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ADVANCING FREEDOM OF INFORMATION IN THE NEW ERA OF RESPONSIBILITY

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

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ADVANCING FREEDOM OF INFORMATION IN THE NEW ERA OF RESPONSIBILITY

WEDNESDAY, SEPTEMBER 30, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Whitehouse, Klobuchar, Franken, and Cornyn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. I was just explaining to Senator Cornyn, who has been such a champion in this area, the reason why I am late. Over in the Russell Building, they were changing the Chair of the Senate Agriculture Committee. For the first time, there will be a woman as Chair of the Committee, Blanche Lincoln of Arkansas, and the first time an Arkansan will be Chair. But it is a Committee which thrives on bipartisanship, and all the former Chairs of that Committee who are currently serving in the Senate were there—that is, Senator Saxby Chambliss of Georgia, Senator Dick Lugar of Indiana, Senator Thad Cochran of Mississippi, all Republicans; and Senator Tom Harkin and myself, Tom Harkin of Iowa and myself. So we had six people there, one Chair, five former Chairs, and we have all—to show you how the majority goes back and forth here, all five of us have been former Chairs and former Ranking Minority members. So it is one of those things that they keep track of. I suspect it is somewhat of an oddity in the Senate and somewhat historical.

But more importantly for this Committee, we are holding an important oversight hearing on the Freedom of Information Act, or "FOIA," as we all know it. FOIA was enacted 42 years ago. It was enacted 7 years before I came to the Senate. It was a watershed moment in our Nation's history because it guarantees the right of all Americans to obtain information from their Government and to know what their Government is doing. Remember, it is our Government, all of us.

In his historic Presidential memorandum on FOIA, President Obama said that "[i]n our democracy, the Freedom of Information Act, which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is

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the idea that accountability is in the interest of the Government and the citizenry alike."

I know from the start of his transition to the White House, I urged him to make a clear commitment to FOIA, and I told him I was very pleased that one of his first official acts was to issue the new directive to strengthen FOIA. But I would also note that he supported every time Senator Cornyn and I made moves to strengthen FOIA, he as a Senator had backed that.

FOIA is an indispensable tool in protecting the people's right to know. It is a cornerstone of our democracy. If you do not have it, you are kept in the dark about key policy decisions. The Government will always tell us look at the great thing we did right. FOIA kind of helps find out those things we do not want to talk about that we did wrong. And without open Government, you cannot make informed choices at the ballot box. Without access to public documents and a vibrant free press using those, officials can make decisions in the shadows, often in collusion with special interests, escaping accountability for their actions. And once eroded, the right to know is hard to win back.

It is essential that we honor the President's promise to restore more openness and accountability to Government. I have called on the Justice Department to conduct a comprehensive review of its pending FOIA cases so that information sought under FOIA is not improperly withheld from the public. In March, the Attorney General issued new FOIA guidance that restores the presumption of disclosure for Government information. I welcome that new policy, and I am pleased that the Associate Attorney General is here to discuss how the FOIA guidelines are being implemented. Mr. Perrelli, I am delighted you are here.

We have made good progress toward strengthening FOIA in Congress. Earlier this year, the Congress enacted an omnibus spending bill that includes critical funding to finally establish the Office of Government Information Services at the National Archives and Records Administration as part of the OPEN Government Act, which Senator Cornyn and I wrote.

Incidentally, speaking of that, both of us realize the temptation to withhold things can afflict both Democratic and Republican administrations. We were trying to write this so no matter who is President, no matter which party is in control, that the temptation can be resisted because FOIA is strong. And so we are going to—there is a lot more I will put in the record. I would note that I have worked with Senator Feinstein, the Chair of the Select Committee on Intelligence, to remove an unnecessary FOIA exemption from the intelligence reauthorization bill. Senator Cornyn and I have also reintroduced the OPEN FOIA Act.

I want to yield to Senator Cornyn, and I will ask that my full statement be made part of the record.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman LEAHY. Senator Cornyn.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Well, thank you, Mr. Chairman, and I want to thank all the witnesses for being here today for this important hearing. I am sad because my responsibilities down the hall at the Finance Committee with health care reform are going to take me away from here, so I will not be able to participate fully. But please know that is not for lack of interest. I am absolutely committed to the cause of open Government and freedom of information. And I am hoping, Mr. Chairman, that you and I can continue to work together as partners to advance this cause in the future as we have been fortunate to do in the past.

I know sometimes people get the impression that in Washington nothing gets done on a bipartisan basis. But that is just not true, and I think the work that the Chairman and I have done in this area is a good example of that. And I would note, since our friend Senator Whitehouse is here, that I was proud to cosponsor with him the Justice Reinvestment Act legislation.

So I think hope springs eternal for bipartisan cooperation. Even though we may fight like cats and dogs on some issues, when we find common cause, we can do some very good things.

The OPEN Government Act of 2007 was an attempt to restore meaningful deadlines with real consequences to the freedom of information system and, thus, to ensure that Government agencies will provide timely responses to requests. Our bill created a new system for tracking pending requests and an ombudsman to review agency compliance.

My experience, Mr. Chairman, when I was Attorney General of Texas and had responsibility for enforcing the Open Meetings and Open Records Act, was that a lot of time people did not know how to navigate Government when they wanted information, and so the ombudsman function served as a good way to avoid litigation, to avoid misunderstandings, and just get to the heart of the matter and find out what people are asking for and get them what they want without delay and without hassle. I am glad we are going to be able to do that at the Federal level.

Today's hearing provides the opportunity to examine whether the key provisions of the OPEN Government Act are being properly implemented and how effective they are. I hope our witnesses will offer suggestions for further improvements to the Freedom of Information Act and enforcement to build on the reforms that we have already passed. I am sure you have some ideas.

Finally, I would like to speak directly to our first panel of witnesses, Mr. Perrelli and Ms. Nisbet, who appear today on behalf of the Federal Government. As I noted, the OPEN Government Act was the latest attempt to improve the Government's response time to citizens' requests for information and the thoroughness of those responses. But tightening deadlines and imposing consequences can only take us so far.

My view is that what is most critical is a change in the ethic and the culture of the Federal Government when it comes to our citizens and their requests for information, which is not the Government's. It is theirs. Citizens requesting information should be treated as valued customers, not as adversaries, and certainly not

as a nuisance. They should be engaged and assisted and not avoided. And that is why, again, I hope the ombudsman function will help in that regard.

Ms. Nisbet, the Office of Government Information Services was created in part to change that ethic and to change the culture and to transform every corner of the Federal bureaucracy. This is a tall order, but one that I believe you are well suited to lead. I stand ready to work with you to help bring this critical change of attitude, ethic, and culture about.

And, Mr. Chairman, thank you again for continuing our partnership. I look forward to more good work in the interests of open Government, transparency, and accountability. Thank you.

Chairman LEAHY. Thank you very much.

Our first witness is Thomas J. Perrelli who currently serves as the Associate Attorney General at the U.S. Department of Justice. Before that, he was the managing partner of the Washington, D.C., office of Jenner and Block.

Incidentally, while Senator Cornyn is leaving, I would note that half of our Committee is back in Finance doing health care.

When Mr. Perrelli was at Jenner and Block, he co-chaired the firm's new media and entertainment practices. Prior Government experience includes service as counsel to former Attorney General Janet Reno, Deputy Assistant Attorney General in the Civil Division during the Clinton administration; a graduate of Brown University and Harvard Law School.

Mr. Perrelli, glad to have you here, sir.

STATEMENT OF THOMAS J. PERRELLI, ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. PERRELLI. Thank you, Mr. Chairman. Good morning.

As you indicated, my name is Tom Perrelli. I am the Associate Attorney General and also the chief FOIA officer for the Department of Justice. I would first like to thank the Chairman, the Ranking Member, and the rest of the Committee for bringing attention to the important issue of our implementation of the Freedom of Information Act. I know it has been a long-time issue on which you have focused, Mr. Chairman, and your leadership has really been to the benefit of the country. And I appreciate also the leadership of Senator Cornyn on this issue.

As you know, President Obama has pledged to make his the most open and transparent administration in history. The administration's efforts started on his first full day in office, when he issued important memoranda that called on his agencies to initiate a new era of open Government. The premise is simple. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.

Since that time, Federal agencies across the Government have been working to promote openness in a variety of ways, but we at the Department of Justice take particular responsibility for implementing the President's directive with respect to FOIA. I have described a number of initiatives in my written testimony, and I would be pleased to talk about those further, but at least I would like to highlight three.

First and foremost is Attorney General Holder's March 19 memo to the heads of all Federal agencies. Those guidelines advise agencies that we are taking a new approach to the disclosure of information and trying to implement, I think, really as Senator Cornyn suggested, a new culture in approaching the FOIA.

In addition to strongly encouraging agencies to make discretionary releases of records, the Attorney General has made clear that records should not be held simply because a FOIA exemption may apply, to prevent embarrassment, or because of speculative or abstract fears. Rather, the Attorney General has made clear that the Department of Justice will defend a 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 the disclosure is prohibited by law. And we and our agency partners are implementing those guidelines every day.

The second thing I will point to briefly is the latest edition of our Department of Justice Guide to FOIA, published this year in sunshine yellow, and that is a lot of FOIA for those who can see the size of the book. It is an indispensable resource and really the definitive manual on FOIA. And that is used by Federal agencies across the country and in the requester community. And having been both a requester and within Government, the FOIA manual has always been of critical help.

Finally, I am also pleased to announce this morning that the Department is issuing updated guidance to the chief FOIA officers. Under the FOIA, the Attorney General is to direct agency chief FOIA officers to report on their agencies' performance under the FOIA. This morning we are issuing guidance that will continue our efforts to promote openness in Government. The new guidance goes beyond the legal requirements of the OPEN Government Act and requires each agency to talk about the steps being taken at their agency to apply the presumption of disclosure as well as to track several different measures related to processing backlogs, reliance on certain statutes for Exemption 3, as well as their efforts to implement new technologies. We think that reporting will help encourage agencies to improve their administration of FOIA.

Finally, I should note that we at the Department of Justice are particularly pleased to be testifying with Miriam Nisbet, welcoming the Office of Government Information Services—OGIS—to the Federal FOIA family, and we are looking forward to working with OGIS and to benefiting the citizens who seek information about how their Government works.

Thank you, Mr. Chairman, and I would be pleased to answer any questions that you or other members have.

[The prepared statement of Mr. Perrelli appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Perrelli.

Before we go to the questions, in my longer statement in the record, I mentioned Ms. Nisbet and how happy I am she is here. She currently serves as the newly appointed Director of the Office of Government Information Services, or OGIS, at the National Archives and Records Administration, an office I have pushed very hard to get established, and I cannot think of anybody better to serve there as head of it. Before she assumed this post, she served

as the Director of the Information Society Division for the United Nations Educational, Scientific, and Cultural Organization—we know it as UNESCO—in Paris. Her extensive information policy experience includes previous work as a legislative counsel for the American Library Association, Deputy Director of the Office of Information Policy for the Department of Justice. She earned her bachelor's degree and her law degree from the University of North Carolina.

Bievenue. Go ahead.

STATEMENT OF MIRIAM NISBET, DIRECTOR, OFFICE OF GOVERNMENT INFORMATION SERVICES, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, COLLEGE PARK, MARYLAND

Ms. NISBET. Merci. I am pleased to appear before you today. This Committee was instrumental in establishing the Office of Government Information Services through the Open Government Act of 2007, which amended the Freedom of Information Act. Thank you in particular, Mr. Chairman, and thanks to Mr. Cornyn, for your vision and your perseverance in making this new office one of the levers for reinvigorating our country's FOIA.

The concept of the public's right to access to the records of its Government is fundamental to our democracy. Mr. Chairman, you have articulated that beautifully in your opening statement. Yet making our Freedom of Information Act work smoothly and efficiently to accommodate that concept has proved more difficult and costly than we could have imagined. This Committee has continued to make improvements in the law over several decades—delicately balancing the various legal concerns for protection of certain information and the need for disclosure, as well as addressing practical aspects such as fees and the time limits for responses to requests by agencies for records, and most recently, by establishing the Office of Government Information Services, or OGIS.

With funding received for the first time this fiscal year, the National Archives and Records Administration acted quickly early in the year to get the office started. Funding is also contained in the fiscal year 2010 President's budget.

I am feeling a little lonely right now. I arrived at the Archives a few weeks ago, and I have been interviewing vigorously to hire five other staff members. But soon we will be a dedicated team building a straightforward and simple interface between the public and the executive branch agencies, offering alternative dispute resolution through mediation, and helping to make the FOIA work better for all involved in the process.

How will we accomplish this? Our mission is twofold. One part involves review of agency compliance and performance with the FOIA. We will, of course, work closely with the Department of Justice, which has a major and well-established role in this regard, and with the chief FOIA officers at the agencies. One immediate and feasible task is to take advantage of available technology to view and assess the existing agency annual FOIA reports, similar to what is being done to assess Federal agencies' information technology initiatives through the IT Dashboard and data.gov.

A second part of the mission is to offer mediation services to resolve disputes between persons making FOIA requests and agencies who receive them as a non-exclusive and non-binding alternative to litigation. We will pursue several routes:

We will use existing Federal mediation resources to help us provide this service, something that has not been done before under FOIA except on an ad hoc basis in litigation as ordered by the courts.

We will work with existing agency FOIA Public Liaisons in our review and in developing our mediation capacities.

We will create an online dispute resolution system, called ODR, which is a relatively new approach to conflict resolution and which holds great potential to efficiently process and prioritize a high volume of cases.

Many people, and this Committee, including this morning, have been referring to the new office as the "FOIA Ombudsman." We view our role in that regard as mediator—assuming, of course, that a FOIA requester has not already decided to go to court—and as a source of information, which we will provide in person as well as through many resources on the Web. Many agencies as well as nongovernmental organizations offer useful guides, templates, and good practices on FOIA, and we will promote and take advantage of these existing resources.

Public understanding of how Government records are organized and maintained is not strong, nor should it be required to submit a FOIA request. But that lack of understanding can result in requests that are overly broad or which lack the specificity to allow the agency to readily search for the records. Similarly, the volume of requests—the Government receives over 600,000 FOIA requests per year—the sensitivity of the records, and the need to consult with other affected agencies all significantly impact the ability of agency FOIA officers to respond in a timely manner. You know this well. The combination of these pressures can result in misunderstandings. Clearing up those misunderstandings and seeking solutions in more complicated cases, short of litigation, would save time and money for agencies and the public alike, as well as bolster confidence in the openness of Government.

In just a short time, I have received helpful advice and support from this Committee, the White House Open Government Initiative and the Chief Technology Officer, the Department of Justice, the National Mediation Board, innovators in the private sector, State Ombudsman offices, and members of the FOIA requester community. With all of these stakeholders assisting in the new office's outreach, we will be able to realize the vision of this Committee to achieve the timely and fair resolution of America's FOIA requests.

Thank you, Mr. Chairman, for the opportunity to testify. I would be happy to answer any questions.

[The prepared statement of Ms. Nisbet appears as a submission for the record.]

Chairman LEAHY. Thank you for being here, and I am going to—I have a number of questions I want to ask. I am going to turn it over for a few minutes to Senator Whitehouse while I respond to another call from another branch of our Government, and then I will come back here.

I was surprised. You know, I was very pleased in March when the Attorney General issued new FOIA guidance that we restore the presumption of openness in our Government, and I told the Attorney General that. Now, what are some of the specific steps that we are taking? For example, I would ask how many times has the Department released additional information in a pending FOIA case since the new guidelines went into effort.

Mr. PERRELLI. I do not think I have precise numbers, but I will say that we have taken a number of steps. Within a few days after the guidelines were released, we began training other agencies as well as Department of Justice personnel on the new guidelines. We have held large conferences to train and to begin the process, again, as Senator Cornyn said, of a cultural change. And the way we put it to our own personnel, as well as to agencies, is that their focus should be not on identifying the reason why something could not be disclosed, not on identifying a reason why something could be withheld, but on identifying those records that could be disclosed to the public. That has been a major cultural change.

I think we have seen a number of examples within the Department of Justice and outside the Department of records released, and we have begun a long-term process of releasing OLC opinions. Our Executive Office of Immigration Reserve has now released the bench book, the reference book that is sitting on every immigration judge's desk.

Chairman LEAHY. But you have a—and you know that all the other departments are going to look and say, well, what is the Justice Department doing, because they are sending out these guidelines. And you have a number of pending FOIA cases currently in the Department of Justice where people have not been able to get their FOIA requests answered.

What are you doing on those? Is it case by case? Is it blanket? What do you do so that people are not hit with "Do as I say, not as I do"?

Mr. PERRELLI. Certainly, that is true, and we want to make certain that in those cases the Attorney General's guidelines are being applied. So we are—working with the litigating lawyers in those cases as well as reaching out to the agencies. And in a significant number of cases, I think we have been able to do some reprocessing and to release additional records.

I know the head of the Civil Division has designated a senior official there who is reviewing all of the cases, and they have many of the high-profile FOIA cases. They are going one by one through those cases and identifying areas where additional records can be released.

I myself have met with the civil chiefs of the U.S. Attorneys' Offices to emphasize the need to do that in their cases as they go forward. And I know our Office of Information Policy has reached out both to the agencies as well as to litigating lawyers to do exactly that.

So I think the agencies are seeing that we at the Justice Department are implementing it and are ensuring that they are doing it in cases where that is appropriate.

Chairman LEAHY. Could you have somebody let me know how many cases are pending?

Mr. PERRELLI. Certainly, we can get you those numbers.

Chairman LEAHY. Thank you. And how many agencies currently have chief FOIA officers and FOIA public liaisons in place?

Mr. PERRELLI. I think 92 of 95 of the agencies have chief FOIA officers that have been designated, and we have been in contact with the three that do not. Those three have interim individuals who have been characterized as "points of contact," and we have told them they need to actually designate individuals.

Chairman LEAHY. What about posting information online? Are they doing that? And is that cutting back on the FOIA backlogs?

Mr. PERRELLI. I think it is too early to tell, but we certainly are encouraging agencies to do exactly that because we think that will have an impact on backlogs. And we are directing agencies to identify records that they should regularly be able to release in the hopes that people will be able to find the records that they are looking for and not need to file a FOIA request or maybe a more limited one.

Chairman LEAHY. We find that—some depending upon who can lobby the most, trying to slip different legislative exemptions in. I mentioned one that we were able to keep out, working with the Intelligence Committee. If they all come before this Committee, there are going to be very few exemptions made. We all understand the need on security. You do not file a FOIA to find out who is acting at this moment in troubled parts of the world with our CIA, but we have all seen some of these in the past: "Well, we cannot tell you that because it is highly classified." And you have something where it is all blanked out. You may have seen the same thing, all of it, in the newspapers weeks before. I once told the Director of the CIA, William Casey, when he came up about the third time in 2 weeks to the Congress to say, "I know I was supposed to have told you about" whatever the issue was, "and now that it has been in the press, I want to tell you more about it." And I told him, "Send this to the New York Times marked Top Secret." We get three advantages. We get the information we want sooner than he would ever give it to us. Second, we got it in greater and more accurate detail. And, third, we got that wonderful crossword puzzle.

[Laughter.]

Chairman LEAHY. He was not as amused as the audience here was. But I only let people know about these statutory exemptions on the one hand. Also, on the other hand, how do we keep from adding more of them in there?

Mr. PERRELLI. Right. This is an issue of real concern to us because when there are efforts to put an exemption in statute in an unclear way, it is difficult for the public, for legislators, and, frankly, for agencies as they try to implement FOIA. So we have a real interest in making sure that it is transparent that an exemption is being proposed and being discussed so a decision can be made on that.

In terms of exemptions already in place, we require all the agencies to identify when they are relying on a particular statutory exemption. We actually publish on our website which statutes are being used as exemptions, so that can be transparent for all to see, and in their annual reports each agency has to identify if it is rely-

ing on a particular statute as a basis for an Exemption 3 withholding.

Chairman LEAHY. I have exceeded my time. I am going to turn it over to Senator Klobuchar, but then I am going to come back. I want to talk about state secrets. Thank you.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Thank you, both of you, for being here.

Mr. Perrelli, I wanted to talk about the President's FOIA memorandum from January 21st. Could you elaborate a little more about what it means to require agencies to have a presumption of openness and to take affirmative steps to make information public? How much of that is already required by FOIA? And how much of the President's memo goes above and beyond the law?

Mr. PERRELLI. Well, the message that the Department of Justice used to send was that if you can find a basis for withholding information, we will support you and defend that.

The President's memorandum changes this really from a presumption that if you can find a basis it will be withheld to a presumption that information will be disclosed unless a particular harm can be identified. And that is, as I said, a significant cultural shift that makes an enormous difference. It also encourages agencies to go beyond that, regardless of whether they get a FOIA request, and identify information that they routinely create and maintain that can be made public. And we have seen many agencies go out of their way with the new presumption to identify those records and put them up on the Web or disseminate them in some other fashion. And like I said, we work with agencies every day to help them think through this and identify those kinds of records.

Senator KLOBUCHAR. Now, I know from having managed 400 employees when I was county attorney that culture shifts are not always that easy. I remember I once moved furniture around in our lobby, and within 20 minutes there were 18 negative comments about the new arrangement.

And so I am just wondering how it has been working with the agencies. What has been the most challenging thing as they have gone to implement these new changes?

Mr. PERRELLI. I think the key to all of this is training, training, training, as well as getting broad-based support within each agency. In Attorney General Holder's guidance to agencies, one of the things he emphasized was that FOIA is everyone's responsibility—an effort really to empower the chief FOIA officers of each of the agencies to identify issues and problems and raise resource issues or concerns about not having enough people, with backlogs, so that we can actually do this more effectively and efficiently.

As Ms. Nisbet mentioned, there are obviously an enormous number of FOIAs submitted to the Government each year, and trying to keep up with that flow remains a significant challenge.

Senator KLOBUCHAR. How about the issue of the—you drafted a new policy regarding partial disclosures, which seems to make sense to me, that even if a full disclosure of a document is not possible, you could do a partial disclosure. Have there been challenges with that?

Mr. PERRELLI. I wouldn't say there have been challenges with that, but I think we are still working to make sure that as individuals are looking at particular documents—and, again, this is all about training—that their focus should be on, "are there pieces of this document that can be released, even if there are pieces in this record that may not be able to be released?" And we very much encourage agencies to go through that process on a document-by-document basis. I think we are starting to see the results of that training and trying to inculcate these ideas, and I think we are making progress every day.

Senator KLOBUCHAR. And one of the provisions of the OPEN Government Act was a requirement that agencies assign tracking numbers to FOIA requests if they would take longer than 10 days to fulfill, and I am sure that got at some of the backlogs and what was going on and established ways for requesters to track the status of their request. Has this been fully implemented yet?

Mr. PERRELLI. I think this has been broadly implemented. I am hesitant to say "fully implemented." But I think it has been an important development just in the customer service aspect of the FOIA, so that people can track these things. The other piece of this puzzle in working with agencies, is that we have seen a wide disparity in technological ability with different agencies. We are working with them, across agencies, on best practices to try to encourage more of them to move to electronic processing, which I think over time is going to be extraordinarily helpful.

Senator KLOBUCHAR. Yes, I would think you would want it more standardized. It would be easier to do that.

Mr. PERRELLI. We continue to work on it.

Senator KLOBUCHAR. Ms. Nisbet, I know you are brand new at your job, but do you want to add anything to this, especially about the standardization, trying to get things working across agencies?

Ms. NISBET. Well, certainly I think this administration is very much dedicated to looking for innovative ways to use technology. Even older ways of using technology would be welcomed at some of the agencies.

[Laughter.]

Senator KLOBUCHAR. As opposed to no way of using——

Ms. NISBET. Yes, as opposed to no way. I think you see the whole range, and it is very much a challenge. It is technology, it is resources to support that technology.

Our office will certainly be looking for ways to use technology to make our resources known and our presence known, and working with the FOIA officers to find the best practices, where it is working, good examples, and sharing those resources so that different agencies are not having to start from scratch to develop their own but, rather, can borrow.

Senator KLOBUCHAR. Thank you, and I do appreciate your efforts here. My State has always had a very broad FOIA law and has allowed a lot of information to be shared. And I was actually quite surprised when I came to Washington and some of the—for instance, in the climate change area, when we were trying to get some of the findings with the previous administration, and the Senators had to view them in a little room by ourselves and could not write anything down. I was, like, "Where is this coming from?"

So I am very glad that you have embarked on this new policy. Thank you very much.

Ms. NISBET. Thank you.

Chairman LEAHY. Thank you, Senator Klobuchar.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Ms. Nisbet, I understand there are FOIA requests that have been outstanding for 17 years, and that Government agencies have requests that have been outstanding for 10 to 15 years. How are those going?

[Laughter.]

Senator FRANKEN. And what will your office do about those?

Ms. NISBET. I am afraid that what you have heard is not a rumor, from what I understand. What we will be doing immediately, as soon as we can really have somebody to answer the phone and deal with those kinds of issues, is use our efforts to mediate where there are stubborn cases. We will be working, of course, with agencies and with FOIA requesters to identify particularly difficult problems and try and get those backlogs over with.

Senator FRANKEN. Well, what is the role—how are you going to mediate these things? Can you be more specific about that? Let us say when there is not just a misunderstanding but the person making the request and the person denying the request are just at loggerheads, how do you do that? How does that work? What is the role of the mediator?

Ms. NISBET. The role of a mediator—and mediators are used in all kinds of fields, not only domestic disputes and financial disputes, but have been used in FOIA cases as well. The technique is really a matter of having a trained mediator sit down with the parties separately and together to see where the issues are and start trying to find ways to find a common ground and a solution.

It is often very difficult. I will give you an example of one case in which I myself participated when I was in the counsel's office of the National Archives in the 1990's. One of the very, very stubborn cases in litigation that I am sure that you have heard of, that is pretty well known, was litigation over the White House tapes of former President Nixon, a very intractable case that went on for many, many years. But with the help of a mediator, the parties—the Justice Department, the National Archives, the custodian of the records, and the estate of President Nixon—were able to work through some of those very difficult issues and eventually come up with a plan for getting much more information released to the public. And that was a very difficult case, but mediation was very much the key there.

Senator FRANKEN. Just curiously, what was so difficult about that? Why couldn't the President tape himself? What was so difficult about the mediation exactly? In other words, it seems to me that would be a pretty clear case where that would be a public record?

Ms. NISBET. Well, the Nixon White House tapes were quite unique in that—I would love to invite you over to the National Archives, and we could perhaps talk a little bit about it and maybe show you when you can listen to some of those records. But, you know, that was the situation in which Congress acted for the first

time to take records of a President and make them the Government's records and not the personal records of the President.

So it led to quite a bit of litigation, going to the Supreme Court over the ownership, over the legality, the constitutionality of the law that was passed to take the tapes, and then eventually over the release of them. And President Nixon continued to retain an interest under law in the release of the tapes. So everything had to be negotiated. A very interesting case, but we are still seeing today releases of those records for the first time.

Senator FRANKEN. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Franken.

One thing I did not have a chance to ask before, Mr. Perrelli, was on the state secrets privilege. Last week, we learned the administration is going to start a new policy on state secrets beginning I guess tomorrow. The Attorney General's new policy has several parts actually taken from the State Secrets Protection Act, which I have introduced along with several members of this Committee. I think that does show new openness, but I want to make sure that the decision whether to invoke state secrets or not has real judicial review. And if you do not have legislation to make it permanent, the next administration could easily change it.

We are all familiar with the use of state secrets, but as I review some of the cases we have seen around this country, I think it has been overused. It is one thing to use the question of state secrets if indeed the security of the country is at stake. It is another thing to use it when it is "let us cover up our mistakes" kind of usage.

Are the courts going to have the ability to review the evidence the Government uses if it wants to justify the privilege of state secrets?

Mr. PERRELLI. Well, Mr. Chairman, the policy that the Attorney General is implementing as of tomorrow is an important step here in protecting classified information, as well as ensuring that it only is invoked in a manner that we think is legally defensible.

As you indicated, the plan has a number of steps. Invocation of the privilege will be reviewed by a Department committee. The decision will be made by the Attorney General. It will not be asserted by the United States in a situation where you are trying to cover up embarrassment or a mistake. And we anticipate that the courts will review those determinations as they do today.

Chairman LEAHY. Well, because I might say if it is used all the time, then it might as well as be used none of the time, because it is going to lose any credibility. I do want the ability of courts to review, and that is why I will keep pushing on the State Secrets Act that we have pending right now before the Committee, not just for this administration but for future administrations to have some guidelines.

I might say, Ms. Nisbet, you know, Senator Cornyn and I have worked very hard to have your office. I hope you will keep us posted here on those things that are going right, but also let us know the things that are going wrong. We want to know what is working in the office, but also if you find things that you do not think are working or that the law creates problems for you, let us know. We

do not kill the messenger up here—actually, we do now and then, but——

[Laughter.]

Ms. NISBET. You will make an exception in my case.

Chairman LEAHY. We kill reluctant messengers. We do not do that to people who are willing to tell us.

We will take a 3-minute recess while we change around the table, and then we will go to the next panel.

Ms. NISBET. Thank you.

Mr. PERRELLI. Thank you, Mr. Chairman.

[Recess 10:52 a.m. to 10:56 a.m.]

Chairman LEAHY. If we could reconvene, please. We have two witnesses here: Tom Curley, who was named the President and Chief Executive Officer of the Associated Press in June of 2003. That is impossible. That is 6 years. Since assuming the position, Mr. Curley has worked to deepen AP's longstanding commitment to the people's right to know. He is one of the country's most outspoken advocates for open government and has testified before this Committee. He holds a political science degree from Philadelphia's La Salle University and a master's degree in business administration from Rochester Institute of Technology.

And the other witness will be Meredith Fuchs. She is General Counsel for the National Security Archive at George Washington University. In that capacity, she oversees Freedom of Information Act and anti-secrecy litigation, advocates for open Government, lectures on open Government, a former law partner in the Washington, D.C., office of Wiley Rein LLP; a bachelor's degree from the London School of Economics in political science; received her J.D., cum laude from the New York University Law School.

Mr. Curley, we will begin with you, and then go right to Ms. Fuchs.

STATEMENT OF TOM CURLEY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, THE ASSOCIATED PRESS, REPRESENTING THE SUNSHINE IN GOVERNMENT INITIATIVE, NEW YORK, NEW YORK

Mr. CURLEY. Mr. Chairman, thank you for this invitation and your continuing commitment to safeguarding our liberties through open Government.

Mr. Chairman, your work is not done. The secrecy reflex at too many agencies remains firmly in place. FOIA still contains relatively weak penalties for those who do not meet their disclosure obligations.

I would like to make four points.

First, we in the news media still find Federal agencies unresponsive to the declarations from the White House that Government must become more open. We truly appreciate the change in policy direction, but the change has not reached the street. A stronger FOIA is still the public's best defense against harmful Government secrecy. Unfortunately, the effort to conceal is greatest where public interest is highest.

Second, the Office of Government Information Services eventually can be extremely valuable to FOIA requesters as an adviser and sometimes as a mediator of disputes. But OGIS is tackling

enormous challenges with very modest resources, and we urge the Committee to continue its close monitoring and support of the new office as it finds its footing.

Third, FOIA's privacy exemption may need the Committee's attention. Courts in some important cases appear to be ignoring the intent of Congress when a past FOIA that is public records containing personal information qualify for the exemption only when that information is highly personal, private, and sensitive. Some judges are satisfied with a mere showing that a person is mentioned by name in a document. Then they compound the error by refusing to recognize any public interest in disclosure unless the requester knows in advance that they are likely to contain evidence of Government misconduct. That is not the proper balancing of interest that FOIA is supposed to require. It is wrong. It is causing problems. And we think it may take changes in the language of FOIA Section 6(b) or b(6) and b(7) to fix it.

The fourth and final point is that the so-called b(3) amendments to the legislation are severely undermining FOIA's ability to preserve the public's access to Government activities and information. As you know, b(3)s are provisions embedded in other laws that put certain very specific kinds of information beyond FOIA's reach. They often are inserted with no discussion, and they now constitute a very large black hole in our open public records law.

The Sunshine in Government Initiative found about 250 b(3)s on the books, and about 140 of those show up in agency denial letters every year. In many cases, these special exemptions protect information already covered under one or more of the other exemptions in FOIA Section b. In other cases, they are creating whole new categories of information not subject to disclosure.

But the real problem with these exemptions is that writing them into statute forecloses any chance of an impartial determination that a valid reason applies to all the information that has been effectively roped off. Whether or not one of the general FOIA exemptions should cover a particular information request is subject to court review. But a statutory exemption for very specific information is not.

The FAA, for example, has a b(3) exemption that lets it withhold information voluntarily submitted to aviation regulators regarding the safety and security of air travel. You may remember that this is the exemption the FAA was planning to use as the basis for holding information the agency collected about airports where birds in flight paths are crippling or even bringing down airliners.

Also secret are the identities of watermelon growers, the identities of people who handle honey, and the ingredients in cigarettes. B(3) exemptions hide the private sector advice that Government trade representatives and Congressional committees use to shape trade policy and also the studies that chemical plants conduct to determine the impact of any worst-case accident on neighboring communities and the environment.

There may be valid arguments for putting a secrecy label on some of this information, but the real concern is that whatever argument exists have not been challenged or even discussed in any public forum, and the b(3) exemptions mean a disappointed FOIA

requester will find it nearly impossible to challenge them in the courts.

Nobody knows exactly how many of these exemptions there are, but AP reporters encounter them on a routine basis. We regarded the OPEN FOIA Act, which you, Chairman Leahy, and Senator Cornyn introduced earlier this year, as a much needed first step toward reining in this alarming trend. Your proposed statute would make it possible for anyone who is watching for b(3) exemptions in proposed legislation to spot them easily.

I hope you can keep the OPEN FOIA Act on track toward passage, and I hope Congress will then build on it with some additional steps such as automatic sunsetting of b(3)s and special scrutiny of b(3) exemptions, including a White House-OMB review process before these exemptions can be submitted by Federal agencies.

Chairman Leahy, thank you very much.

[The prepared statement of Mr. Curley appears as a submission for the record.]

Chairman LEAHY. Thank you. I am going to get back to questions in a moment, but you are not willing to concede that it is vital for national security to keep the identity of watermelon growers secret? I mean, what kind of patriot are you?

[Laughter.]

Mr. CURLEY. Well, it did make for a great story.

Chairman LEAHY. I do remember very well the flights and birds. I mean, I just went right through the ceiling. As someone who flies virtually every week—well, anyway, we will get back to that in a moment.

I should say, for anybody who wants to yank that part of the record out of context, I was joking on the question of your patriotism. You almost have to do that these days.

Ms. Fuchs, go ahead, please.

STATEMENT OF MEREDITH FUCHS, GENERAL COUNSEL, THE NATIONAL SECURITY ARCHIVE, WASHINGTON, D.C.

Ms. FUCHS. Thank you, Mr. Chairman. I am delighted to talk to you today about the Freedom of Information Act.

The outlook is quite different today than it was in March 2007, when I last appeared before this Committee. Thanks to the efforts of this Committee, and particularly your own efforts and Senator Cornyn's efforts, the OPEN Government Act of 2007 was enacted into law. Thank you for that and, in addition, the sustained interest this Committee has shown in the administration of FOIA has had an impact across Government, so thank you again for that. And I hope you continue regular oversight in this area.

As you know, the OPEN Government Act of 2007 amended FOIA in numerous ways. In my written testimony, I have included some details about specific provisions, but today I want to talk about two particular issues under the OPEN Government Act. One is we are delighted with the appointment of Ms. Nisbet as the first Director of the Office of Government Information Services. The National Archive and Records Administration was very open during the process of developing startup plans for OGIS, and Ms. Nisbet has so far shown the same openness to hear the input of the requester community as she sets up her office. We urge this Committee to con-

tinue to use its efforts to ensure that OGIS is on firm financial footing and that the Federal Government FOIA community participates in OGIS' mediation activities in good faith.

Second, with respect to the OPEN Government Act, I want to touch on the state of FOIA backlogs. I can see that Senator Franken at least read my testimony, which pointed out that as of the end of fiscal year 2008 there were still quite old backlogs in FOIA requests. The OPEN Government Act——

Chairman LEAHY. I would note that Senator Franken is one of the hardest-working Senators I have met in a long, long time.

Ms. FUCHS. That is great. Well, I think that the reason he asked that question is because it is quite shocking to imagine that there are still FOIA requests that are 17 years old.

The OPEN Government Act has changed the reporting requirements under the FOIA, and the reason it was necessary for it to do that was because the prior annual agency FOIA reports did not provide an accurate picture of the State of FOIA. Under prior law, agencies only collected what information the law required. They did not design systems to help them with tracking or managing their FOIA requests. In fact, some agencies did not even have any tracking system, which is a reason that you all added tracking requirements to the OPEN Government Act.

The new law should change things. Unfortunately, because many agencies have such antiquated systems, I do not feel that the annual reports filed for fiscal year 2008 are fully illustrative of the State of FOIA. Sadly, they did show that agencies have requests as old as 17 years, 15 years, 10 years, and the like. We are going to look hard at the annual reports that will be developed in the next couple of months for fiscal year 2009, and I urge this Committee to do so as well.

Then I would like to turn a bit to talk about the Obama administration. As you know, President Obama on his first full day in office issued a series of memoranda and executive orders on open Government issues. One of these was a FOIA memorandum. I reread that memo this morning, and I am struck by the vision of openness and accountability it espouses. It says, "All agencies should adopt a presumption in favor of disclosure in order to renew their commitment to the principles embodied in FOIA and to usher in a new era of open Government." Soon after this memorandum, as you know, Mr. Holder issued a FOIA memorandum, and the Department of Justice also soon issued detailed guidelines for agencies.

So in preparation for today, I pondered whether we have entered a new era of open Government which the President asked for. Most of the people I have spoken to are happy with the overarching principles that this administration has articulated, but they worry about the implementation.

One area in particular that people are concerned about is whether the new standards have been applied to FOIA cases currently in litigation at the time the policies were issued.

I myself have a case in which we asked the Department of Justice if it wished to re-review certain records, and the Department declined. I heard similar stories from other litigators, and I have seen court records saying that same thing.

But I also know of several cases where the Department of Justice has released additional records. Some of these were very high profile cases, and there were many factors other than the FOIA policies that were influential, such as the interrogation memoranda and the IG report from the CIA on interrogation. But there are other less well known cases. And we have also seen that in response to regular FOIA requests, agencies are processing more.

Mr. Perrelli suggested that the new standards have been applied in all instances, and with respect to that, I suggest this Committee ask the Department to report on the results of its litigation review and to report whether it has refused to defend FOIA cases under the new standard.

I would finally like to quickly address two additional issues about implementation. I have a list of recommendations in my testimony that I hope will be considered, but I would like to——

Chairman LEAHY. All of which will be part of the record.

Ms. FUCHS. Thank you. The first is that we hope that the Office of Management and Budget and the Department of Justice will renew their Committee to E-FOIA implementation and help us move from an affirmative disclosure model where FOIA requests are limited to the most difficult cases.

Second, we would like to see the administration agree to treat the White House Office of Administration as an agency for the purposes of the FOIA. We have been involved in litigation about preservation of White House e-mails, and the Office of Administration is the central office responsible for that.

I do not have much time to talk about future threats to FOIA. I will note that yesterday a copy of a draft executive order on classification was leaked, and it has some very good innovations; it has some backward steps in it as well. If this hearing was broader than FOIA, I would have plenty to say about that. But the question is: Have we entered a new era of Government?

I guess my conclusion is that the door is open and we can see the light, and I am hopeful that the Obama administration will walk right out into the sunshine and fully implement the principles that the President articulated on January 21st.

Thank you.

[The prepared statement of Ms. Fuchs appears as a submission for the record.]

Chairman LEAHY. Do you think it is too early to tell whether the guidelines are going to work?

Ms. FUCHS. I think that the guidelines are having an impact, but I think it is too early to tell because, you know, the agencies have not fully implemented them, and we do not know how a range of FOIA requests are going to be handled. There have been high-profile releases, but there have been high-profile withholdings as well.

Chairman LEAHY. And that long backlog that Senator Franken referred to is still there.

Ms. FUCHS. I believe it is still there.

Chairman LEAHY. Some of it will just disappear because the requesters will give up, which is a very—that bothers me. And tell me if I am correct in being worried about that, that if that becomes the norm, does that not encourage departments to keep things hidden?

Ms. FUCHS. I think you are exactly right, Mr. Leahy. Some of the annual reports from agencies demonstrate that requesters have simply walked away because they actually—some of them report numbers of cases closed because the requester lost interest.

Hopefully, if agencies could get their backlog to something more reasonable, people would not be walking away.

Chairman LEAHY. I want to follow up on that with Mr. Curley, because we have the ombudsman provision in the OPEN Government Act that I discussed with Director Nisbet. Now, in 2005, a member of the Sunshine in Government Initiative testified before the Committee. I want to make sure I have got this right. He said, "Nearly one-third of FOIA requests were denied in 2004." And so the only thing they could do is pursue litigation, which could not only take a long, long time, but it would be very costly.

Now, if your association or any major news-gathering organization had one specific thing of some significance, you might be willing to undertake that litigation. But I am thinking that on the routine things, the person who does not have any resources should not have to have costly litigation. The OPEN Government Act establishes an agency ombudsman. Do you think that the FOIA ombudsman as an alternative to litigation might help?

Mr. CURLEY. Senator, absolutely. Obviously, we are in the opening weeks, but I think the provision was both prescient and in time it may turn out to be precious—prescient because the industry is under such dire financial conditions right now that having a non-legal, if you will, a non-court approach might be very helpful in getting some expedited attention to these requests.

In time, that may prove to be a very good way, but there are a lot of priorities that have to be set, a lot of details that have to be gone through. And, again, I come back to the agencies that are most in the public interest in terms of Defense, Homeland Security, Justice, Treasury are most unwilling to give up their secrets right now. So it is going to take a while to sort through these procedures.

Chairman LEAHY. And in this regard, I have a philosophical concern. I begin with the idea that we Americans have a right to know what our Government is doing. More importantly, we have a right to know when our Government screws up and makes mistakes.

What I have seen especially since 9/11, it is a lot easier to say I will just close the door on that, that is secret, we cannot know about it. We have seen in the Archives where material that has been there, open, available to anybody for years, is suddenly taken off and is not available because it is considered top secret. We have seen things that have been on Government websites for months, maybe a year, and taken off.

Now, part of this is an unnecessary paranoia. Some part of it is in some areas perhaps because there is a security concern, and I think that we all respect that. But part of it, I think, is a very easy way of saying I do not want you poking around whether I screwed up. It is that last part that really bothers me.

Now, as you mentioned, tell me a little a little bit about the watermelon growers and the beekeepers. I mean, this is somewhat absurd, and I am sure that is why you mentioned it.

Mr. CURLEY. It is really just things that have been slipped into legislation over the years. Deals are made in provisions in laws at

midnight or 1 a.m. and it gets in. And right now, as you know, there is no provision to call and attempt to put something in a b(3) provision into the record or have any discussion about it. So routinely these things are being done now, and whole areas of information are being kept from the people.

We also find the upstream requests under b(5). Agencies are calling a lot of the discussions pre-decisional so they do not have to release it there.

So there are a number of areas here where people are just holding back. It should be fun to know why we cannot find out about the honey growers or the watermelon people, and it has been impossible to figure it out. But this is just an absurd example of something that is happening routinely, at least we figure out, about 140 times a year in Washington.

Chairman LEAHY. I have a very real concern about that. I make the argument that this Committee has jurisdiction over that and we should be discussing it. I mentioned when they tried to put something into the intelligence authorization, we were able to pull back on it. But we have a President who seems deeply committed to FOIA. I know my discussions with him when he was in the Senate and my discussions with him since he became President tell me that.

My touchstone still is how do we keep this going, not only for this administration but the next administration. I mean, there will be other people in your chair, both of you, testifying. There will be somebody else here as Chairman. I do not want the next person to have a less commitment to it. How do we make sure that we have got it right in the law? How do we keep the pressure up?

Mr. CURLEY. Well, I think your efforts here have been extraordinary, and I think we are going to suggest that we do need further amendments in the law to have these things institutionalized. Certainly, directionally the music is sweet that we are hearing, but turning the ship of state in a bureaucracy as vast as this one, as you well know, is not going to happen in 9 months—and maybe even 9 years. And so how does that happen?

From a management standpoint, there are some things that can be done, and we have heard the Associate Attorney General tell us about those. My colleague on the panel, Meredith, has some very good suggestions as well. But ultimately a tougher law closing some of the loopholes will be required.

Chairman LEAHY. I have always found in Government that inertia is a lot easier than initiative, and we will work for initiative.

Do you want to add anything further to this, Ms. Fuchs?

Ms. FUCHS. Well, I would simply add that, you know, the OPEN Government Act was enacted into law in 2007, and very few agencies have taken its provisions and implemented regulations that incorporate those provisions. And I think that that is one thing that will help solidify some of the gains of the law, and, you know, ideally they would also in the regulations add the presumption of disclosure that has been articulated by the President.

But other than that, I would agree with Mr. Curley. Constant oversight by this Committee, new laws or closing loopholes in the laws, those will be important. And I think it is great that this administration has such a different vision because if the next admin-

istration, whatever it will be and whenever it will be, reverses, again you will see a reaction from the open Government community.

Chairman LEAHY. Thank you very much.

Mr. CURLEY. Thank you.

Ms. FUCHS. Thank you.

Chairman LEAHY. We will stand in recess.

[Whereupon, at 11:19 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 18 2010

The Honorable Patrick Leahy
Chairman
Committee on Judiciary
United States Senate
Washington, D.C. 20515

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Associate Attorney General Thomas J. Perrelli before the Committee on September 30, 2009, at a hearing entitled "Advancing Freedom of Information in the New Era of Responsibility." We apologize for the delay in responding to these questions, which apparently resulted from a miscommunication between our staffs.

We hope this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Jeff Sessions
Ranking Minority Member

Written Questions for Associate Attorney General Thomas J. Perrelli

PENDING LITIGATION

1. During the hearing, I asked you about the impact of the Attorney General's new guidelines on pending FOIA cases. You testified that you would provide the Committee with more information about these cases. The Attorney General's FOIA memorandum states that the new guidelines should apply to pending cases only when the Government lawyers working on those cases believe that there is a substantial likelihood that application of the new guidelines would result in a "material disclosure of additional information." This policy appears to be a departure from the case-by-case FOIA review policy adopted by former Attorney General Janet Reno, which led to significant new disclosures of information in pending FOIA cases.

   (a) **How many times has the Department released additional information in a pending FOIA case since the new guidelines went into effect?**

   (b) **Will the Department consider adopting a case-by-case review policy for pending FOIA cases, like the policy implemented by former Attorney General Reno?**

Response

(a) The FOIA guidelines have been successful in getting more information out to the American public. The Department has been actively engaged in educating and training agencies with respect to the new guidelines, and agencies are releasing information that may be technically exempt under FOIA but that can nevertheless be disclosed as a matter of discretion. Pending FOIA cases have been reviewed, as required by the Attorney General's Guidelines, to determine whether additional information can be released, and in numerous cases additional information has been released. It is not possible to provide a truly accurate count of the number of times information has been released in a pending case since the issuance of the guidelines because we do not maintain statistics of that kind for these types of cases that are litigated all around the country by various offices.

(b) Under the defensibility standard announced by the Attorney General in the FOIA Guidelines, the Department 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." The Department does, in fact, review every newly filed FOIA litigation case under this standard. One year ago, at the time the new FOIA Guidelines were issued, there were FOIA litigation cases already pending. In an effort to not unnecessarily divert resources away from processing new requests, the FOIA Guidelines directed that as to those then-pending cases, the new guidance should be applied as practicable whenever it was determined that there was a substantial likelihood that their application would result in a material disclosure of additional information. Since that time, for all litigation cases filed after issuance of the new Guidelines, each case is reviewed under the new standards.

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SUBMISSIONS FOR THE RECORD

Senators, AP seek more public info, fewer secrets

By LAURIE KELLMAN (AP) – 34 minutes ago

WASHINGTON — President Barack Obama's new standards of openness in the federal government have not trickled down to some of its agencies, where officials have used special statutes inserted into bills to skirt the Freedom of Information Act, open government advocates said Wednesday.

Efforts to strengthen the 42-year-old law "have been hampered by the increasing use of legislative exemptions that are often sneaked into legislation without debate or public scrutiny," Senate Judiciary Committee Chairman Patrick Leahy said in remarks prepared for a hearing on the issue.

News organizations and media groups said new legislation was needed to limit the information agencies may keep secret and for how long.

"The secrecy reflex at some agencies remains firmly in place," and FOIA still contains relatively weak penalties for those that don't meet their disclosure obligations, Tom Curley, president and CEO of The Associated Press, said in prepared testimony to the committee.

"We appreciate the change in policy direction, but the change hasn't yet reached the street," said Curley, testifying on behalf of the Sunshine in Government Initiative, a coalition of media groups.

The hearing is the first status report on a new Office of Government Information Services, created by Congress earlier this year at the National Archives and Records Administration to review the government's compliance with open government laws and to mediate disputes with the public.

The new Archives office was established by a bill written by Leahy, D-Vt., and Sen. John Cornyn, R-Texas, that enacted several changes in FOIA, including requirements to better track information requests and reduce processing delays.

Those changes kicked in just as President George W. Bush was leaving office after eight years of secrecy about how he was fighting terrorism in the wake of the Sept. 11, 2001, terrorist attacks. Bush administration officials repeatedly testified before Congress that revealing techniques of finding potential terrorists abroad and on U.S. soil would compromise national security.

Obama's first public act in office was to order more government transparency. He revoked Bush's November 2001 executive order allowing past presidents to exert executive privilege to keep some of their White House papers private. Obama also instructed federal agencies to be more responsive to FOIA requests.

Curley said agencies are still trying to hide information sought by reporters, which isn't much different from past years. The Sunshine in Government Initiative estimates that more than 240

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statutes on are on the books that agencies may use for denying FOIA requests. Such statutory exemptions are typically inserted into massive legislation, such as omnibus spending bills, without any debate and are not subject to court challenge, he said.

The Federal Aviation Administration, for example, tried to hide its database of bird strikes on airplanes from AP reporters probing the Hudson River landing of a plane crippled by a flock of geese, Curley said. The agency "stalled the reporters while it looked for a way to put all the information beyond the reach of FOIA by imposing a special regulation."

Among the FAA's concerns, he said, was that the reporting of bird strikes was unreliable and that any comparison of one airport with another would be unfair. Officials cited an exemption that allows the FAA to withhold safety and security information voluntarily submitted to aviation regulators.

The information was "of deep and obvious interest to air travelers," Curley told the committee. Public pressure led to the eventual release of the information.

Leahy and Cornyn have introduced legislation that would require any such exemptions included in legislation to be clearly stated, rather than buried. The legislation has passed the Senate twice but has not yet been considered by the House.

The Leahy and Cornyn bill is S. 612.

On the Net:

- Bill text: http://thomas.loc.gov
- Senate Judiciary Committee hearing Webcast: http://judiciary.senate.gov/hearings/hearing.cfm?id4077

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U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General — *Washington, D.C. 20530*

March 31, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your letter, dated February 23, 2009, concerning increased government transparency, a topic of great interest to this Administration and to the Department of Justice, which is charged with the responsibility of encouraging agency compliance with the Freedom of Information Act (FOIA).

As you know, President Obama issued a memorandum on the FOIA on his first full day in office. In that memorandum, he directed agencies to administer the Act with a presumption in favor of disclosure, to respond to requests promptly, and to work cooperatively with FOIA requesters. He also emphasized the need for agencies to make greater use of technology to inform the public about the activities of the government proactively, without waiting for individual requests to be made. The President, in turn, called on the Attorney General to issue guidelines governing the FOIA that reaffirm the government's commitment to transparency and accountability.

On March 19, 2009, the Attorney General issued those FOIA guidelines in a memorandum to the heads of executive departments and agencies. The memorandum is enclosed with this letter. The new guidelines address in detail the presumption of disclosure called for by the President and the importance of effective agency systems for administering the FOIA. To effectuate the presumption of openness, the Attorney General announced a new disclosure standard to be applied when making determinations under the FOIA and directed agencies not to withhold information simply because it technically might fall within an exemption.

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With regard to ensuring effective systems for responding to FOIA requests, the Attorney General called for the active participation of agency Chief FOIA Officers, recognized the role played by FOIA professionals who depend on the support of the Chief FOIA Officer, and emphasized that FOIA is the responsibility of everyone. The Attorney General also directed FOIA professionals to work cooperatively with FOIA requesters and stressed that "[u]necessary bureaucratic hurdles have no place in the 'new era of open government' that the President has announced."

On March 26, 2009, the Office of Information Policy (OIP) held a government-wide training conference on the new FOIA guidelines that was attended by over 500 government personnel. OIP will be issuing additional guidance and providing further training to all agencies on implementation of these new guidelines. In addition, Chief FOIA Officers at each agency have been asked by the Attorney General to review their FOIA operations and to report to the Department of Justice each year on the steps taken to improve their administration of the FOIA. As demonstrated by the comprehensive nature of these guidelines, the Department of Justice is fully committed to reinvigorating the FOIA process across the government.

Your letter discusses the Office of Government Information Services (OGIS), which was created by the OPEN Government Act and will offer mediation services to FOIA requesters. Once that office is operational, the Department of Justice anticipates working in close cooperation with it. We certainly agree that FOIA requests should be handled in good faith and we fully expect to provide information to requesters about the services that will be offered by OGIS. Until OGIS hires staff, develops procedures, and defines the scope of its mediation services, it would be premature for the Department to provide guidance to agencies regarding the effect of OGIS mediation upon pending FOIA requests.

Your letter also asks that we direct agencies to implement other provisions of the OPEN Government Act, such as the new tracking requirement. The Department of Justice has already done so. OIP issued a series of guidance articles to all agencies on the various provisions of the OPEN Government Act. That guidance is located on *FOIA Post* on the Department's website. Moreover, the Attorney General's new FOIA guidelines specifically highlight the new tracking provision and note that it went into effect on December 31, 2008.

Further, your letter addresses the issue of greater transparency for FOIA Exemption 3 statutes. The Department routinely reviews proposed Exemption 3 provisions and we will continue to take a close look at them. As you know, agencies are required to identify all Exemption 3 statutes that they used during the preceding year in

their Annual FOIA Report. Those reports are available electronically on the Department's website. The Department agrees that it is worthwhile to increase the transparency of Exemption 3 statutes and OIP will be providing additional information about such statutes on its website.

Lastly, you suggest that the Department conduct a review of pending FOIA litigation cases. The Attorney General's FOIA memorandum requires that the standard articulated therein be taken into account in pending litigation and applied if practicable when there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.

As described above, the Department of Justice is committed to ensuring that the President's "new era of open government" is fully realized. We look forward to working with you on this and other topics of mutual interest. Please do not hesitate to contact this office if you would like additional information about this or any other matter.

Sincerely,

M. Faith Burton

M. Faith Burton
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

Office of the Attorney General
Washington, D.C. 20530

March 19, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL

SUBJECT: The Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, reflects our nation's fundamental commitment to open government. This memorandum is meant to underscore that commitment and to ensure that it is realized in practice.

A Presumption of Openness

As President Obama instructed in his January 21 FOIA Memorandum, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." This presumption has two important implications.

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. But as the President stated in his memorandum, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Pursuant to the President's directive that I issue new FOIA guidelines, I hereby rescind the Attorney General's FOIA Memorandum of October 12, 2001, which stated that the Department of Justice would defend decisions to withhold records "unless they lack a sound

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legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."

Instead, the Department of Justice 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. With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.

FOIA Is Everyone's Responsibility

Application of the proper disclosure standard is only one part of ensuring transparency. Open government requires not just a presumption of disclosure but also an effective system for responding to FOIA requests. Each agency must be fully accountable for its administration of the FOIA.

I would like to emphasize that responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff. We all must do our part to ensure open government. In recent reports to the Attorney General, agencies have noted that competing agency priorities and insufficient technological support have hindered their ability to implement fully the FOIA Improvement Plans that they prepared pursuant to Executive Order 13392 of December 14, 2005. To improve FOIA performance, agencies must address the key roles played by a broad spectrum of agency personnel who work with agency FOIA professionals in responding to requests.

Improving FOIA performance requires the active participation of agency Chief FOIA Officers. Each agency is required by law to designate a senior official at the Assistant Secretary level or its equivalent who has direct responsibility for ensuring that the agency efficiently and appropriately complies with the FOIA. That official must recommend adjustments to agency practices, personnel, and funding as may be necessary.

Equally important, of course, are the FOIA professionals in the agency who directly interact with FOIA requesters and are responsible for the day-to-day implementation of the Act. I ask that you transmit this memorandum to all such personnel. Those professionals deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests. FOIA professionals should be mindful of their obligation to work "in a spirit of cooperation" with FOIA requesters, as President Obama has directed. Unnecessary bureaucratic hurdles have no place in the "new era of open Government" that the President has proclaimed.

Working Proactively and Promptly

Open government requires agencies to work proactively and respond to requests promptly. The President's memorandum instructs agencies to "use modern technology to inform citizens what is known and done by their Government." Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs. When information not previously disclosed is requested, agencies should make it a priority to respond in a timely manner. Timely disclosure of information is an essential component of transparency. Long delays should not be viewed as an inevitable and insurmountable consequence of high demand.

In that regard, I would like to remind you of a new requirement that went into effect on December 31, 2008, pursuant to Section 7 of the OPEN Government Act of 2007, Pub. L. No. 110-175. For all requests filed on or after that date, agencies must assign an individualized tracking number to requests that will take longer than ten days to process, and provide that tracking number to the requester. In addition, agencies must establish a telephone line or Internet service that requesters can use to inquire about the status of their requests using the request's assigned tracking number, including the date on which the agency received the request and an estimated date on which the agency will complete action on the request. Further information on these requirements is available on the Department of Justice's website at www.usdoj.gov/oip/foiapost/2008foiapost30.htm.

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Agency Chief FOIA Officers should review all aspects of their agencies' FOIA administration, with particular focus on the concerns highlighted in this memorandum, and report to the Department of Justice each year on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies. The Department of Justice's Office of Information Policy (OIP) will offer specific guidance on the content and timing of such reports.

I encourage agencies to take advantage of Department of Justice FOIA resources. OIP will provide training and additional guidance on implementing these guidelines. In addition, agencies should feel free to consult with OIP when making difficult FOIA decisions. With regard to specific FOIA litigation, agencies should consult with the relevant Civil Division, Tax Division, or U.S. Attorney's Office lawyer assigned to the case.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees, agents, or any other person.

Testimony of Tom Curley

President and CEO of
The Associated Press

On

"Advancing Freedom of Information
in the New Era of Responsibility"

Senate Judiciary Committee

September 30, 2009

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Chairman Leahy, Ranking Member Sessions and Members of the Committee on the Judiciary, thank you for your invitation to appear before you today as you continue your good work on behalf of open government with this hearing on Freedom of Information.

As it turns out, the timing is excellent. Just two days ago, advocates of open government worldwide celebrated International Right to Know Day. According to the last count I saw, nearly 70 countries have access laws at least partly inspired by our own FOIA. We can be proud of that leadership. But it would be false pride if we don't also remain determined to make FOIA live up to the ideals and values that these laws defend.

I salute this Committee for staying focused on these issues in a year when some thought a time might have arrived when we could take things easier. Many were tempted to believe that eight months after the President committed his administration to transparency, we would be knocking on open doors at federal agencies. After all, we've seen the restoration of FOIA's presumption of disclosure, new tools to make agency data more accessible through Data.gov, and the opening of a conversation about how agencies could be more transparent.

These are certainly welcome signs of good intentions from the top of the executive branch. But it's clear the federal agencies won't be turned so quickly or so easily.

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Administrations come and go. This is no time for friends of open government in Congress to relax their efforts to make sure every citizen has the necessary tools for finding out what government is up to.

A federal shield law remains as important as ever, and I'm glad to see the strong effort toward its passage continuing. And I applaud you, Mr. Chairman, and Senator Cornyn, for your re-introduction in March of the OPEN FOIA Act to provide greater scrutiny for FOIA exemptions under FOIA section b(3), about which I'll say more in a moment.

But we need to press on. There's more work to be done. The secrecy reflex at some agencies remains firmly in place, and FOIA still contains relatively weak penalties for those that don't meet their disclosure obligations. Such penalties as there are don't even come into play unless a disappointed requester takes the agency to court, with all the delay and expense that this entails. Meanwhile, powerful interests pressure agencies to say "no," even when the President and his attorney general both have said clearly that transparency is the new watchword.

An example I'm sure you all remember was the flap last spring over the FAA's bird strike database, that collection of reports from airports and air carriers on potentially dangerous collisions between airplanes and birds.

AP reporters and many others started chasing that information in January after a flock of Canada geese near LaGuardia Airport forced an airliner to land in the Hudson River. The

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journalists figured that a lot of people who fly in planes might want to know whether that kind of thing happens at airports near them. So they called the Federal Aviation Administration (FAA) and asked for the database. The agency stalled the reporters while it looked for a way to put all the information beyond the reach of FOIA by imposing a special regulation.

The FAA claimed to have two concerns about letting the public see where bird strikes have occurred. The first was that some locations and some airlines are better about reporting than others, so any safety comparisons between airports based on this data would be unreliable. The second was that since the reporting is voluntary, disclosing the data would punish the conscientious airports and might discourage them from reporting diligently in the future.

An agency accountable to the public for fostering safe, efficient air travel, was worrying instead that airline and airport executives might get mad if it started sharing safety information of deep and obvious interest to air travelers.

You may recall that in the end, the Transportation Secretary stepped in under public pressure and put a stop to the nonsense. We finally got the full picture from the bird strike database, and, as far as I can tell, the FAA's world is still spinning on its axis.

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I wish I could say that it's now clear the agency is on board with the Obama administration's instructions not to play games in order to avoid disclosing even information that causes no harm except maybe some official embarrassment.

But such is not the case.

After the wraps came off the bird strike database, AP was interested in learning more about why the agency had been so determined to put it beyond the reach of FOIA requests. So we asked in April for correspondence on the subject among the top FAA executives who were involved. It's nearly October, and we're still asking.

The agency claims FOIA exemption b(5) – the one that says agencies don't have to release certain internal pre-decisional documents – allows it to keep the exchanges secret. The FAA is ignoring new Justice Department policy that says this argument should only be used when disclosure would cause *significant and specific* harm.

Why would FAA do this? I submit that this is what agencies are wired to do with requests for public information they consider too sensitive for the public.

As we see from the FAA example and others like it in recent months, notwithstanding the best intentions of the new administration, this Committee's ongoing vigilance is not only appropriate but essential. A FOIA advocate's work is never done.

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So, turning to some of that work, I would like to highlight a few areas where FOIA needs our help, starting with the Office of Government Information Services which is only now taking shape in the National Archives and Records Administration, nearly two years after Congress approved its creation.

OGIS is potentially one of the most valuable FOIA amendments ever. A FOIA denial in the past left the requester with only one recourse -- an expensive federal lawsuit. Now citizens and other requesters can look forward to another choice – advice and an opinion from an unbiased mediator who knows the law.

Some have wondered aloud why we need OGIS when the Justice Department's Office of Information Policy already has the job of helping agencies comply with FOIA. The answer should be obvious. OIP's job is to help agencies. And OIP answers to the Justice Department, which must defend agency decisions to deny disclosures under FOIA. OGIS, on the other hand, will be there to help requesters, a crucial difference.

The first year of OGIS operations is bound to contain some disappointments. In fact, it may take several tries to get OGIS right, and I urge the Committee to oversee its development closely and provide support wherever it can.

Miriam Nisbet's appointment as director strikes us as a strong first step. She appears to have a clear vision of what OGIS can be, along with the passion and energy it will take to realize those ambitions.

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But she will be starting the journey with a staff of only six or seven, which makes OGIS smaller than some state open records offices. Pennsylvania's has 10, for example. Connecticut's has more than 20.

And the current OGIS budget of $1 million is much smaller than what the Congressional Budget Office said the office would need to be effective.

But even with greater resources, success for OGIS would still depend in large part on its ability to engage agencies in mediation and identify improvements that lawmakers and agencies can put into practice. That will require cooperation from the Justice Department. If Justice as a whole doesn't help promote respect for FOIA among federal agencies, OGIS will have a much harder time persuading agencies to engage meaningfully in mediation discussions.

With patience and persistence, the office presents a huge opportunity to deliver more of the benefits of FOIA to the public. I salute the Committee for its continuing support of OGIS implementation.

There are other such opportunities of course, and I referred earlier to one that is already on your radar, the problem of the so-called b(3) exemptions.

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As you know, these are provisions embedded in other laws that put certain very specific kinds of information beyond FOIA's reach. They are often inserted with little or no discussion and no public notice, and they now constitute a very large black hole in our open records law. The Sunshine in Government Initiative found about 250 b(3)'s on the books, and about 140 of these show up in agency denial letters in any given year.

In many cases these special exemptions protect information already covered under one or more of the other exemptions in FOIA's section (b). In other cases they are creating whole new categories of information not subject to disclosure.

But the real problem with these exemptions is that writing them into statute forecloses any chance for an impartial determination that a valid reason applies to all the information that's been effectively roped off. Whether or not a general FOIA exemption covers a particular information request is subject to court review. But a statutory exemption for particular information is not.

So, for example, the FAA has a b(3) exemption that lets it withhold information voluntarily submitted to aviation regulators regarding the safety and security of air travel. Yes, this is the b(3) exemption the FAA was planning to use as basis for its proposed new regulation that would have sealed up the bird strike data I mentioned earlier.

Also secret, in similar fashion, are the identities of watermelon growers, the identities of people who handle honey, and the ingredients in cigarettes. B(3) exemptions hide the

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private sector advice that government trade representatives and congressional committees use to shape trade policy, and also the studies that chemical plants conduct to determine the impact of any worst-case accident on neighboring communities and the environment.

There may be valid arguments for putting a secrecy label on some of this stuff, although I'd sure like to hear what the watermelon growers and honey handlers have to say for themselves and their need to conceal their activities.

But the point is that whatever valid arguments there may be for secrecy in these areas have not been tested or challenged, or even discussed, in any public forum. And the b(3) exemptions mean that a disappointed FOIA requester will find it nearly impossible to challenge them in court.

Nobody knows exactly how many of these exemptions there are, but agencies use them all the time to stiff-arm our reporters. We're dealing with a couple of them right now that may lead to litigation, although we'll be limited to trying to prove the exemption doesn't actually apply to the particular information we're after. If the court says it does, we're out of luck.

We regarded the OPEN FOIA Act which you, Mr. Chairman, and Senator Cornyn introduced earlier this year as a good and much-needed first step toward reining in this alarming trend. Your proposed statute would make it possible for anyone who is

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watching for b(3) exemptions in proposed legislation to spot them easily, since they would have to include a citation to paragraph b(3) of FOIA.

I hope you can keep the OPEN FOIA Act on track toward passage, and I hope Congress will then build on it with some additional steps.

One idea I've heard that's worth considering is legislation you might call a Secrecy Reduction Act, similar in concept to the Paperwork Reduction Act. Such a law would contain three major sections.

First, it would require anyone introducing a statute containing a b(3) exemption to declare it openly, much as earmarks are disclosed. Any b(3) would automatically sunset after a fixed term and be renewed if an extension were warranted. Committees with jurisdiction over FOIA would be given an opportunity to comment on the proposed exemption.

Second, a Secrecy Reduction Act would require the Office of Management and Budget (OMB) to review proposals from federal agencies for b(3) exemptions and limit their use and scope. As you know, Mr. Chairman, b(3) exemptions are often tucked into budget bills that Congress must pass. Defense and intelligence authorization bills are especially likely to contain them. OMB would only allow an agency to propose a b(3) exemption that:

- is essential for achievement of an important agency objective,
- includes provisions for oversight of its use,
- sunsets in five years or less, and

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- is publicly disclosed upon introduction.

Third, a Secrecy Reduction Act would require agencies to report regularly on their use of all b(3)'s in denying FOIA requests, so we can learn more about the ones that are already on the books. It appears that nobody has tried before now to figure out how many there are. I have attached SGI's compilation to this testimony.

If I haven't quite worn out my welcome yet, I would like to draw the committee's attention to one additional problem area of long standing, the flawed application by the courts of FOIA's privacy exemptions.

The privacy exemptions are designed to protect information in which an individual has a privacy interest substantial enough to outweigh the public interest in disclosure. Congress intended this balancing test to favor disclosure. The public interest would always trump unless the infringement on the individual's privacy interest was significant. For example, private health information or certain kinds of information from a personnel file might rise to the necessary level.

Unfortunately, starting with the 1989 Supreme Court case *Department of Justice v. Reporters Committee for Freedom of the Press*, the courts have put their thumb on the privacy side of the scale. The presence in a public record of an individual's name alone can be enough to satisfy a court that the privacy interest in that record is substantial.

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Meanwhile, the public interest in seeing private information has somehow come to be considered not substantial at all unless the FOIA requester can show reason to believe that disclosure will reveal government misconduct. When information about individuals is involved, the courts are finding that the public has no interest in seeing what its government is up to unless the requester already knows the government has done something wrong. In other words, the public has no substantial interest in seeing how government works on the presumably normal days when it's not lying, cheating or stealing.

Even where the private information has already been available for viewing in public files, courts have found that an agency can deny a request that the data be plucked from its "practical obscurity" and disclosed. Perfect. If they know you can't get to it, they say you can have it. But if they know you can get to it, they say you can't have it. Somebody once wrote a book about "catches" like that.

Many, many FOIA requests have been wrongly denied on the strength of the Supreme Court ruling in Reporters Committee and other decisions that have followed its reasoning. Earlier this year, The Associated Press lost two FOIA appeals in the 2nd Circuit, back to back, because of this deeply misguided interpretation of the privacy exemptions.

In the first, AP had asked for reversal of a district court's refusal to order release to AP of the commutation petition of John Walker Lindt, the so-called "American Taliban."

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In the second, the Department of Defense won reversal of a district court ruling that AP was entitled to see names and other identifying information about Guantanamo detainees involved in cases of detainee abuse, either as perpetrators or victims, and to disclosure of information from certain detainees' correspondence with their families.

In each instance, the 2nd Circuit panel found that the mere presence of personal information could bring a document within the scope of FOIA privacy protection, and then dismissed AP's arguments that whatever privacy interest Lindh or the detainees might have was easily outweighed by the public interest in disclosure.

In the Lindh case, the court's dismissal was especially striking. AP had argued among other things that contents of a commutation petition would certainly shed light on an agency's operation since it contained a petitioner's firsthand assessment of the fairness of the government's exercise of its clemency powers.

But the court said AP had offered nothing that overcame the government's declaration that Lindh had not based his commutation plea on any claim of government misconduct. That ended the court's search for public interest in government handling of Lindh's claims that his sentence ought to be cut short.

What all this appears to mean is that the public isn't entitled to know what government is up to unless the government is up to no good. And if the government just says it's not

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doing anything wrong, that's good enough for the courts, at least where records containing the least bits of information about private individuals are concerned.

Privacy interests and the public interest are both important, and FOIA calls for balancing them carefully. I urge the Committee to examine this issue and consider appropriate amendments to FOIA sections b(6) and b(7). Any such amendment should make it crystal clear that the public interest in disclosure of government-held information is presumed always to be strong, with no special extra tests required for public records that contain information about individuals. And the law must also make it clear that to outweigh the strong public interest, the privacy interest must be truly substantial, involving intimate facts of the kind all reasonable people would recognize as a serious intrusion into personal matters.

Mr. Chairman, Senator Sessions, members of the Committee, thank you very much for allowing me this opportunity to speak to you about these important issues today. And thank you again for your commitment to FOIA and to the liberties it does so much to protect.

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EXEMPTION 3 STATUTES
Cited by Agencies 1998-2007

Compiled by The Sunshine in Government Initiative

Statute as standardized	Description
	Note: Quotation marks denote descriptions taken verbatim from agencies.
References to the United States Code	
2 USC 437g(a)(12)(A)	"Material regarding ongoing investigation of possible FECA [Federal Election Campaign Act] violations"
5 USC 552 Note	Protection of Certain Open Skies Treaty Information
5 USC 552a	Privacy Act of 1974
5 USC 574(j)	Administrative Dispute Resolution Act of 1996 regarding ombudsman procedures under the FOIA.
5 USC 638(j)(2)	"Contracts withheld data generated by contractors who elected to retain their rights in accordance with the retention period to under the contract."
5 USC 7114(b)(4)	"Civil Service Reform Act – Representation Rights and Duties, Labor Unions"
5 USC 7301 note	Records concerning a drug free workplace
5 USC App 7(b) (IG Act)	Protects the identity of employees who provide a complaint or information to the Inspector General
5 USC App 11	Federal Advisory Committee Act
5 USC App 102(f)	provides that most qualified trust information, as sought by the one request concerned, is nonpublic.
5 USC App 105	"Financial Disclosure Reports under the Ethics in Government Act"
5 USC App 107(a)(2)	Financial disclosure information
6 USC 133	"Agency withheld infrastructure information."
7 USC 8	Individual account statements
7 USC 12(a)	Business transactions or market positions of any person and trade secrets or names of customers, and any data or information concerning or obtained in connection with any pending investigation of any person.
7 USC 136h(d)	Manufacturing, processing, production, distribution, sale, and/or inventory information on pesticides
7 USC 136h(g)	"Federal Insecticide, Fungicide, and Rodenticide Act 7 USC 136 h, Section 10 (g): Analytical, health, environmental effects and efficacy data that prohibits registrants [sic] from disclosing information [sic] to foreign competitors."
7 USC 136i-1(b)	"FIFRA (Federal Insecticide, Fungicide & Rodenticide Act): Information that would reveal location where restructured pesticides are applied and/or identity of producers"
7 USC 499f(b)	"Perishable Agricultural Commodities Act: Names of individuals filing violations of the PACA"
7 USC 608d(2)	"Agricultural Marketing Act: Olive Handlers Information"
7 USC 1373(e)	Quantity of burley tobacco sold by producer
7 USC 1502(c)	"FCIC Crop Insurance Act Section 502(c) Personal information provided by the producer (policy info, yield data, etc.)"
7 USC 2018(c)	"Contents of applications or other information furnished by vendors in the Food Stamp Act business"

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Exemption 3 Statutes
Cited by Agencies 1998-2007

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7 USC 2020(e)(8)	"Information obtained concerning administration or enforcement of the Food Stamp Act."
7 USC 2131 et seq.	Report on administration and enforcement activities.
7 USC 2276	"Identities of respondents and unaggregated survey data"
7 USC 2279b	Operation of Graduate School of Department of Agriculture as Nonappropriated Fund Instrumentality.
7 USC 2426	Application for plant variety protection
7 USC 4608(g)	List of Honey handlers
7 USC 4801-4819	Identity of challenger
7 USC 4908(c)	"Watermelon Research and Promotion Act: List of watermelon growers and handlers"
7 USC 5712(a)(2)	Section 602, Agricultural Act of 1978
7 USC 8401	Agents & Toxins which could be used as weapons of mass destruction
8 USC 1160(b)(6)	"Information on Special Agricultural workers"
8 USC 1186a(c)(4)(C)	Admission qualifications for alien's travel control of citizens and aliens
8 USC 1202(f)	Records pertaining to the issuance or refusal of visas to enter the United States; passport information.
8 USC 1226	Exclusion information
8 USC 1255a(c)(5)	"Legalization Applications"
8 USC 1304(b)	"Registration of Aliens"
8 USC 1367(a)(2)	"Battered spouse"
10 USC 128	"Unclassified Special Nuclear Weapons Information"
10 USC 130	"Unclassified Technical Data with Military or Space Application"
10 USC 130b	"Personnel in Overseas, Sensitive or Routinely Deployable Units"
10 USC 130c	"Certain Sensitive Information of Foreign Governments and International Organizations"
10 USC 424	"Protection of Organizational and Personnel Information for DIA, NRO, and NGA"
10 USC 455	"Maps, Charts, and Geodetic Data; Public Availability"
10 USC 457	"NGA Operational Files"
10 USC 613a(a)	"Promotion Selection Board Proceedings"
10 USC 1102	"Confidentiality of Medical Records"
10 USC 1506(f)	"Debriefing of a Missing Person Returned to U.S. Control During the Period Beginning on July 8, 1959, and ending on February 10, 1996."
10 USC 2305(g)	contractor proposals
10 USC 2371(i)	"Research Projects: Transactions Other Than Contracts and Grants"
10 USC 2485(h)	"Commissaries: Limitations on Release of Commercially Valuable Information"
10 USC 2640(h)	"Authority to Protect Safety-Related Information Voluntarily Provided by an Air Carrier"
12 USC 1829b	"Currency Transaction Reports, Foreign Bank Account Reports, Currency and Monetary Instrument Reports, Suspicious Activity Reports, and Registration of Money Services Businesses."
12 USC 1951-1959	"Currency Transaction Reports, Foreign Bank Account Reports, Currency and Monetary Instrument Reports, Suspicious Activity Reports, and Registration of Money Services Businesses."
12 USC 3403	"Confidentiality of Financial Records"

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Exemption 3 Statutes
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13 USC 9	"prohibits the use, publication, or examination of any information collected by the Census Bureau, other than for the statistical purposed for which the information was supplied."
13 USC 301(g)	prohibits the disclosure of Shippers' Export Declarations, submitted by shippers to the Census Bureau, unless the Secretary of Commerce determines that nondisclosure would be contrary to the national interest."
15 USC 1 note	Year 2000 Information Readiness and Disclosure Act
15 USC 18a(h)	"Information submitted in connection with the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976"
15 USC 46(f)	"prohibits the disclosure of 'any trade secrets or any commercial or financial information which is obtained from any person and which is privileged or confidential.'"
15 USC 57b-2(b)	"prohibits the disclosure of any materials received pursuant to compulsory process in a law enforcement investigation."
15 USC 57b-2(f)	Submitted voluntarily to FTC in lieu of compulsory process
15 USC 78m(f)(3)	Confidential portion of Form 13F filed by individual
15 USC 78q(h)(5)	Broker-Dealer Examination Records
15 USC 78x(d)	Records from Foreign Authorities
15 USC 80a-30(c)	Investment Company Examination Records
15 USC 80b-10(b)	"Investment Advisors Examination Records"
15 USC 278n(d)(5)	Certain joint ventures
15 USC 1314(g)	"Documentary material, answers to written interrogatories or transcripts of oral depositions submitted in response to a Civil Investigative Demand (CID)"
15 USC 1335a	Cigarette additive information
15 USC 2055(a)(2)	"Trade secret and other confidential business information."
15 USC 2055(b)(1)	"Information that identifies a particular brand-name of consumer product."
15 USC 2055(b)(5)	"Information submitted under statutory reporting requirement for certain potentially unsafe consumer products."
15 USC 2055(c)(1)	"Information submitted under statutory reporting requirement for certain consumer products involved in product liability actions."
15 USC 2074(c)	"Information that identifies injured persons or those treating injured persons, absent consent."
15 USC 3705(e)(E)	"Centers for Industrial Technology - Reports of Technology Innovations"
15 USC 3710a(c)(7)	prohibits the release of confidential commercial information obtained from a private sector partner.
15 USC 4305(d)	Information submitted under the National Cooperative Research and Production Act of 1993
16 USC 35	"Endangered Species Act, 16 USC 35, cited in error, to protect a survey relating to spotted owls."
16 USC 470hh(a)	"Archaeological Resources Protection Act (1979): Archaeological and Historic sites"
16 USC 470w-3	"National Historic Preservation Act of 1966: Location and nature of historic sites"
16 USC 1533(a)(3)	cited (incorrectly) "to protect the specific location of pygmy-owls in Organ Pipe National Monument."
16 USC 1533(b)(2)	cited (incorrectly) "to protect the specific location of pygmy-owls in Organ Pipe National Monument."
16 USC 1881a	Information concerning fish hauls
16 USC 3844(b)	Administrative requirements for conservation programs

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16 USC 4304	"Federal Cave Resources Protection Act of 1988: Information concerning the specific location of any significant cave"
16 USC 5937	"Used to withhold the location of endangered plant species, map locations for paleontological objects, a plan for parkwide eradication proposal and analysis for Point Reyes National Park, and narrative descriptions of objects and their locations."
17 USC 101 et seq.	"to withhold official court transcripts."
17 USC 705	documents pursuant to the Copyright Act of 1976
17 USC 706(b)	Exempts Copies or reproductions of deposited articles retained under the control of the Copyright Office from disclosure
18 USC 208	prohibits release of financial disclosure forms/personal financial interest
18 USC 471-472	Reproduction of currency
18 USC 504	Copies of Food Stamps
18 USC 701	"Official Badges, identification cards. Prohibits the reproduction of official identification media. Used to withhold copies of the IRS employee identification badges and pocket commissions."
18 USC 798(a)	"Communications Intelligence"
18 USC 923 note	"Information required to be maintained by Federal Firearms Licensees and information maintained in the ATF Firearms Tracing System"
18 USC 1461	"Prohibition on Mailing of Obscene Material"
18 USC 1905	Trade secrets
18 USC 2423(a)	Information pertaining to transportation of minors
18 USC 2517	"Intercepted Communications Wiretaps"
18 USC 2703(d)	Electronic communication
18 USC 2721	Driver's License Photograph
18 USC 3123	"Pen register orders"
18 USC 3153(c)(1)	"Pretrial services"
18 USC 3509	Information the disclosure of which would identify children involved in criminal proceedings
18 USC 3521	"Witness security information"
18 USC 4208	"Pre-sentence reports"
18 USC 4305(d)	"Information submitted under the National Cooperative Research and Production Act of 1993"
18 USC 5038	"Interviews of juveniles in Criminal Defense"
19 USC 1337(n)	"confidential business information"
19 USC 1677f	"confidential business information"
19 USC 2155	Advisory Committee Report
20 USC 1232g	Student records (Family Educational Rights & Privacy Act (FERPA))
21 USC 355 note	"exempts any information or documentary material that may have been filed pursuant to the pharmaceutical agreement notification."
21 USC 842	Information acquired during an inspection concerning any method or process which is a trade secret or is confidential business information

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21 USC 853	Criminal forfeiture information
21 USC 863	Drug paraphernalia information
21 USC 1175	Drug Abuse Prevention/Rehabilitation
22 USC 1461	Smith-Mundt Act
22 USC 1644	Names of claimants in Holocaust Survivors Claims Program
22 USC 2571	Arms Control and Disarmament Amendments Act of 1989
22 USC 2751 et seq.	"Technical data withheld according to regulations establishing lists or categories of technical data that may not be exported, under the Arms Export Control Act."
22 USC 2778(e)	"Control of Arms Export"
22 USC 4004	Places restrictions on the release of work performance information of Foreign Service employees.
23 USC 403 note	"The identity of individuals in highway traffic accident or research reports."
23 USC 409	Discovery and admission as evidence of certain reports and surveys
25 USC 450 et seq.	Indian Self Determination and Education Assistance Act, to protect sensitive information regarding the tribe's economic development plans and the natural geophysica characteristics of their aboriginal base
25 USC 2103(c)	Indian Mineral Development Act of 1982 Used to withhold information regarding the Energy Mineral Development Project on the Crow Reservation and subsequent correspondence from the Crow Tribe Chairman to the Rocky Mountain Regional Director.
25 USC 2716(a)	except as provided in subsection (b), of this section, the Commission shall preserve any and all information received pursuant to this chapter as confidential pursuant to the provisions of paragraph (4) and (7) of section 552(b) of Title 5.
26 USC 6103	"United States Internal Revenue Code" (from report): "Places restrictions on the release of tax return information."
26 USC 6103(a)/(b)(2)/(e)(7)	"Firearm data collected for tax enforcement purposes"
26 USC 6105	"Confidentiality of information arising under treaty obligations."
28 USC 534	information included in rap sheets
28 USC 592(e)	Applications to court for appointment of an independent counsel
28 USC 652(d)	"Mediation agreements from U.S. v. Paul D. Zimmerman"
28 USC 1651	A complaint filed under seal
29 USC 181	Redacted confidential client information from the records in order to maintain the confidentiality of the mediation process.
29 USC 464(a)	Section 304(a) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) protects the identity of a complainant in a union trusteeship investigation.
29 USC 491-492	employment statistical information concerning individuals
29 USC 657(f)(1)	withheld the names of complainants who reported safety and health violations
29 USC 664	disclosure of trade secrets
29 USC 666(f)	disclosure of advance notice of safety inspections
29 USC 801	Information about a subscriber to a post-office box
29 USC 1343(f)	"Information submitted to PBGC as part of a notice of a reportable event"

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Exemption 3 Statutes
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29 USC 4010(c)	Information submitted by pension plan sponsors to PBGC
30 USC 813(g)(1)	Federal Mine Safety and Health Act of 1977, section 103(g)(1)
30 USC 872(b)	Coal mine maps
31 USC 3729(d)	"False Claims Act Civil Action for False Claims against the U.S."
31 USC 3730(b)(2)	Civil Actions for False Claims
31 USC 3733(k)	Responses to civil investigative demands
31 USC 5311-5331	Financial crimes information
31 USC 5318(g)	"Office of Thrift Supervision Criminal Referral Form"
31 USC 5318(g)(3)	[WRONG IN ORIGINAL] "Used to withhold records used in Grand Jury proceedings. Regulates matters occurring before the Grand Jury."
31 USC 5319	Records on Monetary Instruments and Transactions
35 USC 122	patent applications
35 USC 181	Secrecy of certain inventions and withholding of patents
35 USC 202(c)(5)	"Utilization reports"
35 USC 205	"Confidentiality of Inventions Information"
35 USC 209	"Licensing of Patents: Detailed patent information."
38 USC 5701	"Records pertaining to any claim filed with the Department for names and addresses of present and former members of the Armed Forces and their dependents."
38 USC 5705	"Records created as part of a medical quality assurance program."
38 USC 7332	Certain medical information
38 USC 7451	Information collected by VA in surveys of rates of compensation for nurses and certain health-care personnel
39 USC 410(c)(1)	"Records relating to names and addresses of postal customers"
39 USC 410(c)(2)	Commercial business information
39 USC 410(c)(3)	"Records relating to information prepared for use in negotiating collective bargaining agreements"
39 USC 410(c)(4)	"Records prepared for proceedings under 39 USC Chapter 36, relating to rates, classification, and service changes"
39 USC 410(c)(5)	"Reports and memoranda of consultants or independent contractors, except to the extent that they would be required to be disclosed if prepared within the Postal Service"
39 USC 410(c)(6)	"Investigatory files, whether or not considered closed, compiled for law enforcement purposes, except to the extent available by law to a party other than the Postal Service"
39 USC 412	"Records containing lists of postal customers"
41 USC 253b(m)	"Federal Property and Administrative Services Act" (from report): "Places restrictions on the release of proposal information submitted by a contractor in response to the requirements of a competitive solicitation."
41 USC 423(a)	Procurement Integrity Act places restrictions on the release of pre-award contractor bids, proposal information, and source selection information.
42 USC 262a(b)(1)(C)/formerly 42 USC 300hh-12(c)	"Bioterrorism-related information"

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42 USC 290dd-2	Mental Health & Drug Treatment Information ("confidentiality of patient records")
42 USC 300aa-12(d)(4)(A)	prohibits release of information submitted to a special master or court proceeding without the express consent of the person submitting the information
42 USC 300aa-25(c)	"Adverse reaction information submitted to a special master"
42 USC 1320c-9	prohibits release of data or information acquired by a professional review organization (PRO) in the exercise of its duties and functions
42 USC 1320d-6	Individually identifiable health information
42 USC 1396r-8(b)(3)(D)	Information disclosed by manufacturers and wholesalers[1] in a form which discloses[1] prices charged for drugs by such manufacturer or wholesaler
42 USC 1433(a)(3)	Community Water, systems concerning vulnerability assessments
42 USC 2000e-5(b)	Confidential conciliation- assistance information
42 USC 2000e-8(e)	Unlawful employment practices information
42 USC 2000g-2(b)	"Community Relations Service (CRS) Confidentiality Clause, CRS Confidential Information"
42 USC 2011 et seq.	"Agency withheld information that is classified as Restricted Data, Formerly Restricted Data, or Unclassified Controlled Nuclear Information."
42 USC 2162(a)	"Restricted Data (Atomic Energy), Atomic Energy Act of 1954"
42 USC 2167	Atomic energy information
42 USC 2168(a)(1)(C)	"Formerly Restricted Data (Atomic Energy), Atomic Energy Act of 1954"
42 USC 242m(d)	National Death Index, information regarding fatalities
42 USC 2454(b)	National Aeronautics and Space Act of 1958, as amended
42 USC 3537a	Funding information in advance of award
42 USC 3545	"HUD Reform Act"
42 USC 3601(a)	Fair Housing Enforcement: Person aggrieved; complaint; copy; investigations; informal proceedings; violation of secrecy; penalties.
42 USC 3601(d)	Information related to conciliation under the Fair Housing Act
42 USC 3789g	"Personally identifiable statistical and research data received by the Bureau of Justice Statistics"
42 USC 5413(h)	Inspections and investigations for promulgation or enforcement of standards or execution of other duties.
42 USC 7412	Offsite consequence analysis sections of risk management plans
42 USC 11137(b)	"Adverse reports of a physician's conduct or practice"
42 USC 12117	"107 of the ADA"
43 USC 1350-1352	Outer Continental Shelf Lands Act Amendments of 1978
44 USC 2204	Presidential Records
44 USC 3501 note	Identifiable form information acquired under a pledge of confidentiality for exclusively statistical purposes.
44 USC 3541 et seq.	Computer Security Act of 1987 (since supplanted by the Federal Information Security Management Act of 2002); this is a citation to that.
45 USC 362(d)	"disclosure of personally identifiable material"
45 USC 362(n)	"disclosure of medical records"

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46 USC 3315(b)	Prohibits release of source of reports of defects and imperfections of vessels.
46 USC 4019	"Maritime Plans"
46 USC 7319	Records regarding issued merchant mariner documents
46 USC 70103	Prohibition on release of all information contained in maritime security plans
46 USC App 1705(f)	materials submitted with section 5 agreements filed confidentially pursuant to section 6(j) of the Shipping Act of 1984, as amended
46 USC App 1707(c)(2)	Service Contracts filed confidentially pursuant to section 8(c)(2) of the Shipping Act of 1984, as amended
46 USC App 1714	Minutes filed confidentially pursuant to section 15 of the Shipping Act of 1984, as amended
49 USC 114(s)	"Nondisclosure of Security Activities"
49 USC 1114(c)	"Any portion of a cockpit voice recording (CVR), or the portions of a transcript of a CVR that the Board did not find relevant to an investigation".
49 USC 1114(e) (drugs)	"Drug tests and medical information"
49 USC 1114(f) (previously 1114(e) (foreign aircraft accidents))	"Foreign aircraft accident investigation information."
49 USC 1136(d)	"Passenger lists"
49 USC 20109	Names of individuals providing information to the Federal Railroad Administration related to violations of the railroad safety laws and regulations.
49 USC 24301 note	"Bid proposals not incorporated in contracts."
49 USC 30305(c)(1)	"Certain information received pursuant to the National Driver Register Act of 1982."
49 USC 31143(b)	"IDs of motor carrier safety complainants."
49 USC 40110	"Contract offers to the FAA."
49 USC 40115	"Information harmful to U.S. international aviation negotiation or to any U.S. international air carrier."
49 USC 40119(b)	Open investigation documents
49 USC 40123(a)	"Aviation Safety Action Program voluntarily submitted information."
49 USC 46102(c)	"Aviation safety, when requested for national defense"
49 USC 46311	Information from air carrier records
49 USC 70114	"Restricted commercial space launch activities information"
50 USC 402	"Intelligence sources and methods"
50 USC 402 Note Sec 6	"NSA Functions and Information"
50 USC 403	Protects material regarding the nature of agency functions; prohibits release of documents that would endanger the intelligence gathering process.
50 USC 403(d)(3)	CIA intelligence sources and methods
50 USC 403-1(i)	"Intelligence Sources and Methods (Director of National Intelligence use only)"
50 USC 403-3(c)(6)	intelligence sources and methods
50 USC 403-3(c)(7)	protects from disclosure intelligence sources and methods.
50 USC 403e	CIA procurement information

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50 USC 403g	certain enumerated categories of information including CIA's organization, functions, names, official titles, salries and/or number of personnel employed by the CIA.
50 USC 421	"Protection of Identities of U.S. Undercover Intelligence officers, agents, informants, and sources"
50 USC 435 Note Sec 1082	"Disclosure of Information Concerning US Personnel Classified as POW/MIA During Vietnam Conflict (McCain "Truth Bill")"
50 USC 1701 note	"Protects records on arbitration claims before the Iran-U.S. Claims Tribunal"
50 USC 1861	"Foreign Intelligence Surveillance Act (cited in the Patriot Act III litigation)"
50 USC 2170(c)	"Authority to review certain mergers, acquisitions and takeovers"
50 USC App 2170(c)	Section 721 (c) of the Defense Production Act protects documents filed with the Committee on Foreign Investment in the United States and its staff.
50 USC App 2411(c)(1)	Information relating to exporting license applications
Citation by Public Law Number	
P.L. 102-381	Agency withheld trade secret or commercial or financial information resulting from activities conducted by the United States Advanced Battery Consortium and the hybrid vehicle propulsion development program.
Citations to Code of Federal Regulations	
7 CFR 1219.63	Membership list of the Avocado Importers Association
7 CFR 272.1(c)	Information obtained concerning administration or enforcement of the Food Stamp Act.
15 CFR 746.2	Based on our embargo of Cuba, the information protected was covered by other laws or statutes that restrict the availability of the information.
28 CFR 16.81(a)(9)	USAO pre-trial diversion program files
29 CFR 70.26	Confidential business information (CFR Title 29, Labor)
42 CFR Part 2.13	Drug Treatment Information on individual under CSOSA supervision.
42 CFR Part 2.15	Drug Treatment Information-Individual Deceased - Prohibited from disclosure without consent of executor, administrator or other personal representative.
48 CFR 24.202(a)	cited (incorrectly) to withhold proposal submitted in response to a competitive solicitation
48 CFR Part 15.1001(c)(v)	Post award notices to unsuccessful offerors.
48 CFR Part 15.1003	Debriefing of unsuccessful offerors.
48 CFR Part 3.104-4	Ethics in Procurement and Procurement Integrity.
49 CFR 1520	OSHA "also withheld information pursuant to Title 49 CFR part 1520, which is enforced by the Transportation Security Administration"
Other Citations	
Executive Order 12600	Predisclosure notification procedures for confidential commercial information
FR Civil P 26(b)	Information not available in civil discovery
FRAP 11	Appellate record

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FRCP 11	Sealed affidavit
FRCP 32/Local rule(s) of court pertaining to pre-sentence reports	Presentence reports
FRCP 41(b)	Search warrants (cited with FRCP 57(b))
FRCP 6(e)	Grand Jury-related information
Mutual Legal Assistance Treaty with Belgium, January 1, 2000, Treaty Doc. 10016, 100th Cong., 2nd Sess., Exec.	"Mutual Legal Assistance Treaty"
FRCP 16	In camera discovery submissions
FRCP 16(b)	Access to criminal case file (similar to citation to "FRCP 16" above)
POSSIBLE ADDITIONAL EXEMPTION 3 STATUTES (4)	
49 USC 1114	certain information pertaining to accident investigations [may be a reference to already-cited exemptions at subsections (c), (e), or (f) - or could be a reference to yet-uncited exemptions at subsections (b) or (d).]
(none listed)	Referral from CIA on documents originating with Ex-Im. [thus, we have no way of knowing whether the (b)(3) statute cited is listed above]
(none listed)	(not listed) [in NEH FY98 report] [thus, we have no way of knowing whether the (b)(3) statute cited is listed above]
Food, Agriculture, Conservation, and Trade Act of 1990	Food, Agriculture, Conservation, and Trade Act of 1990 [could be to an exemption already listed; may not be]

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
September 30, 2009

Senate Judiciary Committee
Hearing on "Advancing Freedom of Information in the New Era of Responsibility"
Wednesday, September 30, 2009

Statement of U.S. Senator Russell D. Feingold

I want to thank the Chairman for holding this hearing on an extremely important issue. For too many years, Americans have been denied access to too much information about their government. Americans have not had adequate access to government documents, whether those documents are mundane or controversial. A strong commitment to the public's right to know helps ensure that our government acts in the public interest. That is why, in my advocacy for restoring the rule of law under this new administration, I included government openness and FOIA reform in particular as critical aspects of that effort.

It is therefore with great optimism that I view recent improvements in the open operation of our government. Both Congress and the executive branch have made changes that reflect a genuine commitment to public knowledge and government accountability.

In 2007, Congress enacted the OPEN Government Act to improve the operation of the Freedom of Information Act, and the Chairman deserves enormous credit for that. As part of the implementation of those reforms, earlier this year Congress passed a spending bill that included funding to establish the Office of Government Information Services. This office will serve as the mediator for FOIA claims and help ensure that administrative agencies are complying with FOIA provisions. In addition, the individual FOIA reforms imposed by the OPEN Government Act will further streamline FOIA procedures and administration.

The executive branch also has demonstrated its renewed commitment to an open and accountable government. On January 21, the day after the inauguration, the President reversed the prior administration's policy and declared that a presumption of openness will govern FOIA requests: "All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government." And in March, the Attorney General issued guidelines limiting the circumstances under which the Justice Department will defend FOIA denials. The executive branch deserves credit for taking these important steps toward more transparency, as well as others like releasing more Office of Legal Counsel opinions.

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That said, more still needs to be done. I continue to believe that over-classification is a problem, in particular with regard to certain information relating to the implementation of Patriot Act authorities that should be part of the public debate.

Congress and the administration must re-dedicate ourselves to accountability through transparency, and the FOIA reforms being discussed today are an important step in that direction. Thank you, Mr. Chairman.

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Statement of Meredith Fuchs
General Counsel,
National Security Archive
at a hearing on
Advancing Freedom of Information in the New Era of Responsibility
Before the United States Senate Committee on the Judiciary
September 30, 2009 at 10 a.m.
Dirksen Senate Office Building Room 226

Mr. Chairman, Ranking Member Sessions, and members of the Committee, thank you for once again inviting me to testify about the Freedom of Information Act (FOIA).

I am General Counsel to the National Security Archive (the "Archive"), a non-governmental, non-profit research institute. The Archive is one of the most active and successful non-profit users of the Freedom of Information Act and the Mandatory Declassification Review (MDR) system. We have published more than half a million pages of released government records, and our staff and fellows have published more than 40 books on matters of foreign, military, and intelligence policy. In 1999, we won the prestigious George Polk journalism award for "piercing self-serving veils of government secrecy" and, in 2005, an Emmy award for outstanding news research.

Things are quite different today than they were when I last appeared before this Committee in March 2007. Thanks to the initiative of members of this Committee, the FOIA has been substantially amended. In addition, there is a new administration in place. Before I begin discussing the state of the Freedom of Information Act, I want to thank this Committee for supporting the OPEN Government Act of 2007. That law is improving FOIA implementation today and several of its provisions hold great promise for better administration of the FOIA going forward. In addition, this Committee's oversight activities have contributed to the improvement of FOIA administration at agencies throughout the Executive Branch. For a statute that is enforced through litigation by private attorneys' general, this kind of regular and sustained attention by Congress can have a dramatic impact. So, I thank you for that.

Today I want to provide a sense of how FOIA implementation looks to FOIA requesters. I will start with the positive developments.

Office of Government Information Services

One of the potentially transformative provisions of the OPEN Government Act was the creation of the Office of Government Information Services (OGIS) at the National Archives and Records Administration (NARA). OGIS is empowered to review agency policies and practices, recommend policy changes, and to mediate FOIA disputes.

With the appointment of Miriam Nisbet as Director, OGIS can finally begin having an impact on FOIA implementation. Ms. Nisbet is today reporting to you on her

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first few weeks and her goals. We are hopeful that this Committee will continue to strongly support OGIS as it becomes firmly established within the federal system.

Further, we hope this Committee will use its influence to ensure that the federal administrative agencies commit to good faith mediation of every dispute that OGIS determines is appropriate for its services. As OGIS reaches its full staffing levels, we are hopeful that its recommendatory role will be facilitated by the cooperation of the Office of Management and Budget, the Department of Justice, and the agency Chief FOIA Officers, and we urge this Committee to consider this issue in its future oversight activities.

Annual Reports and Backlogs

The OPEN Government Act required agencies to begin providing in Fiscal Year 2008 much more detailed reports about their FOIA processing, requester waiting time, and backlogs. Unfortunately, because agencies lacked adequate tracking mechanisms at the time the law was enacted, the first set of annual FOIA reports issued under the new provisions do not yet fully describe the state of FOIA at federal agencies.

What they do report clearly is that agencies still have substantial backlogs of pending FOIA requests. Based on the most recent annual reports, which cover Fiscal Year 2008, there was still a FOIA request that was 17 years old.[1] In fact four agencies had requests older than 15 years.[2] Nine more had requests between 15 and 10 years old.[3] I could continue, but I think those examples are sufficient to illustrate the problem. Indeed, because we have been tracking the ten oldest pending FOIA requests at federal agencies since 2003 – prior to the requirement that agencies report their ten-oldest pending requests – we were able to compare the Fiscal Year 2008 results with those from 2003. We found that in several instances agencies had kept up with the passage of years, but had not made significant progress completing processing of their oldest requests.

One area where the new reporting provides a more fulsome picture of agencies' activities is the response time statistics. The OPEN Government Act required agencies to begin reporting both median and average response times along with the lowest and highest response times. The Fiscal Year 2008 reports demonstrate how these statistics can reveal whether an agency has a systemic delay problem or simply significant outliers that skew their statistics.

I hesitate to say more about agency responsiveness because the available data is one year old. Agencies are scheduled to file their Fiscal Year 2009 annual reports in February 2010, however, and I urge the Committee to take a close look at whether there have been any progress eliminating backlogs and improving response times.

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[1] Central Intelligence Agency.
[2] Central Intelligence Agency, Department of Defense, National Archives and Records Administration, and National Security Agency.
[3] Air Force, Interior, Army, Homeland Security, Defense Intelligence Agency, Department of Justice, Federal Aviation Authority, Navy and Treasury.

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Office of Personnel Management Report on FOIA Personnel

One of the provisions of the OPEN Government Act of 2007 required the Office of Personnel Management to provide recommendations to Congress regarding a series of potential ways to improve personnel practices for employees who administer the Freedom of Information Act (FOIA) in the federal government. The report issued by OPM at the close of the Bush Administration, on December 18, 2008, fell short of the expectations of both government FOIA professionals and members of the public who regularly file FOIA requests. It concluded that there were no steps that OPM could take government-wide to enhance the quality and effectiveness of FOIA personnel. When news of the report reached FOIA personnel and members of the FOIA requester community several months later, it was greeted with significant disappointment.

The American Society of Access Professionals (ASAP) and a coalition of non-governmental organizations that regularly make FOIA requests each wrote directly to the new head of OPM, John Berry, requesting that OPM reconsider the report. Based on those letters, OPM leadership met with ASAP's Board of Directors and I am told that OPM will conduct additional analysis on the issues raised by Congress for that report. This Committee should consider asking OPM to communicate its conclusions directly to the Committee.

Attorneys' Fees Provisions

The OPEN Government Act changed the standard for when requesters who are forced to go to court to obtain information under FOIA are eligible for attorneys' fees. By reversing *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), for FOIA cases and reinstating the catalyst theory, it prevents game-playing by agencies who deny a request until the requester sues, and then reverse their position and release records. Now that agencies must face the consequences of attorneys' fees for this type of behavior, it is our hope that they will make the right decision from the start.

Currently, however, the availability of attorneys' fees for some requesters remains in question because courts are divided on whether the new provision applies to cases pending at the time of the enactment of the OPEN Government Act. Several lower courts have addressed this question and, recently, the D.C. Circuit determined that the amendments to the FOIA do not apply to cases pending at the time of enactment.

Obama Administration FOIA Policy

Perhaps the most interesting issue to discuss is the impact of the Obama Administration policies on FOIA. In preparation for this testimony, I reviewed various report cards and assessments put out by a range of groups and I also contacted several lawyers and FOIA requesters at other non-governmental organizations to discuss their perspectives.

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There is no doubt that the Obama Administration has changed the course that the prior administration had set in this area. On his first full day in office, the President issued a series of memoranda and executive orders setting forth his transparency agenda. One memorandum specifically directed a presumption in favor of the release of government information in response to FOIA requests and promised to "usher in a new era of open Government."[4] This was soon followed in March 2009 by Attorney General Eric Holder's memorandum on FOIA policy. It rescinded Attorney General John Ashcroft's FOIA policy[5] and instructed that DOJ will only defend FOIA denials when disclosure is prohibited by law or when an "agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions" from disclosure.[6] This was followed shortly thereafter by detailed guidance from the Office of Information Policy at the Department of Justice that describes in greater detail how to implement the presumption of openness and the foreseeable harm standard.[7] The speed with which these memoranda were issued demonstrates the fundamental nature of this Administration's commitment to open government.

Many of the requesters I have spoken to would say, however, that implementation of the discretionary release standard is more mixed.[8]

There have been many decisions to release information that had been withheld by the Bush Administration. These include, for example, Department of Justice Office of Legal Counsel (OLC) memoranda about interrogation techniques, a Central Intelligence Agency Inspector General Report on interrogation, a report prepared by the Intelligence Community Inspectors General on the warrantless surveillance program, the decision to permit pictures of the return of fallen soldiers at Dover Air Force base, and systematic release of White House visitor logs. The release of these types of records serves the core purpose of the FOIA because they inform the public about controversial and important government policies.

On the other side of the balance are several high profile refusals to release records, including the continued refusal to release OLC memoranda concerning the warrantless surveillance program and the continued effort to block release of images of detainees at Abu Ghraib that two courts have ruled must be released. Early litigation positions in a number of lawsuits, including suits involving missing White House e-mails,

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[4] Obama, Barack, "Memorandum for the Heads of executive Departments and Agencies: Freedom of Information Act," (Jan. 21, 2009).
[5] Ashcroft, John, "Memorandum for Heads of all Federal Departments and Agencies: The Freedom of Information Act," (Oct. 12, 2001).
[6] Holder, Eric, "Memorandum for Heads of executive Departments and Agencies: Freedom of Information Act," (March 19, 2009).
[7] 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.
[8] My testimony today does not discuss the Administration's policy on state secrets privilege or the broader open government directive process that also was initiated on January 21, 2009. In addition, this testimony only touches briefly on the issues of classification, declassification, controlled unclassified information, and sensitive but unclassified information, each of which have been under consideration by the Obama Administration.

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the agency status of the White House Office of Administration, and the release of White House visitor logs, did not show a shift from prior administration policy, although several of those positions have changed or shifted in recent months.

Our experience with ordinary FOIA requests that are not the subject of litigation is that we are more frequently being asked whether we want draft and deliberative process material that would automatically have been denied under the prior administration policy. In one instance, we were provided with a re-review of a set of important records purportedly on the basis of the new policy. Those records, transcripts of FBI interviews with Saddam Hussein, offered a tremendous insight into important events and a central personality in recent foreign and military policy.

Having said that, many concerns remain among frequent FOIA requesters about the implementation of the Obama policies. In particular, the Holder memorandum does not instruct a case-by-case review of pending FOIA litigation. Although I am aware of a few cases in which additional records were released after the issuance of the Obama and Holder policies, in many instances formal motions or out-of-court requests by FOIA requesters that the government reconsider its withholdings rather than continue to litigate about the documents have been met with refusal. By contrast, under the FOIA policy established by Attorney General Janet Reno, the Department of Justice coordinated a merits review of all pending and prospective FOIA litigation handled by the Federal Programs Branch of the Department of Justice Civil Division, Civil Divisions of United States Attorneys' offices nationwide, and the Tax Division of the Department of Justice.[9] The Department of Justice reported on the results of that review in 1994.[10]

Attorney General Reno also took a number of additional steps to reinforce the foreseeable harm standard after the October 4, 1993, issuance of President Clinton's and her FOIA memoranda: she made a series of public speeches about FOIA and openness,[11] she instituted FOIA-related performance standards throughout the Department of Justice,[12] and she reiterated the FOIA policy through a 1997 and a 1999 memorandum to the heads of all executive departments and agencies.[13] We hope to see Attorney General Holder follow a similar path over the course of his tenure as Attorney General.

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[9] Department of Justice FOIA Update, Vol. XV, No. 2 (1994), http://www.usdoj.gov/oip/foia_updates/Vol_XV_2/page1.htm.

[10] Department of Justice FOIA Update, Vol. XV, No. 4 (1994), http://www.usdoj.gov/oip/foia_updates/Vol_XV_4/foialit.htm.

[11] Supra n. 9 (honoring the annual Freedom of Information Day celebrated on James Madison's birthday at which she described a series of measures taken to instill open government values throughout the Department of Justice); Department of Justice FOIA Update, Vol. XVII, No. 3 (1996), http://www.usdoj.gov/oip/foia_updates/Vol_XVII_3/page3.htm (addressing American Society of Newspaper Editors); Department of Justice FOIA Update, Vol. XIX, No. 4 (1999), http://www.usdoj.gov/oip/foia_updates/Vol_XIX_4/page1.htm (addressing more than 6000 FOIA personnel from a range of departments and agencies at DOJ FOIA training).

[12] Department of Justice FOIA Update, Vol. XVI, No. 3 (1995), http://www.usdoj.gov/oip/foia_updates/Vol_XVI_3/page1.htm.

[13] Department of Justice FOIA Update, Vol. XVIII, No. 2 (1997), http://www.usdoj.gov/oip/foia_updates/Vol_XVIII_2/page1.htm; Department of Justice FOIA Update, Vol. XIX, No. 4 (1999), http://www.usdoj.gov/oip/foia_updates/Vol_XIX_4/page3.htm.

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In addition, there are a series of steps that the new Administration could take to more actively implement President Obama and Attorney General Holder's guidelines. These include:

1. The Administration should direct agencies to issue regulations implementing the OPEN Government Act of 2007 and the Obama/Holder Guidance concerning discretionary releases of information. To date, only a small percentage of agencies have revised their regulations to reflect recent changes in law and policy. Thus, important matters such as new timing and fee provisions, tracking requirements, a new definition of a representative of the news media, and new reporting requirements are not spelled out in most agencies implementing regulations.
2. In order to make President Obama and Attorney General Holder's vision of affirmative disclosure a reality, the Department of Justice guidance on implementation of the E-FOIA Amendments of 1996 should be revised to direct agencies to use a broader approach to prospectively identifying records that are likely to be the subject of multiple requests.[14]
3. The Department of Justice, in conjunction with the Office of Management and Budget, should develop a plan to systematically review agency compliance with the E-FOIA's requirements.
4. All agencies should begin accepting requests and providing responses electronically through the Internet.
5. The Department of Justice should report publicly on the effect of the Holder FOIA guidelines, including specifically any cases in which it refused to defend a FOIA withholding and any cases in which the new guidelines had an impact on pending litigation.
6. The Department of Justice should commit to good faith mediation of all disputes before OGIS and direct federal agencies to submit to OGIS mediation.
7. Each agency should be required to report in March 2010 and March 2011 on steps taken to implement the President and the Attorney General's memoranda.
8. The White House should agree, as a matter of discretion, to treat the Office of Administration as an agency for the purpose of FOIA so that the Office accepts and processes FOIA requests.

Threats to FOIA

I want to end by noting several policies and programs that continue to threaten the reach of the FOIA. The nascent controlled unclassified information (CUI) framework and related use of sensitive but unclassified (SBU) labels raises concerns amongst the public. Although the CUI framework has as its purported purpose enhancement of information sharing, there are few protections for public access built into the framework. There is no Executive Branch effort of which we are aware to address the broader SBU

[14] Although it is beyond the scope of this hearing, we believe that the Administration should aggressively address its electronic records preservation and management policies to ensure that records will not continue to disappear as agencies rely increasingly on electronic information.

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problem. The Obama Administration has conducted a review of the CUI framework and a report apparently has been submitted to the White House that provides the results of that review.

A related issue is the national security classification and declassification program that currently is governed by Executive Order 12958, as amended. The Obama Administration conducted a review of these programs over the summer and recommendations have been submitted to the White House for revision of the Executive Order. In both instances the Administration sought out public input on the programs. Nonetheless, there has not been a public release of the resulting reports or any public notice process to receive comments on new policy recommendations.

Finally, new legislative proposals regularly include new specific exemptions from FOIA. These so called "(b)(3)" provisions are incorporated into the FOIA through 5 USC Section 552(b)(3). This Committee and others in the Senate and the House have been responsive to concerns about (b)(3) exemptions and have sought to focus and reformulate proposals to ensure that they do not unduly undermine the FOIA. I urge you to continue this work and to continue to advance the OPEN FOIA Act introduced by Senators Leahy and Cornyn that would require Congress to openly and clearly state its intention to provide for statutory exemptions to FOIA in proposed legislation.

I hope that these observations have been helpful and I am happy to respond to your questions.

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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
September 30, 2009

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Committee On The Judiciary,
Hearing On "Advancing Freedom Of Information In The New Era Of Responsibility"
September 30, 2009

Today, the Committee holds an important oversight hearing on the Freedom of Information Act ("FOIA"). The enactment of FOIA 42 years ago marked a watershed moment in our Nation's history. The Freedom of Information Act guarantees the right of all Americans to obtain information from their Government and to know what their Government is doing.

In his historic Presidential memorandum on FOIA, President Obama said that "[i]n our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike."

From the start of his transition to the White House, I have urged President Obama to make a clear commitment to FOIA. I am pleased that one of the President's first official acts was to issue this new directive to strengthen FOIA.

Now in its fifth decade, FOIA has become an indispensable tool in protecting the people's right to know. The right to know is a cornerstone of our democracy. Without it, citizens are kept in the dark about key policy decisions that directly affect their lives. Without open government, citizens cannot make informed choices at the ballot box. Without access to public documents and a vibrant free press, officials can make decisions in the shadows, often in collusion with special interests, escaping accountability for their actions. And once eroded, the right to know is hard to win back.

It is essential that we fully honor the President's promise to restore more openness and accountability to our Government. That is why I have called on the Justice Department to conduct a comprehensive review of its pending FOIA cases, so that information sought under FOIA is not improperly withheld from the public. In March, the Attorney General issued new FOIA guidance that rightfully restores the presumption of disclosure for Government information. I welcome this new policy and I am pleased that the Associate Attorney General is

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here to discuss how the new FOIA guidelines are being implemented.

In Congress, we have also made good progress towards strengthening FOIA. Earlier this year, the Congress enacted an omnibus spending bill that includes critical funding to finally establish the Office of Government Information Services at the National Archives and Records Administration -- a key reform in the OPEN Government Act, which I wrote with Senator Cornyn. I am very pleased that the first Director of this new office is here today to discuss the effort underway to get OGIS up and running.

There are also other important reforms in the OPEN Government Act – to ensure better tracking of FOIA requests, to reduce FOIA processing delays and to provide for more accountability for the government's handling of FOIA requests – that became effective for the first time in December. These FOIA reforms have made our government more open and accountable to the American people today, than it was just a few months ago. But, there are still challenges ahead.

Implementation of FOIA remains hampered by the increasing use of legislative exemptions that are often sneaked into legislation without debate or public scrutiny. Just recently, I worked closely with Senator Feinstein, the chair of the Select Committee on Intelligence, to remove an unnecessary FOIA exemption from the Intelligence Reauthorization bill. Senator Cornyn and I have also reintroduced the OPEN FOIA Act – a bill that requires Congress to explicitly and clearly state its intention to provide for a statutory exemption to FOIA when it includes such an exemption in new legislation. This commonsense bill has twice passed the Senate this year as part of other legislation. I hope that the Congress will promptly enact this measure.

I have said many times before -- during both Democratic and Republican administrations -- that freedom of information is not a Democratic issue, nor a Republican issue. It is an American issue. I thank the distinguished witnesses that are appearing before the Committee today. They each bring valuable perspectives on the importance of FOIA in guaranteeing the public's right to know.

During the last Congress and the last administration, we held a FOIA oversight hearing that resulted in the enactment of the first major reforms to FOIA in more than a decade. This Committee will continue to do its part to advance freedom of information, so that the right to know is preserved for future generations. I look forward to today's discussion.

# # # # #

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

February 23, 2009

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

I congratulate you on your recent confirmation. I was pleased that during your confirmation hearing, you pledged to review the Department of Justice's policies and practices related to the Freedom of Information Act (FOIA), and that you were committed to restoring openness to the FOIA process. I write to share my views on several important matters that I hope you will consider as you implement President Obama's directive to issue new FOIA guidelines that reaffirm the commitment to accountability and transparency.

The Office of Government Information Services

A key component of the *Leahy-Cornyn OPEN Government Act*, which enacted the first major reforms to FOIA in more than a decade, was the creation of the Office of Government Information Services (OGIS) to mediate FOIA disputes, review agency compliance with FOIA and house the newly-created FOIA ombudsman. The work of OGIS will be essential to reversing the trend toward excessive FOIA processing delays, and this office will serve as a meaningful alternative to costly litigation. The success of this new office will depend on close cooperation between OGIS, the Department of Justice's Office of Information Policy (OIP), and executive branch agencies. To that end, I urge you to direct the OIP and all Federal departments and agencies subject to FOIA to cooperate fully and promptly with OGIS, once it is operational by: (1) making every effort to formally or informally resolve FOIA disputes in good faith; (2) routinely informing FOIA requesters that they may appeal decisions to OGIS upon denial of a request, or when 20 days have passed without a response; (3) directing Federal departments and agencies not to toll a FOIA request because the request is pending OGIS review or in mediation; and (4) providing information about OGIS services to requesters through the FOIA-related websites maintained by Federal departments and agencies.

The FOIA reforms contained in the OPEN Government Act also include several other critical changes to improve the timeliness of FOIA responses, track outstanding FOIA requests and increase accountability. I urge you to direct all Federal agencies and departments to take immediate steps to fully implement these reforms.

Greater Transparency For FOIA Exemption 3

I also encourage you to bring greater transparency to the use of statutory exemptions to FOIA. Under FOIA Exemption 3, government records that are specifically exempt from FOIA by statute may be withheld from the public. While no one would reasonably quibble with the notion that some government information is appropriately kept from public view, there have been an alarming number of Exemption 3 provisions proposed in legislation in recent years. Often these statutory exemptions are written in very ambiguous terms, to the detriment of the American people's right to know.

I have worked with Senator Cornyn and others on legislation to make the process for creating new statutory exemptions to FOIA more transparent, and I will continue this work in the 111th Congress. The Department can also play an important role in promoting greater Exemption 3 transparency by adopting a FOIA policy that supports only those proposals to create new statutory exemptions under Exemption 3 that: (1) are necessary for an agency to achieve specific, articulated goals or objectives; (2) incorporate affirmative oversight on the use of the exemption; (3) include provisions for a built-in sunset and periodic review of the provision's necessity; and (4) are publicly identified at the time they are proposed. The Department can also promote greater transparency by working closely with the Office of Management and Budget to improve the transparency and accountability of Exemption 3 statutes and by having the OIP provide information to the public about legislation that contains a statutory exemption to FOIA *via* its website.

Lastly, we have witnessed an extraordinary and troubling expansion of government secrecy during the last eight years. The Department's new FOIA policy will not only provide an important opportunity to turn the page, but also to correct past errors that could do harm to our democracy. I am pleased that you recently announced that the Department will review its use of the state secrets privilege. Given the critical role that FOIA plays in protecting the public's right to know, I hope that you will undertake a similar review of the Department's pending FOIA cases.

I hope that you will carefully consider each of these proposals as you develop the Department's new FOIA policy. Again, thank you for your commitment to reinvigorating FOIA and to restoring openness and accountability to our government.

Sincerely,

PATRICK LEAHY
Chairman

STATEMENT

MIRIAM NISBET
Director of the Office of Government Information Services

before the Committee on the Judiciary
United States Senate

National Archives and Records Administration

September 30, 2009

Good morning, Mr. Chairman, Senator Sessions, and members of the committee, I am Miriam Nisbet, Director of the Office of Government Information Services at the National Archives and Records Administration.

I am pleased to appear before you today. This Committee was instrumental in establishing the Office of Government Information Services through the Open Government Act of 2007 (P.L. 110-175), which amended the Freedom of Information Act (FOIA). Thank you in particular, Mr. Chairman and Senator Cornyn, for your vision and your perseverance in making this new office one of the levers for reinvigorating our country's FOIA.

The concept of the public's right to access to the records of its government is fundamental to our democracy. Yet, making our Freedom of Information Act work smoothly and efficiently to accommodate that concept has proved more difficult and costly than any of us could have imagined. This Committee has continued to make improvements in the law over the past 35 years – delicately balancing the various legal concerns for protection of certain information and the need for disclosure, as well as addressing practical aspects such as fees and the time limits for responses to requests for records, and most recently, by establishing the Office of Government Information Services or OGIS.

With funding received for the first time this fiscal year, the National Archives and Records Administration (NARA) acted quickly early in the year to get the office started. Funding is also contained in the FY 2010 President's Budget. I arrived at the Archives a few weeks ago and am interviewing vigorously to hire five other staff members. We will soon be a dedicated team building a straightforward and simple interface between the public and the Executive Branch agencies, offering alternative dispute resolution through mediation and helping to make FOIA work better for all involved in the process.

How will we accomplish this?

Our mission is two-fold. One part involves review of agency compliance and performance with the FOIA. We will, of course, work closely with the Department of

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Justice, which has a major and well-established role in this regard, and with the Chief FOIA Officers at the agencies. One immediate and feasible task is to take advantage of available technology to view and assess the existing agency Annual FOIA Reports, similar to what is being done to assess federal agencies' information technology initiatives through the IT Dashboard and data.gov.

A second part of the mission is to offer mediation services to resolve disputes between persons making FOIA requests and agencies, as a non-exclusive and non-binding alternative to litigation. We will pursue several routes:

- We will use existing federal mediation resources to help us provide this service, something that has not been done before under FOIA except on an ad hoc basis in litigation as ordered by the court
- We will work with existing agency FOIA Public Liaisons in OGIS's review and mediation capacities.
- We will create an online dispute resolution (ODR) system, which is a relatively new approach to conflict resolution and holds great potential to efficiently process and prioritize a high volume of cases.

Many people, and this Committee, have been referring to the new office as the "FOIA Ombudsman." We view our role as mediator (assuming that a FOIA requester has not already decided to go to court) and as a source of information, which we will provide in-person as well as through many resources on the Web. Of course, many agencies as well as non-government organizations offer useful guides, templates and "good practices" on FOIA and we will promote and take advantage of these existing resources.

Public understanding of how government records are organized and maintained is not strong, nor should it be required to submit a FOIA request. But that lack of understanding can result in requests that are overly broad, or which lack the specificity to allow the agency to readily search for the records. Similarly, the volume of requests (the government receives over 600,000 FOIA requests per year), the sensitivity of the records, and the need to consult with other affected agencies all significantly impact the ability of agency FOIA officers to respond in a timely manner. The combination of these pressures can result in misunderstandings. Clearing up those misunderstandings and seeking solutions in more complicated cases, short of litigation, would save time and money for agencies and public alike, as well as bolster confidence in the openness of government.

In just a short time, I have received helpful advice and support from this Committee, the White House Open Government Initiative and the Chief Technology Officer, the Department of Justice, the National Mediation Board, innovators in the private sector, state Ombudsman offices, and members of the FOIA requester community. With all of these stakeholders assisting in the new office's outreach, we will be able to realize the vision of this Committee to achieve the timely and fair resolution of America's FOIA requests.

Thank you for the opportunity to testify. I would be happy to answer any questions.

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September 30, 2009

The Honorable Patrick Leahy
Chairman
Judiciary Committee
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

Dear Chairman Leahy,

We are writing to thank you for your tireless commitment to protecting and advancing government transparency through the Freedom of Information Act (FOIA). As organizations and individuals concerned with government openness and accountability, we deeply appreciate your leadership on this critical issue.

Your nearly three decades of work to ensure the public has access to the information it needs to hold leaders accountable has left a lasting mark. Thanks to legislation you authored, co-authored, and championed, FOIA reflects the reality of modern electronic recordkeeping and accountability has been injected into the system for processing FOIA requests. By fighting off unnecessary exemptions, you have kept the law strong and effective. Additionally, you have increased compliance with and attention to public access by holding thorough oversight hearings.

We are especially appreciative of your dedication to making sure that policy makers consider both the public interest and the security interest before deciding to withhold information. While secrecy across the government has grown since the terrorist attacks of September 11, we know that we would have a much more secretive and less accountable government today if not for your personal efforts.

We look forward to working with you and your staff to improve FOIA in the coming years. We particularly look forward to supporting your efforts to enact legislation that makes it easier to identify new FOIA exemptions tucked into other pieces of legislation, and to working with you to make sure the newly established Office of Government Information Services (OGIS) has the support it needs to fulfill its mission.

Thank you, again, for your leadership on this critical issue.

Sincerely,

OpenTheGovernment.org

American Association of Law Libraries

American Booksellers Foundation for Free Expression

American Civil Liberties Union

American Library Association

Arizona First Amendment Coalition

Association of American Publishers

Association of Research Libraries

Atlanta Law Libraries Association

Bill of Right Defense Committee

Center for Democracy and Technology

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Center for National Security Studies

Citizens for Responsibility and Ethics in Washington

Citizens for Sunshine

Collaboration on Government Secrecy

DC Open Government Coalition

Defending Dissent Foundation

Electronic Frontier Foundation

Electronic Privacy Information Center

Essential Information

Feminists for Free Expression

First Amendment Coalition

First Amendment Project

Government Accountability Project

iSolon.org

Law Librarians Association of Wisconsin

Law Librarians of New England

Law Librarians Society of Washington D.C.

League of Women Voters of the United States

Liberty Coalition

Minnesota Coalition on Government Information

National Coalition Against Censorship

National Freedom of Information Coalition

National Newspaper Association

National Security Archive

New Jersey Law Librarians Association

Northern California Association of Law Libraries

OMB Watch

People For the American Way

Political Research Associates

Project On Government Oversight

Public Citizen

Public Employees for Environmental Responsibility

Reporters Committee for Freedom of the Press

San Diego Area Law Libraries

Social Responsibility Special Interest Section (SR-SIS), American Association of Law Libraries

Society of American Archivists

Society of Professional Journalists

Southern New England Law Librarians Association

South Florida Association of Law Libraries

Special Libraries Association

U.S. Bill of Rights Foundation

Utah Foundation for Open Government

Virginia Association of Law Libraries

Vermont Coalition for Open Government

Vermont Press Association

Washington Coalition for Open Government

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Individuals - *additional information for identification purposes only

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ADVANCING FREEDOM OF INFORMATION
IN THE NEW ERA OF RESPONSIBILITY
Hearing Testimony – Thomas J. Perrelli
September 30, 2009 – 10:00

As the Associate Attorney General of the Department of Justice and the Department's Chief FOIA Officer, I am pleased to speak with the Committee this morning about 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, and the efforts of the Department of Justice to implement the President's January 21, 2009 FOIA Memorandum and 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 this Administration the most open and transparent in history.

President Obama took action toward this goal on his first full day in office, when he issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act. The memo sent a powerful message, announcing "a new era of open Government." Much of this mission, of course, occurs outside the direct context of FOIA, as the President made clear that "agencies should take affirmative steps to make information public." At the same time, the President made clear that we need to take a new approach to FOIA. When administering the statute, "all decisions" should be made "with a clear presumption": "In the face of doubt, openness prevails." 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."

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Finally, the President directed the Attorney General to issue new FOIA guidelines to the heads of all executive departments and agencies, giving further direction to how we can implement this commitment to accountability and transparency.

The Department of Justice has long carried a special responsibility in ensuring that FOIA's demands are met, and the Department immediately began working to carry out the President's directive. Two days after the President issued his Memorandum, our Office of Information Policy (OIP) sent out initial guidance to agencies. This guidance emphasized the significance of the President's Memorandum and advised them to begin applying the presumption of disclosure immediately to all decisions involving the FOIA. We also began training attorneys and access professionals on the President's Memorandum, reiterating the President's message and giving practical advice on how to implement the new policies.

The real cornerstone of our efforts, however, has been the Guidelines that the Attorney General issued on March 19, 2009 in response to the President's Memorandum. The Guidelines, issued during Sunshine Week, contain three primary messages, which I would like to discuss separately. First, the Guidelines implement a new approach to disclosures of information. Second, they emphasize new management practices that will better enable federal agencies to make government accessible and open. And third, the Guidelines direct the implementation of new metrics by which FOIA performance can be measured. I will address these three areas separately.

First, the Guidelines implement the President's presumption of openness with respect to disclosures. The Attorney General's FOIA Guidelines strongly encourage

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agencies to make discretionary releases of records. The Guidelines also direct agencies not to withhold records simply because a discretionary FOIA exemption may apply, and the Guidelines stress that the President 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." Rather, the Attorney General made clear that the Department of Justice 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." Finally, the Guidelines direct agencies to consider whether a partial disclosure can be made, even if a full disclosure may not be possible.

The Attorney General's guidelines are not just words, and we are working to implement them every day. Our litigators, for example, are taking the Attorney General's guidelines seriously. In the course of litigation, our attorneys are regularly working with agencies to identify documents that the agency has withheld under a legitimate assertion of an exemption but that could be disclosed under the new Guidelines, and we are conducting systematic outreach throughout the Department and into the U.S. Attorney's Offices to make sure the change is taking effect. Agencies, for their part, are responding, working with us to release additional documents where they can, re-processing records to apply new standards where practicable, and making partial releases where they cannot make full releases.

The Department and its federal colleagues are also working to make affirmative disclosures outside the FOIA context, just as the President directed. The disclosure of our Office of Legal Counsel opinions through discretionary release and publication has

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received significant attention, but the Department and other agencies are making affirmative disclosures in many other areas. For example, our Executive Office for Immigration Review has published its Immigration Judge Benchbook online, so the public and immigration community have the same access to this resource that our immigration judges have. Another agency has begun including, in its contracts, a provision that expressly provides for the contract and supporting material to be posted publicly. Yet another agency released information about environmental hazards that it had long withheld under Exemption 2. There are numerous other examples, which I will be happy to discuss further.

The President's Memorandum calls not just for a change in policy, but a change in culture. The Department has thus worked hard to educate its agency partners on what the change requires. The day after the Attorney General's Guidelines issued, OIP highlighted the Guidelines' key features for agencies in an article posted on *FOIA Post*, the Department's online publication featuring FOIA guidance and news. A week later, OIP held a government-wide training conference for over 500 agency personnel – and, in the spirit of the Guidelines, posted the presentation online for the widest possible dissemination. And on April 17, 2009, OIP issued extensive written guidance that gives concrete, practical ways that agencies can implement the new requirements. This guidance, also provided through *FOIA Post*, discussed, among other things, the Guidelines' more limited standards for defending agencies when they deny a FOIA request and the new emphasis on proactive disclosures. OIP described ways to apply the foreseeable harm standard and discussed the factors to consider in making discretionary releases.

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Second, the Attorney General emphasized that utilizing the "proper disclosure standard is only one part of ensuring transparency," and that achieving open Government also requires critical attention to "an effective system for responding to FOIA requests." That is, while open government does further good management; open government also *requires* good management. This imperative has several components, as the Attorney General's Guidelines indicated. At one level, it requires us to recognize that FOIA is not just the responsibility of the government's many committed FOIA professionals; it is also the responsibility of agency personnel in all spheres, from the technological personnel who are implementing complicated searches to the policymakers and other employees who have an obligation to search their own offices diligently. At another level, it means that FOIA personnel need to work, as President Obama and Attorney General Holder put it, "in a spirit of cooperation" with FOIA requesters. And at perhaps the most nuts-and-bolts level, it means that agencies have to implement the basic management practices required by Section 7 of the OPEN Government Act, by assigning tracking numbers to requests and establishing telephone lines or internet services that requesters can use to check the status of their requests.

We are taking these management principles as seriously as we are taking the new approach to disclosures. Our April 17 guidance to agencies gives, again, among other things, additional information about the roles that other agency personnel play in implementing FOIA and the need to work cooperatively with requesters. More important than its words, however, is that the Department is practicing what it preaches and has been reaching out to the public and the requester community. The Director of OIP was the keynote speaker at a conference held in May sponsored by the American Society of

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Access Professionals, an association of public and private sector officials and individuals interested in issues relating to transparency. Last month, OIP hosted a productive Requester Roundtable, at which it invited any interested members of the FOIA requester community to meet with OIP and to share their ideas for improving FOIA administration; OIP will hold a training session this Fall for agency personnel to discuss the ideas and concerns that the requesters raised. We intend to continue these training and requester outreach activities in the months and years ahead.

Third, and finally, the Guidelines direct the Office of Information Policy to implement new metrics that we can use to measure FOIA performance, and require agency Chief FOIA Officers to report each year on how the agency is improving its performance. These reports will serve as the means by which each agency will be "fully accountable" for its FOIA administration. The public deserves to see how we are doing in our responses to requests for information.

I am particularly pleased to be discussing this issue today, because our Office of Information Policy is today issuing the guidelines that agencies are to use in preparing the Chief FOIA Officer Reports that the Attorney General has called for. These guidelines will be made available publicly on the Department's website.

The Reports will collect information that is directly tied to the important transparency principles that the President and Attorney General have emphasized. In particular, each agency Chief FOIA Officer will be 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

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and increase timeliness in responding to requests. These reports will follow submission of agency Annual FOIA Reports, which are required to be submitted to the Department of Justice by February 1st of each year.

The Department's Reporting Requirements add several additional obligations to agency Annual FOIA Reports, and go beyond what is required by the OPEN Government Act. They are particularly designed to target information about backlogs of FOIA requests, as agencies are to report on their number of backlogged requests and backlogged administrative 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 will also be required to give a comparison of the backlogged numbers from year to year. These Annual FOIA Reports will be the starting point for agency Chief FOIA Officers when they prepare their Chief FOIA Officer Reports. For any agency facing a backlog of requests, the Department is requiring the Chief FOIA Officer Report to include a description of the steps being taken by the agency to reduce the backlog.

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 this past year and has posted that information on OIP's webpage, and is in the process of creating a chart of all statutes that have been recognized by the courts as proper Exemption 3 statutes.

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We believe that the Department's efforts in this area are taking us a long way to fulfilling the President's goal of making this the most transparent Administration in history – but it is really an Administration-wide project. The Attorney General's Chief FOIA Officer Reports and litigation authority are important tools, but they are not the only ways we can make our government more transparent. That is why we have conducted agency-specific training sessions at the Departments of Commerce, Navy, Energy, Treasury, Labor, Transportation, as well as the SEC, EPA, and GSA, and just prepared a video presentation on our transparency initiatives that we can make easily available to the other federal agencies. It is also why we continue to take pride in the Department of Justice Guide to the Freedom of Information Act. The 2009 edition of this comprehensive reference volume has just come out, and it continues to be the definitive source for FOIA professionals inside and outside of government. We are ready to work with others throughout the government to fulfill the President's openness initiatives.

I should add that we are particularly pleased to be testifying with Miriam Nisbet, and welcoming the Office of Government Information Services ("OGIS") to the federal FOIA family. Director Nesbit has roots in our own Office of Information Policy, and her office and the Department are cooperating already. Our partnership with OGIS will bring benefits both within government and to the citizens who seek information about how their government works. 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 FOIA's requirements, we look forward to OGIS's reviews of where agency compliance currently stands. Indeed, the Department looks forward to working with OGIS on those

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compliance reviews, so that the President may provide recommendations to Congress in the future.

In closing, the Department of Justice appreciates the Committee's commitment to open government, and looks forward to working with the Committee on matters pertaining to the government-wide 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.

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