw his FOIA request.

We have also heard a number of stories recently about FOIA requests being rejected based on technicalities. In the past few months, for example, a couple of agencies have refused to process Public Citizen FOIA requests because we did not include a statement in the request saying that we would agree to pay $25 in fees. However, requesters who are entitled to fee waivers should not have their requests bounced because they will not promise to pay fees if their fee waivers are denied. Similarly, I recently had a conversation with a FOIA officer who told me that I had not given him adequate information to search for records because I could not tell him what component of his agency would be responsible for issuing the policy guidance I had requested. We have also heard from public interest organizations that are having their fee waiver requests denied on the ground that the organizations have not provided sufficient information showing that they are entitled to a fee waiver, even though their fee waiver requests had regularly been granted for years.

Moreover, some agencies are still very difficult to communicate with because they are difficult to reach. At the beginning of this month, I made multiple phone calls in an effort to contact an agency public liaison and ran into the difficulty that he is not generally at his desk and does not have voicemail. I called the phone number listed for him on his agency's website, and it just rang and rang.

I know that the Office of Government Information Services (OGIS) is doing some work with public liaisons. Hopefully, OGIS will be able to help resolve and mediate some of these communication difficulties. Furthermore, these communication breakdowns demonstrate that additional leadership is necessary to ensure that communications between requesters and agencies promote—rather than hinder—full, timely responses to FOIA requests.

III. Inter-Agency Referrals

When agencies have records responsive to a FOIA request that originated with another agency, they generally refer those records to that other agency for processing. This practice of inter-agency referrals—called consultations in agency annual FOIA reports—creates its own set of delay and communications problems. From the FOIA requester perspective, when an agency refers records to another agency for processing, they are essentially being sent into a black hole.

For example, last June, Public Citizen sent the Office of the United States Trade Representative (USTR) a FOIA request for certain records related to the World Trade Organization and financial services. After a series of phone calls, USTR released some records in whole or in part and referred the remainder to the Federal Reserve, the Department of the Treasury, the Department of Commerce, the Department of Transportation, and the Department of State. After Public Citizen appealed the adequacy of the search, USTR did another round of searching, which turned up more

documents, including two that were referred to the Departments of Treasury and State. Over the following months, Public Citizen staff spent a considerable amount of energy tracking down these referred requests. The records that were sent to the Departments of Transportation and Commerce were sent to the agencies' central FOIA offices, but then transferred to subagencies' FOIA offices. At each stage, the responsible staff member and tracking number would change, without any communication from the agencies to Public Citizen, which is still awaiting a tracking number on one of the documents.

Once an agency refers a request to another agency, it is not productive to communicate with the referring agency about the request, but the requester does not necessarily know whom to contact at the other agency. Moreover, referring records can lead to large delays, as each office that receives the request, in turn, figures out how to respond. These delays can be lengthy. According to its Fiscal Year 2009 FOIA annual report, for example, the Department of State has at least 10 consultations that have been pending for at least 1,000 days. Its oldest consultation has been pending since May 2003.

Systems need to be instituted to facilitate inter-agency referrals. Requesters should be able to track a request that is sent from one agency to another and know who in the new agency is responsible for tracking the request. Moreover, given that the receiving agency does not need to conduct its own search—just to review the records that have been referred to it—agencies should be required to process and return the records quickly, so as not to multiply the delays experienced by the requester. An inter-agency committee devoted to consultations and referrals should be established to develop mechanisms for referring requests from one agency to another that would reduce delay and allow requesters to be able to follow and follow up on their referred requests.

IV. Redactions and Withholdings

I have focused so far on problems with agencies responding to FOIA requesters, but requesters' difficulties in receiving records persist even after they receive a response. Despite the President's and Attorney General's directions that a presumption of disclosure be applied, too often records are redacted or withheld when no exemption applies or when no forseeable harm would result from releasing them. Indeed, last Monday, the National Security Archive released its FOIA audit and found no clear upward trend in discretionary releases.

For example, agencies continue to invoke the deliberative process privilege in Exemption 5 to withhold records that contain factual information or where the deliberations took place decades ago. We represented a requester in a case earlier this year in which the agency had been withholding the contents of a box marked "final action" under the deliberative process privilege, which applies only to predecisional documents. Similarly, agencies tend to withhold the names of agency personnel when they release records, even when the release of the person's name would not reveal anything embarrassing about them or make them targets of harassment or attack; we have seen an agency produce hundreds of e-mails in which every name in the "To" and "From" line was blacked

out, making it impossible to know whether e-mails went from a superior to a subordinate, or vice-versa, and whether the same or different people were participating in the various communications.

Of course, when agencies redact or withhold records that are not exempt, the requester can go to court and challenge the withholding. Again, however, requesters do not always have the time and resources to litigate their FOIA denials. We are pleased that OGIS has already been able to provide mediation to help some agencies and requesters resolve their disputes over withholdings. We hope that agencies will be open to participating in OGIS's mediation procedures and believe that they should be instructed that they are expected to engage in the mediation process when it is requested of them.

In addition, continuing training for agency staff and emphasis on the presumption of disclosure is needed. The Administration's encouragement of prizes and challenges to promote open government is a step in the right direction toward encouraging agency personnel to recognize the benefits of transparency and internalize the expectation that they should be operating in an open manner.

Finally, Congress should amend FOIA to promote government transparency. In talking to requesters, I have found that many people are surprised that no public interest balancing test is incorporated into many of FOIA's exemptions. However, for some records that are exempt from disclosure, the benefit that would come from disclosure would outweigh the harm. We believe that a public interest balancing test should be incorporated into each exemption, with the possible exception of Exemption 3. Another simple amendment that Congress could make to FOIA is adding a presumption that older records are not protectable under the deliberative process privilege. Decreased reliance on that privilege would greatly aid the public in learning about the operations and activities of its government. Congress could also amend FOIA to clarify that corporations do not have personal privacy rights under Exemptions 6 and 7(c).

The past year has been an exciting time for people who care about transparency. President Obama has charted a new direction for agencies with respect to government openness, and we have seen some agencies taking steps to implement those visions. Problems with delay, communication, and over-withholding persist, however. Further leadership is necessary for the vision of transparency that the President has articulated to be fully realized throughout the Executive Branch.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

Mr. CLAY. Thank you very much, Ms. Rosenbaum.

Professor Cuillier, you are recognized.

STATEMENT OF DAVID CUILLIER

Mr. CUILLIER. Good afternoon, Chairman Clay, Ranking Member McHenry and members of the subcommittee. I appreciate the opportunity to address you today. I think what you are doing here is extremely important. And I would like to talk, if I may, a little about how requesters view FOIA, developing cultures of openness, and some ideas for maybe enhancing transparency.

First, the state of FOIA today. The past year has been refreshing, like everybody said: the President's Executive order, the Holder memo, the Open Government Directive, the initial work of OGIS has been outstanding, dispute resolution we hear today. That is great.

However, like some of the others, I think the perception of requesters is that we are not quite there yet, and the administration acknowledged this just a few days ago even. In my written testimony, I cited dozens of studies documenting the problems. We have backlogs, delays, redactions that are extreme, exemptions applied broadly, a variety of strategies used to skirt FOIA, such as the state secrets privilege, Presidential Records Act, Privacy Act, Family Educational Rights and Privacy Act.

Most journalists, frankly, don't use FOIA because of the frequent delays and denials. And I keep asking, but I haven't heard from journalists that this changed much in the past year. Perhaps it has, but our perception is that it hasn't yet. If the President were in my class, I would give him an A for effort, but probably a C for execution.

However, I have to say it is unfair to expect immediate change. These things take time. So that is where we come to agency culture. As a former journalist and as a researcher in freedom of information at the University of Arizona, I have found that accessing records is often more about people than the law. If an agency embraces openness, then FOIA tends to work. If it embraces secrecy, then FOIA doesn't work.

It is this human factor that leads me to teach journalists the interpersonal dynamics of accessing records. It led me to co-write with Charles Davis the book, the Art of Access, because the problems with the FOIA process, requesters are forced to be adept at what I call psychological warfare. It is a cat and mouse game. And it shouldn't be that way, but it is. And it really helps no one, not requesters, not agencies, not taxpayers. And that is why I think it is imperative to fix the laws and develop a culture of openness in Government.

Changing people is a lot harder than changing laws, but it can be done. It is a state of mind grounded in one's psyche, and it can be learned. So how do we do this? Well, there are a couple of different ways, and I am sure others have great ideas. But first, I would think that we need harsher penalties for noncompliance. We see this at the State level and the effectiveness it has. Some of the most transparent States in this country, Florida, Texas and others, have provisions for jail time or fines against agencies or individuals

who act in bad faith, who knowingly break the law. I think we need that in FOIA as well.

We need more assistance for requesters. We have this wonderful new office, OGIS, but we can do more. We need more staffers for OGIS, apparently, and I agree with them. It is unreasonable to expect an average citizen to take the time and money to sue the Government for information. Just figuring out what the information is to ask for is a challenge.

We need online accountability. FOIA performance for all agencies should be made clear in one place, perhaps on the new Open Government Dashboard. Quantifiable benchmarks should be set and agencies graded, much like restaurant inspections or school standardized testing. When it comes to FOIA, I would like to know, is an agency passing? Is it exceptional? Or is it failing?

We need more funding and rewards for agencies, carrots. It is unfair to require agencies to be more transparent, but not provide them the resources to do it. We need more staffing to reduce backlogs. We need prizes and monetary awards for doing a good job.

And finally, training of values. We need training of all Federal employees, not just FOIA officers, on the fundamental principles of open Government. There are States that do this, and I think it is effective. I had to take this training once as a State employee, why it matters, government accountability, economic innovation, an informed electorate, building public trust.

Too often, training is limited to FOIA officers and they are focused on the application of exemptions, how to keep things secret. If we are going to have a culture of openness, then that means truly internalizing the societal benefits of transparency.

So in conclusion, I am pleased with what we have seen this past year so far as a starting point. There are still a lot of problems that need to be fixed, but change takes time and if this administration stays on track, I am hopeful this country can develop a strong Freedom of Information Act and a lasting culture of openness.

Thank you, sir.

[The prepared statement of Mr. Cuillier follows:]

Testimony
Of
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Information Policy, Census, and National Archives Subcommittee
Of the Oversight and Government Reform Committee

2154 Rayburn House Office Building
Thursday, March 18, 2010
2:00 p.m.

"Administration of the Freedom of Information Act: Current Trends"

Good Afternoon, Chairman Clay, Ranking Member McHenry and Members of the Information Policy, Census, and National Archives Subcommittee, I appreciate the opportunity to address you today regarding current trends in the implementation of the Freedom of Information Act and ways for improving government transparency and accountability. I am here specifically to discuss the current status of FOIA administration at federal agencies, from requesters' perspectives, and the importance of developing a culture of openness that transcends legislation and the whims of changing presidents. I hope I can provide some useful information based on empirical research in the field and the perceptions of requesters.

In my capacity as a former journalist, a current representative of journalists, and a scholar in freedom of information, I have found that accessing public records is often more about people than the law. If an agency encourages a culture of openness then the laws are applied; if not then requesters are forced to either go to court or use other strategies to get the records to which they are entitled. It is this human factor that led me and National Freedom of Information Coalition Executive Director Charles N. Davis to write the book, *The Art of Access: Strategies for Acquiring Public Records*. We felt a need for requesters to learn psychological strategies for getting records, since the laws

have not worked well in many cases. With that in mind, in this testimony I will, 1) outline the culture and attributes of openness, 2) convey my impressions of the current status of openness in federal agencies, and 3) provide recommendations for enhancing a culture of openness.

1. Cultures of Openness and Secrecy

Bureaucracies inherently favor information control, and are hesitant to provide records freely for a variety of reasons, some justifiable (national security or personal privacy protection) and others not (to hide corruption or embarrassment).[1] A substantial amount of research demonstrates the prevalence of secrecy in government, particularly during the previous presidential administration.[2] Backlogs in FOIA requests are unreasonably long, with some requests pending decades.[3] Environmental journalists, for example, say that getting records under FOIA is so frustrating that they simply avoid the process altogether.[4] This might explain one reason for why journalists comprise only 5 percent of FOIA requests[5] – they seek information through other means because of the inability to acquire records in a timely manner through FOIA.

While we would like to think that laws work, the reality is that the public records process is arbitrary and broken, based on the whims of record custodians and officials who may or may not adhere to the law or respond in a timely fashion. At the state and local level, on average police agencies will illegally deny a valid records request for incident reports 71 percent of the time.[6] Florida court clerks interviewed for a study said they deny valid records requests if they feel the person doesn't deserve it.[7] This behavior exists at the federal level, as well. A study of records requests in Canada show that requests from journalists and politically sensitive requesters are more likely to be denied and delayed than requests from other people.[8] The FOIA process causes a wall of paranoia and mistrust between requester and agency,[9] sometimes resulting in a contest of wills and psychological warfare. This is not beneficial to agencies or requesters.

Organizational cultures of openness or secrecy are a product of people's attitudes. We know that FOIA officers at federal agencies are generally supportive of providing information to the public.[10] The problems arise with their superiors, as well as the people throughout an agency who might not favor disclosure of information. People who favor secrecy tend to be fearful, authoritarian, and trusting of those in authority.[11] Those who favor openness tend to be more educated, higher in self-esteem, skeptical, open to questioning, and high information seekers, particularly online.[12] Openness is a state of mind – grounded in one's psyche but also learned. People and organizations can develop an openness state of mind, but they have to want to do it.

Cultures of openness can change over time, for better or for worse, regardless of the agency or nation. For example, Sweden was the first country to adopt a federal FOIA law, including a federal ombudsman office, in 1766. The law was inspired by the China's

policies to provide citizen access to government information in the seventh century A.D.[13] Yet, within six years of Sweden's new law, an autocratic king came to power and rescinded the legislation. The law was re-instated in 1810, and is considered one of the best, if not the best, FOIAs in the world today.[14] We've seen this pendulum swing in the United States as well as presidents and cultural conditions cause agencies to vacillate between openness and secrecy. We, like Sweden, can find a stable culture of openness if we reject autocratic leadership and stay true to our values. Or, we can lose our way, like China, and gradually slide into an authoritarian, secretive society.

2. Current State of Openness

During the past year we have witnessed improvement in openness in the United States compared to the previous eight years, at least on the surface. The strong statements of the Obama Administration have been refreshing, including the first-day executive order and memos declaring a new policy of transparency, the March 19, 2009, Holder memo, and the December Open Government Directive. Even partisan opposition can be beneficial, as Republicans have pressured Democrats to make the health care debate more transparent.

Despite some of the promising overtures by the Obama Administration, however, requesters remain skeptical and do not perceive significant change. Some of Obama's actions have not followed his words, such as his reluctance to release all White House e-mails. Requests still seem to drag on far too long. Redactions are often extreme and exemptions applied broadly instead of narrowly. Much of the data posted by agencies in response to the Open Government Directive is of little importance or interest to average citizens and the focus is on proactive dissemination of data online rather than improving the FOIA process. Legal scholars have been reluctant to declare a new era of transparency in the United States, grading the president's performance at a "C" or lower.[15]

One problem today in FOIA administration is that the concept of openness under the White House's definition is this: Flood the Web with data. While it is important to have as much government information online as possible, piling data on the Web does not improve the FOIA process nor does it lead to meaningful public understanding of government. Citizens and journalists want specific information, yet they are denied or delayed in a much worse way than if they attempt to get similar information at the state or local level. For example, jail logs and photos are typically public at the state level, but not under FOIA. State and local agencies typically respond to a request within five business days, depending on the state, not the 20 allowed for federal agencies under FOIA. Federal records that contain any mention of a live human being are routinely kept secret because of the warping of the Privacy Act. The Obama Administration continues to apply the state secrets privilege and the Presidential Records Act to hide information. It is easy to post a database of wind farm production rates on the Web but it takes true

courage and transparency to release e-mails of White House visitors or documents outlining the extent of the U.S. government spying on its own people.

However, it is perhaps unfair to expect immediate change. Cultures take years to develop, and the groundwork has been laid. OGIS will no doubt improve requesters' ability to better maneuver through agencies. The stated culture of openness might trickle down and permeate the federal government over time. Just this month, the Office of Management and Budget encouraged agencies to develop prizes for workers who promulgate openness.[16] That is promising, but it is not enough.

3. Recommendations: Sticks and Carrots

Increasing a culture of openness among federal agencies is obtainable, in my opinion, over time through a combination of penalties (sticks) and incentives (carrots). First, the sticks:

- **Penalties for noncompliance.** We see at the state level the effectiveness of penalties for encouraging compliance with public record laws. Some of the most transparent states, such as Florida, Texas, and Washington state, have provisions for jail time or financial penalties against individuals and agencies that flagrantly violate the law.[17] Requesters who live in states that have no penalties for noncompliance express frustration and distrust toward their government.[18] There are no "FOIA police" to enforce lawbreakers, and most citizens cannot afford the time or money to sue. We know that the threat of litigation can be an effective method for agencies to comply with public records laws.[19] Federal FOIA should include financial and criminal penalties for officials and agencies that choose to act in bad faith.

- **Litigation assistance for requesters.** It is unreasonable to expect an average citizen to take the time and money to sue the federal government for information. A system should be created to provide requesters an avenue for timely and affordable redress of illegal denials. For example, some states give their public records ombudsman officers the authority to require agencies to make information public to a requester.[20] In Colombia (the second country to adopt a FOIA law, in 1888), a citizen can write a letter to an administrative tribunal for free if an agency denies access, usually getting a decision back within a week.[21] While those systems also have their problems, they attempt to provide assistance to the people who are at a disadvantage when challenging government.

- **Online accountability.** FOIA performance should be made clear on the new Open Government Dashboard. Anyone should be able to see in one place how all the agencies are complying with the law, including the volume of requests, backlogs, average processing time, percentage and number of records released and denied,

appeals and their outcome, etc. Quantifiable benchmarks should be set and then agencies graded, much like a restaurant inspection or school's standardized test scores. Is an agency passing, exceptional or a failing when it comes to FOIA?

The carrots:

- **More funding.** It is unfair to require agencies to be more transparent but not provide them the resources to do it. If Congress is going to impose requirements upon another branch of government the least it can do is provide it suitable resources for carrying out the mission.

- **Incentive programs.** Agencies that work diligently toward providing records should be rewarded with additional funding to further reduce backlogs.

- **Training of fundamental values.** Training of all officials, not just FOIA officers, on the fundamental reasons for FOIA and benefits of making information public (e.g., building public trust, facilitating innovation and economic growth, leading to improved government and accountability) would build a positive culture. Too often internal government training is focused just on FOIA officers and are led by attorneys who focus on the technical aspects of exemptions – how to keep information secret.

Ultimately, we as a nation should focus on creating a culture of openness in government and throughout society. Civics education is imperative because our government is a reflection of our people. Our children are taught to do well on standardized tests with little emphasis on social studies, creating a generation ignorant of the fundamental principles of democratic self-governance. We can have the brightest scientists and inventors, but if we as a people accept authoritarian leadership and secret government then we risk using our technological advances for destruction, not the common good. Open and accountable government should be valued by every American, whether they work in or out of government.

Endnotes

[1] See Thomas Susman, *Delay and the Freedom of Information Act: Senator Cornyn's legislative prescriptions,* 1 OPEN GOVERNMENT (2005), www.opengov.org for an explanation of different causes for delays in U.S. FOIA requests, including inadequate resources for processing requests, complexity of requests, the need for consulting with other agencies, little incentive to release, to mask embarrassment, to squash requests, particularly those from the media, and bureaucratic largesse. For seminal works on the importance of freedom of information and tension with other forces, see Vincent Blasi, *The Checking Value in First Amendment Theory,* 2 LAW & SOC. INQUIRY 521 (1977), pages 609-610, who argues that "the First Amendment may require that journalists have access as a general matter to some records…" Also see HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS (Columbia University Press 1953); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Harper 1948); Aimee C. Quinn, *Keeping the Citizenry Informed: Early Congressional Printing and 21st Century Information Policy,* 20 GOV'T INFO. Q. 281 (2003);

[2] See Jane Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information,* 11 COMM. L. & POL'Y 479 (2006); TED GUP, NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE (Doubleday 2007); Peter Hernon, *Government Information Policy in a Time of Uncertainty and Change, in* FEDERAL INFORMATION POLICIES IN THE 1990S: VIEWS AND PERSPECTIVES (Peter Hernon, Charles R. McClure & Harold C. Relyea eds., Ablex Publishing 1996); ALASDAIR ROBERTS, BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE (Cambridge 2006).

[3] See *Justice Delayed is Justice Denied* (2003) by The National Security Archives, which studied delays in access, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB102/press.htm; *40 Years of FOIA, 20 Years of Delay* (2007), by The National Security Archives, which found the oldest pending FOIA requests going back more than 20 years, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB102/press.htm; and *Secrecy in the Bush Administration* (2004), by Rep. Henry A. Waxman, provides a comprehensive examination of secrecy in the Bush Administration, http://oversight.house.gov/features/secrecy_report/index.asp. Also, see *Government Secrecy: Decisions Without Democracy* (2007), by David Banisar, sponsored by OpenTheGovernment.org and People for the American Way Foundation, shows how secrecy has increased since 9/11 and how that hurts democracy and good government. http://www.openthegovernment.org/otg/govtsecrecy.pdf; and *Secrecy Report Card* (2009) by OpenTheGovernment.org provides a great summary of the state of secrecy today at the federal level, http://www.openthegovernment.org/otg/SecrecyRC_2009.pdf

[4] Robert McClure, *A Flawed Tool: SEJ Study Finds FOIA Little Used, Plagued by Delays,* 15 SE J. (Society of Environmental Journalists) 5 (2005), http://www.sejarchive.org/site/sejournal/past/sej_fa05.pdf. Also, see Jennifer LaFleur, *The Lost Stories: How a Steady Stream of Laws, Regulations and Judicial Decisions have Eroded Reporting on Important Issues*, Reporters Committee for Freedom of the Press (2003), http://www.rcfp.org/loststories/; Charles Lewis, *Freedom of Information Under Attack in the Name of 'Homeland Security,' the Work of Journalists is Made Harder,* 56 NIEMAN REP. 84 (2002); Pete Weitzel, Beware of Regulatory Creep as Secrecy Shrouds Records, THE IRE J., Nov.-Dec. 2004, at 15; Ben Welsh, *Privacy, Security Block Access to Data,* UPLINK, Jan.-Feb. 2006, at 8.

[5] See *Few journalists use the federal Freedom of Information Act* (2001), the Heritage Foundation examined 2,285 federal FOIA requests to find that only 5 percent of requests of selected federal agencies in 2001 were submitted by journalists. Most submitted by lawyers and businesses, http://www.heritage.org/Press/MediaCenter/FOIA.cfm. Also, *Frequent filers: Businesses make FOIA their business* (2006), Coalition of Journalists for Open Government analyzed 6,439 FOIA requests in federal agencies to find that only 6 percent of requests are submitted by journalists. About two-thirds are submitted by commercial interests and the rests by citizens and non-profits. See summary at http://www.spj.org/rrr.asp?ref=31&t=foia.

[6] See David Cuillier, *Access America: A Meta-Analysis of 32 Access Audits* (Study presented at the Society of Professional Journalists national conference, Sept.10, 2004, New York); Also, similar results were reported in Emily Erickson, *What Statewide Audits Tell Us About Access, Privacy, and Political Culture,* presented at the Association for Education in Journalism & Mass Communication annual meeting, August 2008, Chicago.

[7] Michele Bush Kimball, *Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law,* 8 COMM. L. & POL'Y 313 (2003).

[8] Alasdair Roberts, *Administrative Discretion and the Access to Information Act: An 'Internal Law' on Open Government,* 45 CAN. PUB. ADMIN. 175 (2002); See also, Alasdair Roberts, *Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada,* 83 PUB. ADMIN. 1 (2005).

[9] For an examination of the culture of FOIA in the U.S. and Poland, see Michael G. Powell, *The Emergence and Institutionalization of Regimes of Transparency and Anti-Corruption in Poland,* dissertation for Rice University, 2006, UMI Number 3216763.

[10] SUZANNE J. PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM 89-96 (State University of New York 2007).

[11] See David Cuillier, *The Public's Concern for Privacy Invasion and its Relationship to Support for Press Access to Government Records,* NEWSPAPER RES. J., Fall 2004, at 95; Paul D. Driscoll, Sigman L. Splichal, Michael B. Salwen & Bruce Garrison, *Public Support for Access to Government Records: A National Survey,* in ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE, at 23 (Charles N. Davis & Sigmund L. Splichal eds., Iowa State University Press 2000); Joseph Phelps & Matthew D. Bunker, *Direct Marketers' Use of Public Records: Current Legal Environment and Outlook for the Future,* J. OF INTERACTIVE MARKETING, Winter 2001, at 33.

[12] See David Cuillier, *Access Attitudes: A Social Learning Approach to Examining Community Engagement and Support for Press Access to Government Records,* 85 JOURNALISM & MASS COMM. Q. 549 (2008); Suzanne J. Piotrowski & Gregg G. Van Ryzin, *Citizen Attitudes Toward Transparency in Local Government,* 37 AM.REV. OF PUB. ADMIN. 306 (2007); David Cuillier and Suzanne J. Piotrowski, *Internet Information Seeking and Its Relation to Support for Access to Government Records,* 26 GOVERNMENT INFORMATION QUARTERLY 441-449.

[13] For a historical examination of the "Freedom-of-Press and the Right-of-Access to Public Records Act," see Stephen Lamble, *Freedom of Information, a Finnish Clergyman's Gift to Democracy,* 97 FREEDOM OF INFORMATION REVIEW. 2-8 (February 2002), available online at http://members.optusnet.com.au/~slamble/freedom_of_information.html#_ednref27.

[14] For a comparison of U.S. FOIA and Sweden's FOIA, see Stephen Lamble, *United States FOI laws are a poor model for statutes in other nations,* 106 FREEDOM OF INFORMATION REVIEW. 51-55 (August 2003); find more information at the Anders Chydenius Foundation Web site: www.chydenius.net/.

[15] See, for example, an analysis of the Holder memo's weaknesses by former Department of Justice FOIA official Daniel J. Metcalfe, *Sunshine Not So Bright: FOIA Implementation Lags Behind,* 34 ADMINISTRATIVE & REGULATORY LAW NEWS.5-9 (2009). Also see Columbia Journalism Review's grading of the president's openness, at http://www.cjr.org/transparency/report_card.php?page=all, and the latest assessment of openness by Amanda Becker, *Obama's Transparency Efforts Achieve Mixed Results,* THE NEWS MEDIA & THE LAW, 34, available at http://www.rcfp.org/news/mag/34-1/obamarsquos_transparency_efforts_achieve_mixed_results_12.html.

[16] See March 8, 2010, memo at http://www.rcfp.org/newsitems/docs/20100311_125455_open_memo.pdf.

[17] See an analysis of penalties for public records and open meeting laws in all 50 states: Adrianna C. Rodriguez and Laurence B. Alexander, *Punishment for Shade: An Analysis of Penalties and Remedies for Violations of Open Meetings Laws Across the Country,* presented at the Association for Education in Journalism and Mass Communication annual meeting, August 2009, Boston.

[18] See a survey of people who used the Indiana Public Access Counselor's Office, where 90 percent said they wish the office could levy fines against agencies who act in bad faith: Yunjuan Luo and Anthony L. Fargo, *Measuring Attitudes About the Indiana Public Access Counselor's Office: An Empirical Study,* http://indianacog.org/files/PAC_final2.pdf

[19] In two experiments in Arizona, agencies that received request letters threatening litigation resulted in three-quarters responding in contrast to only half for agencies that received friendly or neutral letters (also resulted in faster response, lower copy fees, and higher overall compliance). See David Cuillier, TESTING COMPLIANCE-GAINING THEORIES IN THE CONTEXT OF FREEDOM OF INFORMATION LAWS, to be presented at the International Communication Association meeting, June 23, 2010, Singapore.

[20] See a description of some of the mediation avenues in the states, at *Mediation Without Litigation* (2007) by Harry Hammitt for the National Freedom of Information Coalition, http://www.nfoic.org/hammitt_mediation_without_litigation; and see an examination of the different models, including states like Utah that give strong powers to its public records commissions (forcing records to be disclosed and fining agencies), by Daxton "Chip" Stewart, *Managing Conflict Over Access: A Typology of Sunshine Law Dispute Resolution Systems,*

presented at the Association for Education in Journalism and Mass Communication annual conference, 2008, Chicago.

[21] See a description of Colombia's open records legislation and constitutional protections, as well as other countries' laws, at http://www.freedominfo.org/countries/colombia.htm

Mr. CLAY. Thank you so much, Professor.

Mr. Fitton, you have 5 minutes.

STATEMENT OF TOM FITTON

Mr. FITTON. Thank you, Mr. Chairman, Mr. Vice Chairman, and thank you for inviting me to this important hearing.

Essential to Judicial Watch's anti-corruption watchdog mission is the Freedom of Information Act. Judicial Watch uses this tool effectively to root out corruption. We have used it to root out corruption in the Clinton administration and we took on the Bush administration's penchant for improper secrecy.

We have nearly 16 years of experience in using FOIA to advance the public interest, and we are perhaps the most active FOIA requester and litigator operating today.

The American people were promised a new era of transparency by the Obama administration. Unfortunately, this promise has not been kept. To be clear, the Obama administration is less transparent, in our experience, than the Bush administration. We have well over 340 FOIA requests pending with the Obama administration, and we have filed over 20 FOIA lawsuits in Federal court against this administration.

Administratively, agencies have put in place additional hurdles and stonewalled even the most basic FOIA requests. The Bush administration was tough and tricky, but the Obama administration is tougher and trickier. The Obama administration continues to fight us tooth and nail in court. The Obama administration's approach to FOIA is exactly the same as the Bush administration's, so one can imagine that we don't have an easy time litigating these issues in court against the Obama Justice Department.

Now, in my written testimony, I detail some of the legal wrangling we are involved in, but generally as a policy matter the Obama administration has decided to wall off, for instance, the Fannie and Freddie records now controlled, in our view, by the Federal Housing Finance Administration. $400 billion in taxpayer funds are now at least committed to these two entities, and yet their argument is that we can't have access to that. Unfortunately, we are now disputing that in court and people can see details of that in my written testimony.

And in addition to the problem of walling off FHFA's control of our Nation's mortgage market through Fannie and Freddie from public accountability, the Obama Treasury Department is a black hole for basic information requests on the various Government bailouts.

So I can't quite fathom how some can laud a new era of transparency while over $1 trillion in Government spending is shielded from practical oversight and scrutiny by the American people.

And the subcommittee might also be interested to learn about some of the background related to the release of the White House visitor logs. Those logs are being released at the sole discretion of the Obama White House. And they are making the argument, and we are fighting with them in court, but the policy dispute is over whether or not these logs are subject to the Freedom of Information Act. And to echo David's point earlier, the Bush administration made this point in court recently at the end of its administration.

The Obama administration has continued to argue they are not subject to FOIA. So we are in a fight with them on that key issue that they are using in terms of their public pronouncements on extolling their own openness.

So on two major transparency issues, and people can read the details of that in my written testimony. I know you don't want to go into the details of litigation. But two transparency issues relate to policy. This a policy debate as well, on the bailouts and White House access. The Obama administration has come down on the side of secrecy.

Releasing high value data sets from Government bureaucracies is meaningless in the face of key decisions to keep politically explosive material out of the public domain. So we give them an F on transparency.

Let me end by saying the Founding Fathers understood why transparency is important. Let me quote John Adams, and we can all agree on John Adams, I think: "Liberty cannot be preserved without a general knowledge among the people. They have a right, an indisputable, inalienable and indefeasible divine right, to that most dreaded and envied kind of knowledge, I mean of the characters and conduct of their rulers."

Thank you for your time, and I am happy to submit to questioning.

[The prepared statement of Mr. Fitton follows:]

Testimony of Judicial Watch President Tom Fitton

Hearing of the House Government Reform and Oversight Subcommittee
on Information Policy, Census, and National Archives on
"Administration of the Freedom of Information Act: Current Trends"

March 18, 2010, 2154 Rayburn House Office Building at 2:00 p.m.

Good afternoon, I'm Tom Fitton, President of Judicial Watch. Judicial Watch is a conservative, nonpartisan educational foundation dedicated to promoting transparency, accountability and integrity in government, politics and the law. Essential to our mission is the Freedom of Information Act (FOIA). Judicial Watch used this tool effectively to root out corruption in the Clinton administration and to take on the Bush administration's penchant for improper secrecy. Founded in 1994, Judicial Watch has nearly 16 years of experience in using FOIA to advance the public interest. Judicial Watch is perhaps the most active FOIA requestor and litigator operating today.

The American people were promised a new era of transparency by the Obama administration. Unfortunately, this promise has not been kept.

To be clear: the Obama administration is less transparent than the Bush administration.

We have well over 300 FOIA requests pending with the Obama administration, and we have filed over 20 FOIA lawsuits in federal court against this administration.

Administratively, agencies have put in place additional hurdles and stonewalled even the most basic FOIA requests. The Bush administration was tough and tricky, but the Obama administration is tougher and trickier.

The Obama administration continues to fight us tooth and nail in court. The Obama administration's approach to FOIA is exactly the same as the Bush administration's—so one can imagine that we don't have an easy time litigating these issues in court against the Obama Justice Department.

Judicial Watch has been digging hard into the scandals behind the collapse of Fannie Mae and Freddie Mac and their role in helping trigger the global financial crisis. A key component of this investigation concerns the role political corruption played in the failure of adequate congressional oversight and the catastrophic collapse of these "government sponsored entities" in 2008. That is why we filed a Freedom of Information Act (FOIA) lawsuit (http://www.judicialwatch.org/judicial-watch-v-u-s-federal-housing-finance-agency) against the Obama administration to get hold of documents related to Fannie's and Freddie's campaign contributions over the last several election cycles.

Since American taxpayers are on the hook for trillions of dollars, potentially including at least $400 billion alone for Fannie and Freddie, we deserve to know how and why this financial collapse occurred and who in Washington, D.C. is responsible.

Unfortunately the Obama administration disagrees.

In January, the Federal Housing Finance Agency (FHFA), the agency responsible for Fannie Mae and Freddie Mac, responded to our FOIA lawsuit by telling us that all of the documents we seek are not subject to FOIA.

Here is the exact language the Obama agency used in its recent court filing (http://www.judicialwatch.org/files/documents/2010/jw-v-fhfa-defmem4sj-01292010.pdf) : "...Any records created by or held in the custody of the Enterprises (Fannie Mae and Freddie Mac) reflecting their political campaign contributions or policies, stipulations and requirements concerning campaign contributions necessarily are private corporate documents. They are not 'agency records' subject to disclosure under FOIA."

And here's why the Obama administration's reasoning is flat-out wrong, as detailed in a court motion (http://www.judicialwatch.org/files/documents/2010/jw-fhfa-opp2sj-cm4sj-03052010.pdf) we filed on March 5:

> At issue in this Freedom of Information Act ("FOIA") lawsuit is whether FHFA, the federal agency that has custody and control of the records of Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Company ("Freddie Mac"), must comply with a FOIA request for records relating to those previously independent entities. Until they were seized by FHFA in September 2008, Fannie Mae and Freddie Mac were private corporations with independent directors, officers, and shareholders. Since that time, FHFA, a federal agency subject to FOIA, has assumed full legal custody and control of the records of these previously independent entities. Hence, these records are subject to FOIA like any other agency records.

In addition to the problem of walling off FHFA's control of our nation's mortgage market through Fannie and Freddie from public accountability, the Obama Treasury Department is a black hole for basic information requests on the various government bailouts.

So I can't quite fathom how administration defenders can laud a new era transparency while over $1 trillion in government spending is shielded from practical oversight and scrutiny by the American people.

The Subcommittee might also be interested to learn the truth behind the Obama White House's trumpeting of the Secret Service Department's release of White House visitor logs.

In fact, the Obama administration is refusing to release tens of thousands of visitor logs and has stated that these logs are not subject to the Freedom of Information Act.

So while the Obama administration attempts to take the "high ground" in the debate by releasing a select number of visitor logs, tens of thousands of other records continue to be withheld in defiance of FOIA law. Why release some and not all?

Last October Judicial Watch staff visited with senior White House official Norm Eisen, Special Counsel to the President for Ethics and Government, to discuss Judicial Watch's pursuit of the White House visitor logs. The White House encouraged us to publicly praise the Obama administration's commitment to transparency. However, the Obama team refused to abandon their legally indefensible contention that the Secret Service Department's White House visitor logs are not subject to FOIA law.

So we filed a lawsuit to ask the court to enforce the law.

As with Fannie and Freddie, the Obama administration continues to advance its ridiculous and bogus claim that the visitor logs "are not agency records subject to the FOIA." But the Obama administration doesn't have a legal leg to stand on. As we noted in our original complaint (http://www.judicialwatch.org/files/documents/2009/jw-v-usss-complaint-12072009.pdf) filed on December 7, 2009, the administration's claim "has been litigated and rejected repeatedly" by the courts. In fact, it has been rejected by every court that has considered it.

As our recent court filing notes:

> At issue here is whether Secret Service visitor logs are agency records subject to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. To date, every court that has reached this issue has concluded that the requested documents are agency records and must be processed in response to a properly submitted FOIA request. As no disputes of material fact exist as to the nature of the records, summary judgment as to this straightforward legal issue should be entered now.

(http://www.judicialwatch.org/files/documents/2010/jw-v-usss-mot4sj-02222010.pdf)

Our brief also notes that the Secret Service had released White House visitor logs in response to previous FOIA requests (http://www.judicialwatch.org/judicial-watch-v-u-s-secret-service) from Judicial Watch and other parties.

So in two major transparency issues—on the bailouts and White House access—the Obama administration has come down on the side of secrecy. Releasing "high value data sets" from government bureaucracies is meaningless in the face of key decisions to keep politically explosive material out of the public domain.

As far as Judicial Watch is concerned, the Obama administration gets a failing grade on transparency for its first year or so in power.

Let me end by noting that a commitment to transparency should cut across partisan and ideological lines. The Founding Fathers understood the importance of knowing what our government is up to. John Adams wrote:

> Liberty cannot be preserved without a general knowledge among the people . . . they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers.

Thank you.

Mr. CLAY. Thank you so much for your testimony.

I guess this is a panel-wide question. Have any of the witnesses noticed improvement in responses from agencies under the Obama administration as compared to the Bush administration? For instance, Ms. Rosenbaum got a response from a 4-year old request, and could it be because the culture has changed at the agency that you requested it?

Ms. ROSENBAUM. There is still a long delay in that particular request within this administration. We have seen some improvements. We are seeing some of our requests acted on quicker than we might have expected beforehand. As I said, we have seen some improvements in communication where it is a little bit easier. There will be more sort of interim responses letting people know a little bit more about what is happening with their request while it is in the process of being processed.

Mr. CLAY. OK, that is one that says they have seen improvement.

Mr. SOBEL. Mr. Chairman, I honestly have not really noticed a great deal of difference at the agency level. But in fairness, I have to say I tend to deal with the difficult agencies. I mean, where the culture is a real problem, agencies like the FBI and various components of the Department of Homeland Security where the law enforcement culture in those agencies just tends to be resistant to the concept of opening things up.

Mr. CLAY. So you still see stonewalling?

Mr. SOBEL. Yes, I do. And to underscore what I said earlier, I think the point of contact where the administration's stated policy could have an impact is when agencies like that get sued, they should be told by Justice Department lawyers, we are not going to defend this. And that is how you send the message, and I don't see that happening. So I think we need to find ways where the rhetoric can get translated into reality, and those are the things that I am really looking for.

Mr. CLAY. That is a very good point.

Ms. Cohen, any difference in the administrations?

Ms. COHEN. I think what a lot of people are seeing is a lot more politeness from the people that they are dealing with, kind of not quite as much of a confrontational initial stance, but sadly, not a whole lot of difference in the results in the end. So that is kind of what we are hearing. It is agency by agency, though, and some appear to be making a much more serious effort than others.

Mr. CLAY. Thank you for that response.

Professor, any difference?

Mr. CUILLIER. Well, no. I haven't heard any, but then most journalists don't cover it any more. They are so fed up with it. So I am doing a survey in a couple of months. I am asking 800 journalists that exact question, so I will get back to you.

Mr. CLAY. Thank you.

Mr. Fitton.

Mr. FITTON. Obviously, I think they are a little bit worse. Believe it or not, we are actually quite flexible working with agencies on focusing and narrowing requests, but there is not too much difference. And at the legal level, that is where the rubber meets the road and it is the same as the Bush administration as a problem.

Mr. CLAY. So it is the same amount of suits, litigation.

Mr. FITTON. Well, the Government is doing, respectfully, a lot more these days so we are asking a lot more questions. So as a result, we have a few more lawsuits.

But their position in the lawsuits are not only problematic in terms of traditional FOIA, but the key provision of the new FOIA law related to awarding attorney's fees and costs as an incentive to agencies to get the documents out. David as a lawyer may have more insight on this than me. They are trying to read that out of the law, practically speaking, saying that just because you file a lawsuit doesn't mean you should get costs if the documents come out as a result.

So the lawyers are the problem. How is that for a summary response?

Mr. CLAY. Well, we better make sure we take care of the lawyers. [Laughter.]

Mr. Sobel, let me ask you, there are those who say the administration has not done enough in the last year to improve the FOIA process. Others say that after many years of Government secrecy, it takes time to turn things around. Before I ask you about the process itself, I would like to ask how important you think it has been and will continue to be that the President has issued clear and unambiguous guidance that the presumption of the administration is to disclose rather than to withhold?

Mr. SOBEL. I think it is important, but the question, as I indicated a couple of minutes ago, is how do you make that filter down to the front lines where these decisions are being made by overburdened FOIA personnel every day. And I agree that incentives and disincentives is an important concept.

One of the points I raise in my written testimony is that the Civil Service performance evaluation process probably ought to be taking into account performance with respect to transparency obligations. Agencies should think about or OPM should think about making transparency work a critical element in job performance.

I think all of the incentives are to withhold. I mean, the average employee feels like they can be disciplined for releasing something improperly, but they don't have the same concern about withholding something improperly. And I think we need to change that. So it is very much at the level of the FOIA Office that the change needs to occur.

Mr. CLAY. And under your evaluation system, do you think that would curb the use of exemption three?

Mr. SOBEL. I think exemption three, talk about an agency by agency proposition. I mean, exemption three really exemplifies that, that every agency has their own exemption three statutes that they either are permitted to use or are inclined to use. But I certainly think with respect to some of the agencies that have access to most of those exemption three statutes, yes. I mean, more of a sense of penalty improper withholding would go a long way. Yes.

Mr. CLAY. Thank you for that response.

Mr. McHenry.

Mr. MCHENRY. Thank you, Mr. Chairman.

Mr. Fitton, now, the chairman and I both serve on the Financial Services Committee as well, and obviously we have an interest in the GSEs and the Federal Home Loan Finance Agency, and the receivership that Fannie Mae and Freddie Mac are currently under. In essence, they are in my view functioning as a Government agency.

You made a Freedom of Information request of documents from FHFA. Now, coming to light that the Government basically took over Fannie Mae and Freddie Mac and their hundreds of billions worth of debt, what was their justification? Now, they rejected your Freedom of Information request. Is that correct?

Mr. FITTON. That is right. They believe that these are not agency records under FOIA and they cite their precedent and obviously we cite our precedent back. But you know, from a practical non-legal perspective, they seized control of these agencies. They control their operations down to the greatest minor detail. They control the appointment of the Board of Directors and all their communications. They have control of the records. They can search for them. But they have obviously decided to wall them off.

That is a decision, in my view, that is not made lightly by the administration. This is a significant issue and the decision to wall Fannie and Freddie from FOIA scrutiny is the result of the Government taking it over. It is a decision that I suspect was not made lightly and indicative of the administration's position on a key transparency issue.

Mr. MCHENRY. So they simply rejected it?

Mr. FITTON. That is right. No one who wants to ask anything about Fannie and Freddie through the FHFA under the Freedom of Information Act, it will be responded to under their view of the law.

Mr. MCHENRY. Have other groups experienced this? Anybody else in a similar situation with FHFA?

Now, so the justification is that they are not a Government agency. Correct?

Mr. FITTON. They are not a Government agency. They are a private corporation temporarily being held by the Government.

Mr. MCHENRY. Well, is this emblematic of your experience with other agencies?

Mr. FITTON. Well, it raises an interesting issue with the Treasury Department's running of General Motors. We haven't gotten necessarily into that fight specifically, I don't believe legally, but if the Government is running General Motors, if all General Motors, some of General Motors' operations' documents, for instance their hiring of lobbyists using taxpayer money, does that become subject to FOIA?

On Treasury generally, they are terrible. They just ignore FOIAs. They grant themselves extra time.

The Federal Reserve, a new area that everyone seems to be interested in these days. We are just asking for Ben Bernanke's visitor logs. We are not getting anywhere on it. Our interest there is obvious. There is a lot of money and power and sensitivity to the use of that money in power, given the financial crisis. And walling all of that off from effective disclosure and scrutiny, to me, is, that to me is the story of FOIA under the Obama administration.

Mr. MCHENRY. How many FOIA requests did Judicial Watch, how many FOIA requests did you have in 2009?

Mr. FITTON. In 2009? Over 300.

Mr. MCHENRY. OK.

Ms. Rosenbaum, Public Citizen, how many FOIA requests did you have in 2009?

Ms. ROSENBAUM. I actually don't know the number of requests that we have made.

Mr. MCHENRY. OK. All right.

Well, Mr. Sobel, you mentioned that certain agencies are just consistently bad.

Mr. SOBEL. Yes, I think that is a fair characterization.

Mr. MCHENRY. Now, the sort of broader general question, is it the political appointees or is it the agency? There has been a shift, and thankfully the President said the right things. Unfortunately, we haven't seen implementation, and I think the panel in essence agrees that we have seen maybe in terms of courtesy a little more positive than the last administration, but in terms of results, it is basically the same or in some cases worse.

What agencies, would you say it is the political appointees or the agency culture?

Mr. SOBEL. Well, with respect to that question, I think an interesting example, and an agency that happens to be near the top of my list in terms of bad agencies is the FBI. The FBI is an agency where you would assume that political appointees don't really play that much of a role because you have Director Muller who really is not a political person. I mean, he has now been there for a while. He has a 10-year term.

I mean, if any agency you would assume is immune from political influence, we would like to think it is the FBI, and that is an agency that has historically had the worst backlogs. I cite in my testimony the fact that in one of our cases, the FBI asked for a 6-year stay in a court case to allow it to complete processing of a FOIA request.

And then once they finally do get around to processing a request, they tend to withhold to an extent that I don't think it justified. And again, in my written testimony, we cite a specific example of material that was withheld by the FBI 3 years after that very fact was revealed in a Department of Justice Inspector General report.

So I think that is an example where it is culture because I do believe that the FBI, to a large extent, is immune to political trends one way or another.

Mr. MCHENRY. My time has expired, but Ms. Cohen, Professor, if you could touch on this as well?

Ms. COHEN. Yes, to me it is less agency by agency than it is kind of unpredictable on what appears to requesters to sometimes seem capricious. That if you can make the argument that it is in the agency's almost political interest to release something, you can get some records released, where somebody who doesn't make as good an argument that it is in their interest will get the same records denied.

And for reporters, David is right. Very few reporters will go through the process. They would rather just get leaked documents

at that point. So that is one effect of not having an effective one is that people look for other avenues a way around it.

Mr. CUILLIER. Yes, I don't have much to add. I think there are so many factors involved with whether you get records or not that it is hard to pinpoint one particular thing or one agency. But I think the type of records you ask for is probably a major factor, and there is research that shows that who you are affects whether you will get it or not. Journalists and politically sensitive requesters tend to not get things, or get delays, for example.

Mr. MCHENRY. Thank you, Mr. Chairman, and thank you all for testifying.

Mr. CLAY. Thank you, Mr. McHenry.

Ms. Cohen, can you expand upon your suggestion that Congress should build transparency into the oversight of new information systems?

Ms. COHEN. Yes, I was a reporter in Florida in the 1990's, and at that time the State instituted, and I don't know if it was a legal institution or just a practice, that when new information systems, new data bases were being designed, say, a new email system was being implemented, or, say, a new system to catalog inspections, that part of the certification of that system was that the public parts of it could be made public, could be easily extracted, and that it would not be mixed up with proprietary and private information, and it really did make a big difference there.

Mr. CLAY. Thank you for that response.

Ms. Rosenbaum, in your written statement, you mention problems contacting FOIA public liaisons. Can you expand on this issue and give us a sense of what you expect from public liaisons?

Ms. ROSENBAUM. We have found that sometimes agencies are just very hard to get a hold of. I think the example I gave in my testimony was of trying to contact a public liaison and finding that he didn't tend to be at his desk and didn't have voice mail. So we just called, and when I would call the phone would ring and ring, and that was that.

So I think it is important that the public liaisons be available to the requesters in order for them to have a sense of what is happening with their request and be able to have contact with the agencies about what is happening with those requests.

Mr. SOBEL. And Mr. Chairman, if I can just jump in on that.

Mr. CLAY. Sure.

Mr. SOBEL. I have had experiences where the phone number and the name of the employee listed on an agency Web site just appears to be wrong, where you dial the phone number and you get the voice mail for some other employee, and that is sort of the dead end that you hit.

Mr. CLAY. Doesn't sound like much priority is placed on that.

Mr. SOBEL. No, and as a litigator, what is frustrating is I will usually make a very good faith effort to attempt to resolve an issue before taking it to court. And often those efforts are frustrated just by the inability to reach an adult in an agency to bring this matter to their attention.

Mr. CLAY. Thank you.

Professor, what, in your opinion, is the single greatest point of misunderstanding between agencies and requesters?

Mr. CUILLIER. Well, I think often it is what the person is after. There is a lot of disconnect. A person wants X records and an agency thinks it is something else. And then that creates a problem. And the agency denies it outright, and then they start getting confrontational. They start digging in.

And so I think that is where the human—we have a lot of problems with not just FOIA, but State public records, all that sort of things, because of that. People can't figure out what to ask for. Sometimes an agency won't help them figure out what to ask for. And so we get into this cycle of fighting.

And so I like what I heard from Ms. Nisbet today about trying to figure out ways to get agencies to help requesters figure out what they are after. Unfortunately, I think sometimes when they are after something the agency doesn't want them to get, they help them not find the record. It can be a problem.

Mr. CLAY. Do you believe that the process in terms of legislation, regulation and policy is as good as it gets? And that requesters need to rely on strategy to improve their chances?

Mr. CUILLIER. Well, right now they do. Right now, they have to know a lot more than the law to get what they want. That is just the reality. That is why we wrote our book because we saw so many requesters running into problems.

They think they can just say, here's the law; I would like to get this record, please. And it doesn't work that way. So I think it is really important that we figure out a way to make this work.

Mr. CLAY. OK. Thank you for the response.

Representative McHenry.

Mr. MCHENRY. Thank you, Mr. Chairman.

Just very brief, but I would like everyone if you could just very briefly, not elaborate, but what are the top line things we can do in terms of policy, so that the public has more access rather than less? And this is not one administration. It is not one agency. It is the policy that we, here on the Hill, should legislate and ensure, and the reason why we have these hearings is to make sure the law as written is being followed. What kind of policy changes can we make in order to open this up?

And we will just start with Mr. Fitton and just move on down the line.

Mr. FITTON. I don't have an exact piece of advice on this issue. But the most abused exemption is the internal deliberative process withholdings that are made, and figuring out when and how that is appropriate, maybe legislating a way to allow requesters better access to that and giving the agencies less discretion in the seemingly arbitrary way they withhold documents in that regard.

Mr. MCHENRY. OK. Thank you.

Mr. CUILLIER. Again, I would say penalties, and I would say some carrots. And I would look at some of the best State laws out there. There are some really good laws out there, and there are some States doing some incredibly good things in this way. Perhaps we can take a look at that. I think a lot of journalists, in particular, much prefer their State law to FOIA.

Mr. MCHENRY. OK.

Ms. ROSENBAUM. The most recent FOIA amendments have tended to focus on process, which is very important because people need

to actually be able to get responses and have their requests processed to get records. But I think that Congress should also consider more substantive amendments to the FOIA exemptions themselves.

We think that Congress should include consideration of the public interest in disclosure in the exemptions, in more of the exemptions. That is not considered right now in determining whether records are exempt under various of the exemptions.

Mr. MCHENRY. OK.

Ms. COHEN. I think that giving the same priority to disclosure as we give to other priorities in Government throughout a lot of different laws, not just the FOIA law, would make a big difference. And also somehow, and I don't have a specific example of this, but to change the power balance between the requester and the agency. Right now, there is only one power there and that is the agencies, then there is really nothing that a requester can do.

Mr. SOBEL. First, I would agree with Adina that we need to take a look at the substance of the exemptions and build in a public interest component to a greater extent than is currently the case.

And second, and this is not a very satisfactory recommendation because nobody wants another study commission, but I do think that the Faster FOIA Act idea of finally examining in depth the delay problem is really a necessary step. And if that had been done several years ago when this idea first came up and actually passed the Senate Judiciary Committee, we would be sitting here today with some real information and some real recommendations. So I think we finally do need to get that process started.

Mr. MCHENRY. OK. Thank you so much. This is very helpful because so much of what we talk about here is the problem, not the solution. So just to pivot and give us some thought process, give us food for thought on how to approach this.

And I certainly appreciate you all being here and the interests that you are trying to carry out on behalf of the people.

Thank you.

Mr. CLAY. Thank you.

Let me also thank this panel and the previous panel for your participation in this hearing that kind of highlights Sunshine Week, and it is so important that we improve upon FOIA and how the Federal Government interacts with the public, especially the requester community. I think your testimony has been invaluable.

And without objection, this hearing is adjourned.

[Whereupon, at 4:37 p.m., the subcommittee was adjourned.]

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