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THE FREEDOM OF INFORMATION ACT: ENSURING TRANSPARENCY AND ACCOUNTABILITY IN THE DIGITAL AGE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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THE FREEDOM OF INFORMATION ACT: ENSURING TRANSPARENCY AND ACCOUNTABILITY IN THE DIGITAL AGE

TUESDAY, MARCH 15, 2011

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

The Committee met, pursuant to notice, at 10:16 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

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

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

Chairman LEAHY. Good morning. Normally we would have started at 10, but Senator Grassley and I were both at the Supreme Court for the Judicial Conference, and so we appreciate everybody's willingness to start at 10:15.

This is an important hearing on FOIA, or the Freedom of Information Act. When Congress enacted FOIA more than 40 years ago, this watershed law ushered in a new and unprecedented era of transparency in Government. Four decades later, FOIA continues to give citizens access to the inner workings of their Government and to guarantee the right to know for all Americans.

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. In the digital age, FOIA remains an indispensable tool in protecting the people's right to know.

As Americans from every corner of our Nation commemorate Sunshine Week, they have many good reasons to cheer. I am pleased that one of President Obama's first official acts when he took office was to issue a historic new directive to strengthen FOIA. Just yesterday, the Department of Justice launched the new FOIA.gov website. It compiles all of the Department's FOIA data in one online location.

The Congress has made good progress in strengthening FOIA. Last year, the Senate unanimously passed the Faster FOIA Act. That is a bill that Senator Cornyn of Texas and I introduced to establish a bipartisan commission to study FOIA and to make recommendations to Congress on ways to further improve FOIA. We will reintroduce this bill later this week.

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The reason Senator Cornyn and I have joined together for years now on strengthening FOIA, we go on the assumption that no matter whether you have a Democratic or Republican administration, whoever is there is going to be glad to talk about the things that go right, not quite so eager to talk about things that might not have gone right. And it helps everybody, no matter whether it is a Republican or Democratic administration, to know that the people being represented have a chance to find out what is happening.

There is reason to cheer the recent unanimous decision by the Supreme Court in *Federal Communications Commission* v. *AT&T*, concluding that corporations do not have a right of personal privacy under the Freedom of Information Act. That, again, makes our Government more open and accountable to the American people. The Government is still not as open and accessible as I would like to see it, and many of us would.

Implementation of FOIA continues to be hampered by the increasing use of exemptions—especially under section (b)(3) of FOIA.

Last year, Senators Grassley, Cornyn, and I worked together on a bipartisan basis to repeal an overly broad FOIA exemption in the historic Wall Street reform bill.

It is also essential that the American people have a FOIA law that is not only strengthened by reform, but properly enforced. A report released yesterday by the National Security Archive found that while there has been some progress in implementing the President's FOIA reforms, only about half of the Federal agencies surveyed have taken steps to update their FOIA guidance and assess their FOIA resources. And FOIA delays continue to be a problem; six-year-old delays are far too much.

I am pleased that we have representatives from the Department of Justice and the Office of Government Information Services, and I will continue to work with Senator Cornyn, Senator Grassley, and others because this is something we should all join on. It is important for the country.

Senator Grassley.

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. This is a very important hearing, and thank you for it and particularly coming during this week that is called "Sunshine Week" observed annually, seemingly coinciding with James Madison's birthday, Founding Father of our checks-and-balances system of Government. Open government and transparency are more than just pleasant-sounding words. They are essential to maintain our democratic form of Government.

FOIA is based on the belief that citizens have a right to know what their Government is doing and that the burden is on the Government to prove otherwise. It requires that our Government operate on the presumption of disclosure. So it is important to talk about the Freedom of Information Act and the need for American citizens to be able to easily obtain information from their Government.

Transparency is not negotiable, even in a Republican administration, as far as I am concerned. Although it is Sunshine Week, I am

disheartened, continuing the practices of previous Presidents, Republican or Democrat, that we do not have the openness that we should. And contrary to President Obama's hopeful pronouncements when he took office more than 2 years ago, the sun still is not shining on the executive branch.

Given my experiences in trying to pry information out of the executive branch and based on investigations by the media, I am disappointed that President Obama's statements about transparency are not being put into practice. Federal agencies under the control of his political appointees have been more aggressive than ever in withholding information. There is a real disconnect between the President's words and the actions of his political appointees.

On his first full day in office, President Obama issued a memorandum on FOIA to heads of all executive agencies: "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 and abstract fears."

But further quoting his instruction to executive agencies, "Adopt a presumption in favor of disclosure"—and that is very important to remember those words. "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."

Unfortunately, based upon his administration's actions, it appears that in the eyes of the President's political appointees, his hopeful words about open government and transparency are mere words. It is not just a matter of disappointment in the administration's performance in complying with requests for information, and it is not even about bureaucratic business as usual. It is more, and far worse.

Perhaps the most dramatic and troubling departure from the President's vow to usher in a new era of open government are revealed in e-mails from the Department of Homeland Security obtained by the Associated Press in July last year. A report by Ted Bridis of AP uncovered that for at least a year Homeland Security was diverting requests for records to senior political advisers who delayed the release of records they considered politically sensitive. The review often delayed the release of information for weeks beyond the usual wait.

Specifically, in July of 2009, the Department of Homeland Security introduced a directive requiring a wide range of information to be vetted by political appointees, no matter who requested it. Career employees were ordered to provide Secretary Napolitano's political staff with information about the people who asked for records, such as where they lived, whether they were private citizens or reporters, and about the organizations they worked for. If a Member of Congress sought such documents, employees were told to specify Democrat or Republican.

The Homeland Security directive laid out an expansive view of the sort of documents that required political vetting. Anything that touched on controversial or sensitive subjects that could attract media attention or that dealt with meetings involving prominent business and elected leaders had go to political appointees.

I was very disturbed by the Associated Press report, which came out July 21st last year. Accordingly, in August, Representative Issa and I wrote the Inspectors General of 29 agencies and asked them to review whether their agencies were taking steps to limit responses to Freedom of Information Act requests from lawmakers, journalists, activist groups, and watchdog organizations. The deadline for responding to my letter passed about 5 months ago. To date, only 11 of the 29 agencies have responded.

The lack of a response from so many agencies sends a disturbing message. The leadership of the Federal agencies do not seem to consider the political screening of requests under the Freedom of Information Act to be a matter worthy of their attention.

My concern about the lack of responses to my letter was well founded. It now appears that the Department of Justice may have also politicized compliance with the Freedom of Information Act. On February 10, 2011, blog—I have got three more pages, and I am laying out a case here. If you do not want me to, I will put it in the record.

Chairman LEAHY. No, go ahead and finish.

Senator GRASSLEY. On February 10, 2011, blog-posting Christian Adams, a former attorney in the Voting Section of the Civil Rights Division at the Justice Department discussed this disturbing development in detail. Specifically, Adams' review of the Voting Section's logs for Freedom of Information Act requests revealed that requests from liberals or politically connected civil rights groups are often given the same-day or expedited turnaround. By contrast, requests from conservatives or Republicans faced long delays, if they are fulfilled at all. Adams reported that as of August 2010 the logs show a pattern of political screening and politicizing compliance. Overall, the data in the logs obtained by Adams reveal priorities of the Civil Rights Division: transparency for insiders and friends, stonewalling for critics, political appointees, and Republicans.

So there is a disturbing contradiction between President Obama's words and the actions of his political appointees. When the agencies I am reviewing get defensive and refuse to respond to my requests, it makes me wonder what they are trying to hide.

Throughout my career I have actively conducted oversight of the executive branch regardless of who controls Congress or who controls the White House. It is our constitutional duty. It is about basic good government, and accountability, not party politics or ideology.

Open government is not a Republican or Democrat issue. It has to be—and our Chairman has highlighted that—a bipartisan approach. Our differences on policy issues and the workings of Government must be debated before our citizens in the open. I know that you know this, Mr. Chairman. I know how hard you worked with Senator Cornyn on the Open Government Act of 2007, which amended FOIA. Mr. Chairman, I hope that you are as disturbed as I am by these reports and by the Attorney General's approach to them. I hope that you will work with me to investigate these allegations.

I also hope that more in the media will investigate these disturbing reports. I am disappointed that there has not been more media coverage of the Associated Press uncovering the political

screening of the Freedom of Information Act requests by the Department of Homeland Security and Christian Adams' article about similar conduct at DOJ.

I am also disappointed that there has not been more coverage of Representative Issa's efforts to investigate Homeland Security's political screening of information requests. This conduct is not just political decisionmaking; it is the politically motivated withholding of information about the very conduct of our Government from our citizens. In particular, it's the withholding of information about the Obama administration's controversial policies and about its mistakes.

We cannot ignore or minimize this type of conduct. It is our job in Congress to help ensure that agencies are more transparent and responsive to the Government we represent. I view this hearing as a chance to have the facts come out and as a chance to examine some of the disturbing practices which have been reported on. In other words, as I sum it up, except for national security and intelligence information—and that is about 1 percent of the total Federal Government's business—99 percent of what the Government does is the public's business and it ought to be public.

Thank you very much.

Chairman LEAHY. Well, I agree with the Senator. When requests are made, we ought to get answers. I think of the thousands of requests made during the Bush administration that have yet to be answered, never were answered there.

Senator GRASSLEY. For this Senator, too.

Chairman LEAHY. Yes, and the hundreds of thousands of e-mails that they still say they cannot find from that time. I would not want to suggest that the blame just falls on one side. We have had those requests during the—we had the Lyme disease one—still trying to find requests during the last administration. But what I want to know is how we make it work best.

Melanie Pustay is the Director of the Office of Information Policy at the Department of Justice. She has the statutory responsibility for directing agency compliance with the Freedom of Information Act. Before becoming the office's Director, she served for 8 years as the Deputy Director. She has extensive experience in FOIA litigation, received the Attorney General's Distinguished Service Award for her role in providing legal advice, guidance, and assistance on records disclosure issues. She earned her law degree from American University Washington College of Law, and she was on the Law Review there.

We put your whole statement in the record, of course, but please in the time available go ahead and tell us whatever you would like.

STATEMENT OF MELANIE PUSTAY, DIRECTOR, OFFICE OF INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Ms. PUSTAY. Thank you. Good morning, Chairman Leahy and Ranking Member Grassley and members of the Committee. I am pleased to be here this morning to address the subject of the Freedom of Information Act and the efforts of the Department of Justice to ensure that President Obama's memorandum on the FOIA, as well as Attorney General Holder's FOIA Guidelines, are indeed

fully implemented across the Government. As the lead Federal agency responsible for proper implementation of the FOIA, we at the Department of Justice are strongly committed to encouraging compliance with the Act by all agencies and to promoting open government.

As you know, the Attorney General issued his new FOIA Guidelines during Sunshine Week 2 years ago. The Attorney General called on agency Chief FOIA Officers to review their agencies' FOIA administration each year and then to report to the Department of Justice on the steps they have taken to achieve improved transparency. These reports show that agencies have made real progress in applying the presumption of openness, improving the efficiency of their FOIA processes, reducing their backlogs, expanding their use of technology, and making more information available proactively. Now, while there is always work that remains to be done, for the second year in a row agencies have shown that they are improving FOIA compliance and increasing transparency.

For example, across the Government there was an overall reduction in the FOIA backlog for the second year in a row. There was also an increase in the number of requests where records were released in full. And I am particularly proud to report that the Department of Justice for the second straight year in a row increased the numbers of responses where records were released in full and were released in part.

My office, the Office of Information Policy, provided extensive governmentwide training on the new guidelines to agencies, and we have issued written guidelines to assist agencies. We have also reached out to the public and the requester community. We will be holding our first ever FOIA requester agency town hall meeting, which will bring together FOIA personnel and frequent FOIA requesters.

Yesterday, the first day of Sunshine Week, the Attorney General approved new updated FOIA regulations for the Department. These regulations will serve as a model for all agencies to use in similarly updating their own FOIA regulations. And then most significantly, yesterday we launched our newest transparency initiative, which is our website called FOIA.gov.

Combining the Department's leadership and policy roles in the FOIA, the FOIA.gov website shines a light on the operation of the FOIA itself. The website has two distinct elements. First, it serves as a visual report card of agency compliance with the FOIA. All the detailed statistics that are contained in agency Annual FOIA Reports are displayed graphically, and the website will be able to be searched and sorted and comparisons made between agencies and over time. We will also be reporting key measurements of agency compliance, and it is our hope that FOIA.gov will help create an incentive for agencies to improve their FOIA performance. The site will also provide a link to each agency's FOIA website which will allow the public to readily locate records that are already posted on agency websites.

Now, in addition, the FOIA.gov website will serve a second and equally important function. It will be a place where the public can be educated about how the FOIA process works, where to make requests, and what to expect through the FOIA process. Explanatory

videos are embedded into the site. There is a section addressing frequently asked questions. There is a glossary of FOIA terms. A wealth of contact information is given for each agency. Significant FOIA releases are also posted on the site to give the public examples of the types of records that are made available through the law.

The Department of Justice envisions that this website will be a one-stop shop both for reviewing agency compliance with the FOIA and for learning about how the FOIA process works. We plan to continually add features and updates to the site, and we welcome comments from both the public and from agencies.

Now, looking ahead, OIP will be assessing where agencies stand in their ongoing efforts to improve compliance with the FOIA. We will be providing additional training to agencies. We will continue our outreach to requesters.

As I stated earlier, the Department is committed to achieving the new era of open government that the President envisions. We have made progress in the past 2 years toward that goal, but OIP will continue to work diligently to help agencies achieve even greater transparency in the years ahead.

In closing, the Department of Justice looks forward to working together with the Committee on all matters pertaining to the FOIA, and I would be pleased to answer any questions that you or any other member of the Committee might have. Thank you.

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

Chairman LEAHY. Thank you very much.

We will also hear, before we go to questions, from Director Miriam Nisbet, and we have been joined by Senator Cornyn. Did you notice?

Ms. Nisbet is the founding Director of the Office of Government Information Services at the National Archives and Records Administration. Before that she served as the Director of the Information Society Division for UNESCO. Her extensive information policy experience was previous work as legislative counsel for the American Library Association and the Deputy Director of the Office of Information Policy for DOJ. She earned her bachelor's degree and law degree from the University of North Carolina.

Welcome back.

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

Ms. NISBET. Thank you, Mr. Chairman. Good morning to you, Senator Grassley, and members of the committee. I really appreciate the opportunity to be here with you during Sunshine Week to talk about my office, which is an important part of the freedom of information and open government initiatives of the Federal Government.

As you know, the Office of Government Information Services, or OGIS, as we refer to it, has been hard at work carrying out its statutory mission since opening in September 2009. While we have worked to resolve disputes under the Freedom of Information Act

and to review agency FOIA policy, procedures, and compliance, we have realized that much of our work falls under the designation that Congress gave us as the "FOIA ombudsman." As an ombudsman, OGIS acts as a confidential and informal information resource, communications channel, and complaint handler. OGIS supports and advocates for the FOIA process and does not champion requesters over agencies or vice versa. We encourage a more collaborative, accessible FOIA process for everyone.

We are off to quite a start. In our first 18 months, we heard from requesters from 43 States, the District of Columbia, Puerto Rico, and 12 foreign countries. We answered questions, provided information, listened to complaints, and tried to help in any way we could. For the more substantive disputes, we facilitated discussions between the parties, both over the phone and in person, and worked to help them find mutually acceptable solutions.

The statutory term "mediation services," which you all are aware of as authors of that language, includes the following: formal mediation, facilitation, and ombuds services. OGIS continues to offer formal mediation as an option for resolving disputes, but so far we have not yet had a case in which the parties agreed to participate in that process. However, we have found that the less formal method of facilitation by OGIS staff members provides a very similar process, and parties are more willing to engage with OGIS and with each other without the perceived formality of mediation.

Since September 2009, OGIS has closed 541 cases, 124 of them true disputes between FOIA requesters and agencies, such as disputes over fees charged and FOIA exemptions as applied. As a facilitator for the FOIA process to work as it is intended, we were not calling balls or strikes, but letting the parties try to work matters out with our assistance in an effort to avoid litigation. In three-quarters of the disputes we handled, we believe that the parties walked away satisfied and that OGIS involvement helped to resolve their disputes.

A realization we quickly faced is that defining success is a challenge. The final result of our process is not both parties getting exactly what they want—sometimes not even close—but if we are able to help them in some way, by providing more information or by helping them understand the other party's interests, we believe that we have provided a valuable service. When OGIS first set out, we spoke of changing a culture or mindset from one of reacting to a dispute in an adversarial setting to one of actively managing conflict in a neutral setting.

Because we have had so many requests for mediation services, we have also been challenged in setting up a comprehensive review strategy for that prong of our statutory mission.

For now, the review plan includes providing agencies with FOIA best practices, using existing data to address topics such as backlogs or referrals and consultations, and to offer what we call collaborative reviews alongside willing agencies.

We are also offering training for FOIA professionals in dispute resolution skills to help them to prevent or resolve disputes at the earliest possible time.

OGIS has a unique perspective on the way FOIA works. As an entity that works side by side with agency FOIA professionals to

improve the process from within and that also works closely with requesters on the outside to address shortcomings, we have seen the importance of building relationships—and trust—among the members of the FOIA community. It is an exciting process, and while we have just gotten started and see it as a long-term effort, we are pleased to see so many positive results in the short term and to see that our process works.

Thank you. Please let me know if you have questions or if we can help your constituents.

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

Chairman LEAHY. Thank you very much.

Let me ask this: We talked about it, but I have worked for years on a bipartisan basis to reinvigorate FOIA, and I am pleased by the support we have gotten for that. I was also pleased when in March 2009, when Attorney General Holder issued new FOIA guidelines, it, I believe rightfully, restored the presumption of disclosure. But the report released yesterday by the National Security Archives found only half of the Federal agencies surveyed have taken concrete steps to update their FOIA policies and procedures in light of this guidance. They are doing what they did in past administrations.

So, Ms. Pustay, what is the Department doing to help keep the President's promise of a more transparent Government?

Ms. PUSTAY. To respond to the National Security Archive report issue first, the conclusions that they reached in that report are incomplete because the agencies were asked—all 97 agencies subject to the FOIA were specifically asked by the Department of Justice to address the issues of training guidance and staffing, which were the two factors that were looked at by the National Security Archive report. And what happened with the Archive report is they took the absence of a response or the absence of documents to mean that the agency had done nothing in those factors. But if you look at their Chief FOIA Officer reports, they have addressed those very factors. And so, for example, an agency might not have created its own guidance for implementing Attorney General Holder's guidelines, but what they have done is used the Department of Justice's guidance that is already posted and has been posted since the guidelines first came out.

Chairman LEAHY. Well, let us go to some of the agencies—in fact, 12 of them had pending FOIA requests that go way back. They were not answered during the Bush administration, still are not being answered. They go back 6 years. What do you do about that? I mean, that seems somewhat excessive to me.

Ms. PUSTAY. Right. Of course——

Chairman LEAHY. Especially if you had to make decisions in your own life based on those answers.

Ms. PUSTAY. The age of the oldest request across the Government definitely continues to be too old. There is no doubt about that. And that has been a specific area that we have focused on. The Department of Justice first required agencies to report on their ten oldest requests as a way of giving more accountability and transparency to the issue of the age. So it is specifically something that we are asking agencies to address when they look at their backlogs. We

ask them to measure it both in terms of numbers of requests and age of requests because we see them as two distinct aspects of backlog reduction.

I am happy to say, though, that for the second straight year in a row, agencies have reduced their backlogs. So since implementation of our new guidelines, we are seeing progress. Backlogs are going down. The age of the oldest is improving. So we are on the right track.

Chairman LEAHY. Well, let me ask on that, Ms. Nisbet, we have the Office of Government Information Services, OGIS, trying to provide cost-effective alternatives for resolving FOIA disputes because, as you know, sometimes a dispute can just drag on and the cost gets to much and so nothing ever happens. Can OGIS actually help reduce the current backlog that Ms. Pustay has talked about?

Ms. NISBET. Senator Leahy, we believe that we can. I am not sure that we are able today to show in measurements exactly how we are doing that. But I can tell you that the cases that come to us—and we have now had, as of last week, just shy of 600. About one in five do continue to be problems with delays in response. But what we are finding that we can do with that, with the help of the agencies and working with the requesters, is sometimes to narrow the focus of the request, help with the search, resolve issues pretty quickly in terms of fees, and move things along that way.

Chairman LEAHY. I will go back to Ms. Pustay. Last week, the Supreme Court held in *Milner* v. *Navy* that the Government may not rely upon FOIA Exemption 2 to withhold Government records that are unrelated to personnel or human resources matters. They rejected the concept of the so-called high two, the exemption in FOIA established in the D.C. Circuit in the *Crooker* case.

Ms. PUSTAY. The *Crooker* case.

Chairman LEAHY. It was 25 or 30 years ago.

Ms. PUSTAY. Right. 1981.

Chairman LEAHY. To some of us, it seems like only yesterday.

[Laughter.]

Chairman LEAHY. Some have suggested that Congress should enact legislation to allow the Government to continue to withhold high two information response through *Milner*. So what is the Department's position on that? And are you going to propose legislation to Congress?

Ms. PUSTAY. We are considering the impact of the *Milner* decision. As you can imagine, it is just brand new, and so I am not prepared yet to say what we are going to propose. But we are obviously carefully looking at the impact of the decision.

Chairman LEAHY. Well, as you are looking at it, please keep in touch with myself, Senator Cornyn, and Senator Grassley.

Ms. PUSTAY. I appreciate that.

Chairman LEAHY. I yield.

Senator GRASSLEY. Thank you.

Going back to some statements I made in my opening comments, it would seem obvious that the political vetting policy at the Department of Homeland Security that was uncovered by AP violates both the President's and the Attorney General's orders set forth in their memos. A simple question, first to you, Ms. Pustay, and then to Ms. Nisbet. Would you agree?

Ms. PUSTAY. I am sorry. I did not——

Senator GRASSLEY. OK. The question is: Would you agree whether what the Associated Press uncovered about the Department of Homeland Security and their political vetting process violates both the President's and the Attorney General's orders set forth in memos from 2009?

Ms. PUSTAY. Certainly, if the statements in the article are true, of course, it would be very serious and would be something that we would have serious concerns with, of course.

I can tell you that the policy of the Department of Justice and certainly what we share with agencies and in our training with agencies, our one-on-one guidance, all our presentations, of course, is that the identity of a requester has nothing to do with the response given to the request, that the process is one that is to be handled by agencies without any regard for the identity of the requester in the normal course of events. Typically, FOIA professionals within an agency are career employees who handle the requests in a routine matter that does not involve or implicate any of the things that were mentioned in that article.

Senator GRASSLEY. Can you say whether you agree or disagree, Ms. Nisbet?

Ms. NISBET. Well, I think the issues raised are of great concern, and I do note that Congressman Issa is continuing to look into this matter, as you referred to, to find out more about it and to see what steps might need to be taken.

Senator GRASSLEY. OK. Thank you.

A March 19, 2009, memorandum by General Holder repeated President Obama's hopeful pronouncements about transparency and stated, "Each agency must be fully accountable for the administration of the Freedom of Information Act."

So, Ms. Pustay, how are the political appointees at the Department of Homeland Security who authored and carried out the political vetting policy being held accountable for their actions?

Ms. PUSTAY. I am really not—I do not think I am in a position right now to talk about the Department of Homeland Security and the allegations from that article. What I can say is that part of what the Department is doing to make real the words of accountability is connected directly with our website, our FOIA.gov website, where all the detailed data about how FOIA requests are handled is available now for all the public to see and to be able to compare and contrast information.

Senator GRASSLEY. What sort of an environment would you need to talk about it? Or are you saying you cannot talk about it at all?

Ms. PUSTAY. I am not in a position to talk about the Department of Homeland Security's process.

Senator GRASSLEY. OK. Is your office or any other unit in the Justice Department or any other unit in the Government investigating the political vetting policy at Homeland Security which was uncovered by Associated Press? That is simple. Either you are investigated it or you are not investigating it.

Ms. PUSTAY. I am not aware of us investigating it.

Senator GRASSLEY. OK. So then obviously the next follow-up question was who was conducting the investigation, but you do not think that there is any investigation.

The third question. On March 1, 2011, Representative Frank Wolf questioned General Holder about Christian Adams' article. The Attorney General testified that he had looked into the issues and assured Congressman Wolf that there is no ideological component to how the Justice Department answers FOIA requests. So, would you describe for us in as much detail as possible the Justice Department's investigation into the allegations made in Christian Adams' article?

Ms. PUSTAY. On that topic I can tell you that we are looking into the issue at the Department of Justice, and there will be a response coming to Representative Issa.

What I also, though, can tell you, from what I know of the facts of those allegations, is that the article mistook different versions—different types of access procedures that the Civil Rights had, compared apples and oranges, if you will. The Civil Rights Division has multiple ways to access records separate and apart from FOIA, and so one of the causes of confusion or concern raised by the article writer was mixing those two different forms of access up.

Again, I can tell you the policy certainly within the Department of Justice is that the identity of the requester has nothing to do with how a FOIA request is processed.

Senator GRASSLEY. OK. My time is up. I hope I can have a second round. I guess you are in charge now.

Senator WHITEHOUSE [presiding]. I am sure there will be no objection to a second round, although we do have a second panel as well. But I will leave that to the Chairman on his return.

Thank you both for your testimony. I am interested in the extent to which the FOIA process might be facilitated by modern digital technology. There is sort of the early beginnings of a website in FOIA.gov., but as I understand it, it tracks the FOIA process but does not contain much substantive information of any kind. As somebody who in my State life was on the receiving end of a lot of FOIAs, we had to copy stuff and send it out, and then it was gone. And if somebody else asked the same question a week later, you had to go back, copy it all again and send it out again.

Why is there not a data base that you can go and search through the way—why can't you Google all the old FOIA requests? Should we be able to? Is there a process for getting there? And what can we do to accelerate that process?

Ms. PUSTAY. It is absolutely something that agencies, are working on and certainly at the Justice Department we are very much working on. One of the things already that is available on the FOIA.gov website are links to every single FOIA website of every agency. So the records that each agency has already put up on their website are all available just by clicking on the link. So that is existing right now on FOIA.gov.

We are working on a search capability that will allow the requests—a member of the public or a requester to type in a search term and have the technology capabilities of FOIA.gov launch a search through all the FOIA websites of every agency and pull up all the records that would match that term. So that is something that is actively being worked on now, and we are pretty hopeful that that capability will be available soon on FOIA.gov.

Senator WHITEHOUSE. I ran pretty small offices, and I do not think we kept the old FOIA requests once they were sent out. What do the Federal agencies do——

Ms. PUSTAY. Agencies absolutely—a common part of our guidance is to keep copies of what has been processed because, of course, the easiest way to process it when it comes in the second time is that you already have it. But more than that, we have had a policy for quite some—we have actually by law, once a request has been—once a subject matter has been requested three times, it is required by the FOIA itself to be posted on the agency's website.

With Attorney General Holder's guidelines, we have expanded that and have been encouraging agencies at any time to think about records that might be of interest to the public, and to put them up on the website even before there is one request.

We have certainly seen in the Chief FOIA Officer Reports that we have just gotten in this past week that lots of agencies are taking steps to put information up on the website that has been requested and are anticipating interest in records. So agencies are definitely right on board with this concept.

Senator WHITEHOUSE. Two questions further. Does the search capacity—or when it is installed, will the search capacity reach the FOIA request or just the substance? Because sometimes the value of the FOIA answer is that a knowledgeable person has aggregated the information that is relevant to a particular request, and if it is just out there and you do not really know—if the responsiveness in and of itself is of some informative value.

Ms. PUSTAY. Of course.

Senator WHITEHOUSE. Are they just pointing things? Or is the original request that came in that they are responsive to also part of what is on the Web and what can be searched?

Ms. PUSTAY. The answer is yes to both those things.

Senator WHITEHOUSE. OK.

Ms. PUSTAY. Both types of things are being posted, both types of things will be retrievable with our search function once we get it up and running.

Senator WHITEHOUSE. OK. And is there a role for—I mean, a lot of this stuff ends up in Government archives one way or another. Is there a role for other agencies to participate in this and have the FOIA thing be a part of a larger Government records retrieval and retention system?

Ms. PUSTAY. Well, FOIA already is obviously part of a larger system because every agency handles its own records, and every agency has a FOIA website where there are things that are required to be put on that website. FOIA.gov is now our new way to capture all of that material across the Government through one single website. So that is what we think is one of the real beauties of FOIA.gov and the educational——

Senator WHITEHOUSE. In my last 15 seconds, how far back are agencies expected to go in stuff that they have sent out in the past and load it onto their websites?

Ms. PUSTAY. What we advise agencies to do is to put on their website information that they anticipate would be of interest to someone today. So that is a judgment call they make, and we have

seen really good examples of agencies thinking proactively when events occur and they know a request will come in, and so they will put the information up on their website.

Senator WHITEHOUSE. My time has expired. Mr. Chairman, thank you very much.

Chairman LEAHY [presiding.] Thank you.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

Mr. Chairman, it has been a pleasure to work with you on FOIA issues over the 8 years I have been in the Senate, and I am glad to see Ms. Nisbet here, who is the first ombudsman created by the Federal Government to help people who request records navigate the labyrinthine bureaucracy of the Federal Government to try to get some information.

I know you and I both believe, Mr. Chairman, that openness and transparency is essential to self-government, and, frankly, I think we need to have a dramatic culture change here in Washington, D.C., about just whose records these are and to make sure that there are real teeth in enforcement procedures within the law that guarantee a reasonable request will be responded to in a reasonable time.

Ms. Pustay, let me ask you, according to the report released Monday by the National Security Archive, 90 different FOIA requests, but 17 agencies were reported still working on a response to the request after 117 business days when the law provides for 20 days. Can you explain what consequences there are when an agency fails to respond on a timely basis to a FOIA request?

Ms. PUSTAY. The statute provides, of course, that there is a 20-working-day period to respond, but then the FOIA actually also recognizes that there are situations where agencies will need additional time to respond if they have voluminous records to process or have to search in a field facility, that type of thing. And so the idea that is built into the statute is that requesters are notified of the time or the estimated time for completion and given a chance to work out an agreed-upon time with the agency.

Ultimately, of course, if the requester is unhappy with the delay, what we would certainly encourage the requester to do is to contact the FOIA public liaison or contact the agency official who is handling the request to find out what the delays are all about.

Senator CORNYN. In each case where there is a FOIA request made, you are saying the agency must within the 20 working days provided by the statute provide a response, either including the records that were requested or a response that there are voluminous records that are going to require some time to examine and pull out relevant records? Is that what you are saying?

Ms. PUSTAY. Sure. The statute itself provides—there is a standard 20-day response period, or there is an additional 10-day response period if you have those circumstances. And then also the statute provides that if the period of time to respond is going to be longer than that 30 days total, there is a process where the agency gives an estimate to the requester and works with the requester on the time.

Senator CORNYN. And if they do not do that, what recourse does a citizen have?

Ms. PUSTAY. Ultimately, of course, a requester can go to court because there is constructive exhaustion built into the FOIA where, if the agency goes beyond the statutory time period, you are allowed as a requester to go to court. Nobody encourages that. Nobody wants to see that happen. And what we have instead is a real focus on having agencies work with the requester to explain why the delay is happening. We have 600,000 requests across the Government, so it is an incredible crush of requests that agencies are facing, and oftentimes just explaining that to a requester is helpful.

Senator CORNYN. Well, what I meant earlier when I said we need to change the culture here in Washington, I think too often the agencies believe that this is a nuisance to be avoided, and they do not treat the requester as a customer or recognize, acknowledge the fact that actually the Federal Government works for the people who are requesting the documents.

But, Ms. Nisbet, let me ask you in your capacity as the ombudsman, what has been your experience? I notice in this National Security Archive report, four of the agencies denied even getting the FOIA request, and you know and I know that saying, well, you can always sue the Federal Government in court, that is a hollow promise in many instances because people simply do not have the resources to do that.

Ms. NISBET. And, indeed, I believe that was one of the strong interests of you all in setting up the Office of Government Information Services, is to have an alternative to litigation so that neither requesters nor agencies have to litigate over issues, particularly involving delays when the agency has not been able to give a response.

What we are finding, though, is that, yes, delays, as I mentioned before, continue to be an issue. It is a legitimate reason—there are legitimate reasons for that, of course, because requests can be quite complex, records can be voluminous. Sometimes it is very difficult to even start a search for records in a short amount of time. But what is important is having some channels of communication between the requester and the agency. Requesters often are willing to work with the agency and, in fact, they should work with the agency on the scope of the request. They are understanding of delays if someone talks to them, explains to them, and works with them so that they know that someone is trying to provide that service that you are talking about, even if it is not going to be as quickly as the requester likes.

Senator CORNYN. I know my time is up for this round, but let me just say that I think that was one of the most important things that we were able to do in the legislation, the Open Government Act, is to create an ombudsman that could help the requester narrow the request and to get what they want as opposed to overly broad requests which basically misses the target. So I think it is really important that we have somebody they can talk to, not an adversarial relationship but somebody who can help facilitate that and get the information in the hands of the requester on a timely basis.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Did you have any other questions of this panel? Because we only have another half-hour.

Senator GRASSLEY. I have got hopefully three short questions.

I already referred in my opening comments about our letter to the Inspectors General at 29 agencies wanting to request the extent to which requests from lawmakers, journalists, activist groups, and watchdog organizations were—the Inspector General was asked to determine the extent to which political appointees are systematically made aware of FOIA requests and their part in the decisionmaking process. We asked the Inspector General at DOJ to look into that. He passed it on to you, and then your response admits the Freedom of Information Act offices at the Justice Department make their political leadership aware of FOIA requests and "seek their input" on responding. Your memo does not provide any specifics on the nature of the input from political appointees, so these are my questions.

What type of input do political appointees under the Obama administration give to career employees regarding response to Freedom of Information Act requests? Then I have two follow-up questions.

Ms. PUSTAY. To prepare that response, I did a survey of all the components in DOJ, and fundamentally I was completely unsurprised by the responses that they gave me because the practice at DOJ now is exactly how it has been for the two decades that I have been working at DOJ. So there was nothing unusual at all.

Essentially, components will make the management offices of the Department of Justice aware of requests in their capacity as the managers of the Department. So it is completely appropriate, completely something that we have seen literally for the decades that I have been at DOJ.

Senator GRASSLEY. Since the memo was put out in January 2009, have responses to FOIA requests ever been delayed pending review by political appointees at the Department of Justice?

Ms. PUSTAY. Not at the Department of Justice. We have, I think, an outstanding track record at DOJ of processing more requests these past 2 years than we ever have before, of releasing more records these past 2 years than ever before, and of managing our backlog over the past 2 years. So I think the facts speak for themselves.

Senator GRASSLEY. OK. Then, why or why not to this question. Do you believe that the involvement of political appointees in FOIA requests is acceptable practice within the Justice Department?

Ms. PUSTAY. The involvement that we have is totally acceptable and, as I said, exactly how it has always been. It is awareness for awareness and management purposes, and that is all.

Senator GRASSLEY. Thank you.

Chairman LEAHY. Thank you very much.

Senator Cornyn.

Senator CORNYN. I just have a few more questions.

I noticed in the FOIA.gov website, which I compliment the Department for putting up—I hope it becomes very robust and something that people will be able to use for multiple purposes. But I noticed that for fiscal year 2010 the Department of Justice re-

ceived, it looks like, 7,224 requests and—or I am sorry. It looks like that was the number of requests pending.

Ms. PUSTAY. We get about 63,000 requests a year at DOJ.

Senator CORNYN. OK. I read this wrong. So the number of requests pending at the start of the year was 7,224, and at the end of the year it is 7,538. So rather than chipping away at the backlog, the backlog is getting worse. Right?

Ms. PUSTAY. Our backlog only increased by 204 at the Department of Justice, and that is despite receiving over 2,000 more requests this past year than the year before. So——

Senator CORNYN. I guess you are looking at the glass being half-full and I am looking at it being half-empty.

Ms. PUSTAY. Absolutely. Absolutely. Out of 63,000 requests——

Senator CORNYN. And your backlog is getting worse. It is sort of like the Federal Government and spending. Our debt keeps getting bigger and bigger.

Chairman LEAHY. Let her finish the answer, though, if we could.

Senator CORNYN. I am sorry.

Chairman LEAHY. I will make sure you have plenty of time to continue.

Had you finished your answer?

Ms. PUSTAY. Having increased our processing of requests—we processed more this past year than we did last year. Despite having received 2,000 more requests, the backlog only went up by 204. Out of 63,000 incoming requests for a year, I think that really is a remarkable statistic.

Senator CORNYN. And at the end of the year, you had 7,538 requests pending.

Ms. PUSTAY. Yes. You are looking at—pending is different than backlog, but that could be right. Pending could mean it came in the day before the report was issued. Backlog means it is something that has been on the books over the statutory time period. So it is just two different stats. That is all.

Senator CORNYN. And how many are in the backlog?

Ms. PUSTAY. 204 out of sixty——

Senator CORNYN. Out of the 7,538 pending?

Ms. PUSTAY. Yes, exactly. Exactly. Our backlog increase is only 204.

Senator CORNYN. Following up on Senator Grassley's questions, is it ever appropriate for political decisions to stall or block a FOIA request? Ms. Pustay?

Ms. PUSTAY. No, not to stall or block. I certainly would not agree with those words.

Senator CORNYN. I mean, that is simply not the law.

Ms. PUSTAY. No.

Senator CORNYN. As you pointed out, it is irrelevant who the requester is.

Ms. PUSTAY. It is irrelevant who the requester is.

Senator CORNYN. Or the purpose for which the information is being requested, correct?

Ms. PUSTAY. Absolutely. Absolutely.

Senator CORNYN. And don't you agree that if we were able to create a system whereby there were more timely responses by Federal agencies to FOIA requests, there would perhaps be a greater sense

of trust and confidence among requesters that everybody was being treated exactly the same? In other words, when there is such a large backlog in requests or delays in producing the documents, it seems to me that that gives rise to concerns that maybe people are not being treated on an equal basis and the law is not being uniformly applied. Would you agree with that concern?

Ms. PUSTAY. It is not at all my experience that that is a concern, and I have regular contact with requesters. I have a lot of outreach with the requester community, and, of course, just by working with agencies day in and day out. We see firsthand across the Government that on many, many occasions agency officials are communicating with FOIA requesters, explaining what the situation is, explaining what the backlog is, where a request might be in a queue. And in my experience, overwhelmingly requesters are understanding of the process.

We have long had a policy of asking agencies to give contact information to requesters so that there can be a dialog. This is not something that is new. And it is a process that really does help increase understanding between requesters and agencies. So my experience is not at all in line with the concern that you are raising.

Senator CORNYN. So everybody is happy with the——

Ms. PUSTAY. Well, I am sure everyone is not happy, but they are accepting of the situation. Again, 600,000 FOIA requests across the Government is an incredible crush, an incredible workload, and it went up this past year.

Senator CORNYN. Well, it should not be just looked at as a crush or a workload; it is the responsibility——

Ms. PUSTAY. Oh, sure.

Senator CORNYN.—under the law to respond on a timely basis, correct?

Ms. PUSTAY. Sure, sure. I use those words—no, I absolutely agree. I use those words just to convey the magnitude of the interest in making requests.

Senator CORNYN. And, Director Nisbet, I just have one final question of you. If I understand the record correctly, you were the one who mediated the Associated Press FOIA request of the Department of Homeland Security that resulted in the revelation of political screening. Can you tell us what your reaction was to the DHS conduct that was revealed in that story?

Ms. NISBET. Well, our part in that was that the Associated Press came to us because it had not gotten a response to its FOIA request for the e-mails on that subject. We were very pleased that we were able to help in that case and to help get those records released to the Associated Press, as a result of which the stories were written that Senator Grassley referred to.

I have to say that is the only request that I can recall of that nature—you are asking about requesters complaining about that. But certainly that was a significant concern in that case, and we were glad that we were able to help.

Senator CORNYN. And you shared that concern of political screening?

Ms. NISBET. Certainly. If the allegations are as written, that is a concern, and I believe that certainly my colleague from the Justice Department would agree with that.

Senator CORNYN. Thank you.

Senator GRASSLEY. Could I have 15 seconds for an observation as we close this panel.

Chairman LEAHY. Go ahead.

Senator GRASSLEY. I do not dispute anything that you have told me because you said, well, it is not a whole lot different than it has been for 20 years. But, you see, that is what is wrong, whether it is 20 years under a Republican or 20 years under a Democrat. But it also tells me—the point I tried to make in my opening comment—that the President set a very high benchmark, and if we are doing the same thing after 2½ years of this administration, the same as they have been doing for 20 years, the President's benchmark is not being followed by the people he appoints.

Thank you very much.

Chairman LEAHY. Did you want to respond?

Ms. PUSTAY. Yes.

Chairman LEAHY. OK, we will take time out of the next panel. Go ahead.

Ms. PUSTAY. Just really, really quickly. My comment about things being the same was completely connected to the idea of the review or alerting of political officials of FOIA requests. That stayed the same. The process of FOIA has changed dramatically. I really have never seen transparency as fulsome and as robustly worked on as I have now. I think we are the most transparent that we have ever been. I think it is quite a different day now.

Senator GRASSLEY. Thank you.

Chairman LEAHY. Thank you.

Thank you very much. We will take a 2-minute recess while we change panels.

[Pause.]

Chairman LEAHY. Thank you. The first witness will be John Podesta. I feel he is certainly somebody who knows this room very well. He is my former Chief of Staff, formerly counsel here in this Committee, and currently serves as the president and CEO of the Center for American Progress. He had also been White House Chief of Staff to President Bill Clinton. He has held several other positions in the Clinton administration, including Assistant to the President, Deputy Chief of Staff, Staff Secretary, and Senior Policy Adviser in Government information, privacy, telecommunications, security, regulatory policy. He served in numerous positions on Capitol Hill.

I apologize for the laryngitis this morning.

He served as co-chair of President Obama's transition where he laid the groundwork for President Obama's historic FOIA memorandum, a memorandum which restored the presumption of disclosure of Government information. He is a graduate of Knox College and Georgetown University Law Center, where he is currently a visiting professor of law.

Mr. Podesta, it is great to have you here. Great to see you.

STATEMENT OF JOHN D. PODESTA, PRESIDENT AND CHIEF EXECUTIVE, CENTER FOR AMERICAN PROGRESS ACTION FUND, WASHINGTON, D.C.

Mr. PODESTA. Thank you, Mr. Chairman and Senator Grassley. It is great to be back in the Committee, and it could not be led by two greater champions of openness and accountability. So it is a pleasure to be here during Sunshine Week.

I think this hearing comes at a momentous time for the Freedom of Information Act as it comes on the heels of last week's Supreme Court ruling in *Milner* v. *Department of the Navy*, which has been referred to, which properly narrowed the scope of the (b)(2) exemption 2 and the recent AT&T decision finding that corporations do not have a right of personal privacy under the Act. We should celebrate these victories, but there is more work to do.

While President Obama has delivered in many respects on his promise to have the most transparent administration in the Nation's history, the results on FOIA, while improving, I think still have a long way to go. The problem, I think, Senators, is not one of policy. I think Attorney General Holder's FOIA memorandum tells Federal agencies that in the face of doubt openness prevails, and the Office of Management and Budget's Open Government directive instructs agencies to reduce backlogs by 10 percent a year.

The problem, as I think this Committee has noted this morning, is in implementation. Federal agencies in the year after the Holder memo increased the use of legal exemptions to keep more records secret, according to the Associated Press, and the Justice Department continues to defend expansive agency interpretations of FOIA exemptions.

I would note in the administration's favor they have reduced the use of the (b)(2) and (b)(5) exemptions in the past year, which I would characterize as "We just do not want to give you the information exemptions in the Act."

So the question today is: How do we turn to good policy that is embedded in the President's and Attorney General's memoranda and OMB directives into reality? And I offer three ideas.

First, along the lines of Senator Whitehouse, we should require automatic Internet disclosure for publicly useful data sets. FOIA, of course, rests on four key principles: Disclosure should be the general rule, not the exception. All individuals have equal right of access to information, as Senator Grassley has noted. The burden of disclosure should rest with the Government, not with the people. And people denied access to documents have a right to relief through the courts.

As importantly as those four principles, when FOIA was passed, then Attorney General Ramsey Clark added another, which is that there needed to be a fundamental shift in Government attitude toward public records and the value of openness. Those principles need to be applied and that attitude needs to be updated for the digital age. You have done a good deal of that in the 2007 amendments that were processed by this Committee and championed by the Chairman and Senator Cornyn. But disclosure should be automatic, not just in response to requests, and it should be done through the Internet so everyone has easy and immediate access.

I think the recent experience of *Recovery.gov* and *Data.gov* provide useful models for Congress to expand automatic disclosure under 552(a) of the Act. Congress can help by setting standards for exactly what should be automatically disclosed and disseminated.

Second, we should build a searchable online data base where the public can track FOIA requests and view agency responses. The public in most cases cannot see what FOIA requests have been submitted to Federal agencies or what information was provided in response to those requests. The administration's planned *FOIA.gov* website will provide report cards on compliance. That is an important step in the right direction. It is not a great leap forward. We have proposed that if the Federal Government would automatically publish their FOIA requests as well as information provided in response through a centralized searchable, online data base, automating these functions will increase productivity. It will save money. It will serve the public better.

Third, we need to improve information used to assess FOIA implementation. Annual agency FOIA reports, again, as the testimony this morning indicates, provide useful data on requests granted and denied. But the Department of Justice, for example, does not disclose the number and percentage of FOIA denials it chooses to defend. Nor do agencies report what they have done to comply with the Holder memo. So I think more can be done in that arena, too.

And if I could, Mr. Chairman, I would like to call your attention to one other topic vital to openness and free debate. Two Senate bills introduced last month would criminalize the disclosure of classified information to unauthorized people. Protecting properly classified Government information from improper disclosure is an important priority. I think I have certainly earned my spurs trying to reduce the number of classified records while simultaneously better protecting classified information. But these proposals sweep too broadly. They create a chilling effect on legitimate Government communication. I think we have come too far without an official secrets act in our country, and we cannot afford to sacrifice that hard-won progress to shortsighted doubts. So I would ask you, Mr. Chairman, to take a look at those proposals. I do not think they will meet with your high standards of openness.

Thank you.

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

Chairman LEAHY. Thank you very much.

Sarah Cohen is certainly familiar with this Committee and our work up here. She is Knight Professor of the Practice of Journalism and Public Policy at Duke University's Sanford School of Public Policy. She joined the School of Public Policy in 2009. She worked nearly 20 years as a reporter and editor, shared many of the major awards in journalism, including the Pulitzer Prize, the Goldsmith Prize, the Selden Ring Award, the Investigative Reporters and Editors Gold Medal, and I probably left some out. She holds a bachelor's degree from the University of North Carolina, Chapel Hill; a master's degree from the University of Maryland; and she is testifying today on behalf of the Sunshine in Government Initiative.

Ms. Cohen, good to have you here.

STATEMENT OF SARAH COHEN, KNIGHT PROFESSOR OF THE PRACTICE OF JOURNALISM AND PUBLIC POLICY, SANFORD SCHOOL OF PUBLIC POLICY, DUKE UNIVERSITY, DURHAM, NORTH CAROLINA, ON BEHALF OF THE SUNSHINE IN GOVERNMENT INITIATIVE

Ms. COHEN. Thank you very much, Chairman Leahy and Senator Grassley and members of the Committee. Thank you so much for the invitation to talk about the Freedom of Information Act in the digital age. In my reporting career, I depended frequently on the Act, and I appreciate this Committee's longstanding commitment to accountability and open records.

In the past 2 years, President Obama's policies to promote accountability through open government has resulted in some policy changes that are beginning to affect day-to-day practice, but they are still not habit on the ground. Just one example is looser guidelines for releasing internal e-mails which contributed to our understanding of the Deepwater Horizon oil spill and its aftermath.

But administrations change. These actions can be reversed as quickly as they began, and many of the President's initiatives are aimed at helping consumers find data and at collaborative Government. Public affairs journalism requires more than the products of a well-planned public information effort. It also requires access to the artifacts of governing.

So FOIA remains a vital tool, and it is a tool that simply just does not meet its promise. You have heard in the past of problems that still have not been resolved, such as agencies' overuse of personal privacy exemptions. I know this Committee has worked hard to reduce the proliferation of special (b)(3) amendments, but they remain a concern.

Today I would like to describe two of the biggest impediments to the effective use of FOIA among journalists, and I detail others in my written statement. But at core, they all suggest a widespread but wrong default position that records belong to the Government and not to the public. This position turns FOIA upside down. Instead of the Government convincing the public that certain information must be kept secret, in practice the public must convince officials that it should be released.

The biggest problem in journalists' use of FOIA, as has been suggested here, is timeliness. Agencies are reporting improved response times, but we are not seeing them yet. Admittedly, reporters' requests are broad and difficult to fulfill, and the subjects are quite naturally politically sensitive. But I have never received a final answer to a FOIA within the deadline. Some reporters joke about sending birthday cards to their FOIA requests because response is measured in years, not days. And when asked, the Office of Government Information Services can prod agencies to respond, but so far we have seen little in the progress on delays.

I wanted to highlight one consistent and growing source of delay. That is the requirement to vet contracts and other documents with the originator to identify trade secrets and other commercially confidential information. The records are then held hostage to the subject of the request. It gets to run the clock, and it often is granted extensive redactions, if it responds at all.

The second point I want to make is that agency websites are incomplete and incomprehensible. I and other journalists have used FOIA to obtain Congressionally mandated reports on the use of funds in Iraq and Afghanistan, but they are not posted on the Defense Department or Inspector General websites. Original nursing home inspections with reviewers comments, a very common request among local reporters, requires individual FOIA requests. And even if these kinds of common documents were posted, the chance of finding them is slim.

In 2009, the Associated Press tried to identify all of the major agencies' reading rooms so it could monitor them. It gave up after a week. The reporter had already found 97 reading rooms in just four departments.

So what can Congress do to improve the implementation? It might go further than in recent years to enforce reasonable deadlines and appropriate use of exemptions. It could build the current policy of the presumption of openness into the law, and it could require disclosure in a central virtual location by Cabinet-level agency of common public records, such as correspondence logs, calendars, and spending awards, and it could more specifically define frequently requested records. Any combination of these would reinforce the idea that our Government holds transparency and accountability as a core value.

Mr. Chairman, I hear you call again the public's access to records a "cornerstone of our democracy." I appreciate the efforts made by Congress and President Obama to open our Government to scrutiny even when that effort may reflect poorly on its performance. But recent changes cannot be considered complete until compliance with current policy and deadlines is more consistent and a structure is erected to prevent this or the next President from reverting to secrecy.

There are certainly times when the democratic need for open records conflicts with other vital priorities, such as privacy and national security. I believe journalists and their news organizations would be happy to work on these substantive issues if they could be assured that the law usually worked as it should.

Thank you so much for the opportunity to talk with you about this.

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

Chairman LEAHY. Thank you very much.

Our next witness is Thomas Fitton. He is the president of Judicial Watch, a public interest group that is set up to investigate Government corruption. He has been affiliated with Judicial Watch since 1998. He is a former talk radio and television host and analyst. He is the author of several published articles. He also previously worked at the International Policy Forum, the Leadership Institute, and Accuracy in Media. Mr. Fitton earned his bachelor's degree from George Washington University.

Mr. Fitton, welcome. Please go ahead.

STATEMENT OF THOMAS FITTON, PRESIDENT, JUDICIAL WATCH, WASHINGTON, D.C.

Mr. FITTON. Thank you, Mr. Chairman. Thank you, Chairman Leahy and Senator Grassley, for hosting this hearing. It is an honor for me on behalf of Judicial Watch to appear before this Committee, and I want to take some time to extend personal thanks to you both, the Chairman and Senator Grassley, for not only your leadership on Government transparency but your often unheralded work on behalf of Government whistleblowers. You helped at least one of our clients many years ago, and I am sure you have helped many other whistleblowers over the years, and these brave folk are often alone in their efforts to expose Government wrongdoing. So your help is crucial and has been crucial to saving jobs and careers.

Essential to Judicial Watch's anticorruption and transparency mission obviously is the Freedom of Information Act. We are probably the only group on the right that uses it the way we do. We have used this tool effectively to root out corruption in the Clinton administration and to take on the Bush administration's penchant for improper secrecy. We have nearly 17 years' experience using FOIA to advance the public interest, and without a doubt, we are the most active FOIA requester and litigator operating today.

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

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

We have filed over 325 FOIA requests with the Obama administriation, and we have been forced to file 44 FOIA lawsuits against the Obama administration to enforce the law.

Administratively, Obama administration agencies have built additional hurdles and stonewalled even the most basic FOIA requests. The Bush administration is tougher and trickier.

And once we are forced to go to Federal court, the Obamam administration continues to fight us tooth and nail. The Obama administration's litigious approach to FOIA is exactly the same as the Bush administration's, so one can imagine the difficulties we encounter litigating these issues in court against the Obama Justice Department.

As you know, we have been investigating the bailouts, particularly Fannie and Freddie, trying to find out about political contributions and other key documents. The Obama administration has taken the position that, despite the fact of Fannie and Freddie putting taxpayers on the hook for trillions of dollars, including at least in the current number $153 billion in funds expended for Fannie and Freddie, the Obama administration has taken the position that not one of those documents is subject to the Freedom of Information Act. These agencies have been taken over completely by the Federal Housing and Finance Administration, and yet they say no one has a right to these agencies' records, nor will they be subject to disclosure. We are at the appellate stage on that issue in terms of litigation.

In addition, to the walling off of control of our Nation's mortgage market through Fannie and Freddie from public accountability, the

Obama Treasury Department has been seemingly incapable to disclosing even basic information on the various Government bailouts.

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

This Committee may also be interested to learn the truth behind the Obama White House's repeated trumpeting of the release of Secret Service White House visitor logs. In fact, the Obama administration is refusing to release tens of thousands of visitor logs and insists, following a Bush administration legal policy developed at the end of that administration, that they are not subject to the Freedom of Information Act. Obviously, the Secret Service is part of the Department of Homeland Security. Those records are subject to the Freedom of Information Act.

In 2009, we were invited to the White House to visit with Norm Eisen, then Special Counsel to the President for Ethics and Government, to discuss Judicial Watch's pursuit of these visitor logs, and we were told by the Obama White House in no uncertain terms that they wanted us to publicly encourage and praise them for being transparent, saying it would be good for them and good for us. Well, they refused to release these records as they are supposed to under FOIA, and we were forced to sue in court.

On top of this, we have the issue that now White House officials are meeting across the street at the White House Conference Center and in Caribou Coffee with lobbyists and others to avoid disclosing their names under this voluntary disclosure policy they have put out related to visitor logs. So rather than visiting people at the White House, where their names might be subject to disclosure, they are meeting outside the White House. How does that comport with the President's commitment to transparency?

We have been reading about the 1,000-plus Obamacare waivers that have been issued by the Department of Health and Human Services. We have yet to receive one document in response to our request, and now a lawsuit, after 5 months, about any of those waivers, not one document.

And my final example briefly is the Department of Homeland Security—we had asked for a report about an illegal alien who is accused of running into and killing a nun. The report was sent, according to the reports, to the Department of Homeland Security Secretary Napolitano last year. We asked for the final report. They said, "We will give it to you." And then they said to us at court, "By the way, that report is not final. It is a draft and you cannot have it. We are still working on the final report." Well, we just got it last month, and the report was dated November 24th. That to me is an indication of ham-handedness, only political appointees could be involved in that sort of process.

So those are the concerns we have——

Chairman LEAHY. Excuse me. You did get the report, though?

Mr. FITTON. We did get a report dated November 24th, but I do not know how a report dated November 24th could still be being worked on in January, February, and March.

Chairman LEAHY. I just want to make sure we understood that you got it.

Mr. FITTON. That is right.

Chairman LEAHY. I am sorry you have not been able to get the records of the visits during the Bush administration, and I was not able to, either.

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

Chairman LEAHY. Let me go back to Mr. Podesta. You led the effort during the Clinton administration to restore the presumption of disclosure for Government information, and it has been testified that policy changed under the next administration, the Bush administration. You worked to make it more open under the Obama administration. Now, these are Presidential policies that could change from President to President. Should we enact some legislation to codify the presumption of disclosure, whether it is a Democratic or Republican administration?

Mr. PODESTA. Well, I would certainly support that, Mr. Chairman. Let me say that I think the structure of the Act, as I noted in my opening statement, really does create at some level the presumption of openness because, as the FOIA changed the previous law in 1966, the right of every person to every record subject to narrow exemptions and the right to go to court does embed in the FOIA itself a presumption of openness and disclosure.

I think there is one place that is in particular need of legislative attention, and that is with respect to classified information. I was able to serve on Senator Moynihan's Commission that studied the problems of Government secrecy. He suggested and had bipartisan support across the political spectrum for a set of recommendations that included codifying the presumption of openness, particularly in the (b)(1) exemption, and that has been subject to change back and forth with the passage of administrations. And I think that is something that the Committee did consider when that report was issued in the 1990s, but it should take a second look at it. It is an extremely important report on Government secrecy.

Chairman LEAHY. I would like to see a better understanding of what should be classified and what is not. I mean, we had some strange new classifications that came up a few years ago that no one ever heard of. I remember being in a closed-door, top-secret briefing, and the first two items that came up were not top secret. One was either a Time or Newsweek cover, and the other was something else that had been published in a scholarly paper that had been available for several years.

There was some discussion among those who were there—and I am trying to be vague about what the subject was we were discussing—that perhaps the briefers had lost some credibility by beginning with those two. It reminds me of a long time ago, another head of the CIA who would come running to the Hill every time the press had disclosed something and say, "Well, I meant to have told you about this." And I told him that he should take the New York Times, instead of coming up for briefings, mark it "Top Secret" and deliver it to each of us. We would get the information in a more timely fashion. We would certainly get it in far greater detail than he ever gave us. And we would get that wonderful crossword puzzle.

Ms. Cohen, I know you are here today representing the Sunshine in Government Initiative. I know that my story of this former Director of the CIA about the New York Times can be said about many other newspapers, just to point out that we oftentimes, including people here in Congress, rely more on the media to get this information than we do from whoever is in Government. The producers recently of an award-winning documentary film about Lyme disease, entitled "Under Our Skin," reported that a Freedom of Information Act request they submitted to the Centers for Disease Control back during the last administration, in 2007, is still outstanding. And you have testified that during your time as an investigator reporter you never received a timely response to a FOIA request.

So what does that do if you are trying to report on something, say a health scare where parents may be wanting to read about something that might affect their children's health or a medication that a cancer patient is taking or whatever it might be, and the press often is the one that blows the whistle first. But what happens if you cannot get timely FOIA?

Ms. COHEN. Well, there are two issues that happen, I think. The first one is in a case of a public event, a health scare, frankly you get the documents unofficially. You are going to find a way to report that story. And if you have to get them through leaks or through some other way, you will get them that way.

I think the more frightening thing are the stories that are never done, that the public never hears about. There is a reporter in Texas who, after a year and a half, gave up on doing a story on private security contractors who are protecting Federal courthouses because he was convinced he was never going to get those records, and he has never done that story. And the problem is that most reporters go in with questions, not answers, and if you cannot even ask the question, you can never even find out whether or not you are going to get the answer. So I think that is the more frightening part of that.

Chairman LEAHY. And after you have been stonewalled long enough, your editor is going to say, "Hey, we are paying you. I am going to put you on something else."

Ms. COHEN. Well, yes, you move on. I mean, there are plenty of stories to be done, and if it is futile and you are not sure of what the answer is going to be, it may be that there is no problem, and so you move on.

Chairman LEAHY. My time is used up. Senator Grassley.

Senator GRASSLEY. Thank you.

Mr. Fitton, AP published yesterday, "Promises, Promises: Little transparency progress," concluding that in year two the administration's performance was mixed and that it was struggling to fulfill the President's promises on transparency.

The first question very briefly: Based on your firsthand experience, do you agree with the evaluation of the Obama administration's performance in the first year, which was rated at C or lower?

Mr. FITTON. Yes. I would give it a failing grade.

Senator GRASSLEY. Two, how would you grade the Obama administration's performance during the second year?

Mr. FITTON. It is still failing. To be specific, we appreciate the increased availability of Government material on the Internet, but about matters of public interest and controversy, in terms of getting information from the administration, it is as difficult if not more difficult than ever.

Senator GRASSLEY. You are familiar with Tom Bridis' investigative report for AP. According to the report, in 2009 and 2010, Homeland Security diverted requests for records to senior political advisers who often delayed the release of records they considered politically sensitive. The political vetting often delayed the release of information for weeks beyond the usual wait. According to an AP report, Homeland Security rescinded the rule prior to political—for prior political approval July of last year. Supposedly under a new policy, records are now submitted to the Secretary's political advisers 3 days before they are made public, but can be released without their approval.

Based on your experience, are President Obama's political appointees still engaging in a politicized approach to handling requests for information under FOIA and to litigating lawsuits under the Act?

Mr. FITTON. Yes, and certainly our experience with the Department of Homeland Security is consistent with that, specifically the release of this final report that became a draft report, that became a report in progress, that became a report that was finished in November of 2010.

Senator GRASSLEY. Expand a little bit on your experiences. How widespread is the politicized approach to requests for information under FOIA?

Mr. FITTON. Well, you see indications of the politicization when the response makes no sense to you, as I say, with the DHS memo or where you are told that, "We are not even going to look for documents because nothing you are asking for would be subject to disclosure, so we are not going to bother looking." Or with, frankly, the request more recently of the FBI files. We asked for the documents related to Ted Kennedy's FBI file, and we had to push and push and push, and the FBI pushed back on us, and it turned out to be they did not want to release embarrassing information. They ended up releasing it to us in the end, but it came after 9 months of fighting. And that to me was an example of the administration for political reasons withholding embarrassing information about, well, a recently deceased friendly voice.

Senator GRASSLEY. Your organization has extensive experience with the tactics employed by this administration by political appointees in handling FOIA. Based on what you have seen, do you believe an independent investigation is warranted?

Mr. FITTON. Yes.

Senator GRASSLEY. And if so, do you have any suggestions or recommendations on who should investigate politicized compliance with Freedom of Information Act requests and what the parameters of that investigation might be?

Mr. FITTON. Well, if you think the law is important, you would have an independent counsel of some type appointed by the agency or by the Justice Department. If you think the law is a law to be trifled with, that it is a big joke—which I think that is how it has

been treated from administration to administration. The politicization of FOIA did not begin with the Obama administration. But we were told it would end, and it has not.

Senator GRASSLEY. My last question. As I noted before, your organization has significant experience. What is your evaluation of the Office of Government Information Services? What is the general impression of the requester community about the Office of Government Information Services?

Mr. FITTON. That agency may be helpful to non-expert requesters in terms of helping them with the FOIA process. We have used it a little bit to try to speed along certain requests, and we have been successful in that regard. But when you are in a fight or a dispute with an agency, you are not going to rely on that because you can go to court and get finality as to what the dispute is. You are not going to get finality through this agency.

Senator GRASSLEY. My last question is whether or not you have got any suggestions for improving the Office of Government Information Services.

Mr. FITTON. Well, I would not focus on another layer of bureaucracy, personally. I would focus on the agencies and the political appointees and making sure that there is a commitment to FOIA. Our Government, for better or for worse, depending on your point of view, is doing more than ever, and FOIA has not caught up with it.

Senator GRASSLEY. Mr. Chairman, I want to thank you so much for this sort of hearing, but it is something that you have just got to keep your hands on all the time if we are ever going to beat down these road blocks.

Chairman LEAHY. I have been doing it for over 30 years and will continue.

Senator GRASSLEY. I know it. That is all the more reason we have got to work hard.

Chairman LEAHY. Thank you.

Senator Whitehouse, then Senator Franken.

Senator WHITEHOUSE. Were the panelists here when I asked my questions to the first panel? Could I ask each of you to respond? The topic being here we are in the Google age, the digital age, what are the best steps that we can do to make the FOIA banks more accessible to the public, even people who just do not want to file a FOIA themselves but just want to use it for research purposes?

Mr. PODESTA. Yes, Senator, my prepared testimony and my statement this morning go into that in some detail. I think there are two large baskets that you should be looking at. One is information that ought to be automatically disclosed without resort to FOIA requests. The Obama administration has taken some criticism from Mr. Fitton. I do not think there is any question that it has gone further than any administration in history in putting out information, particularly on Recovery.gov, Data.gov, and putting up useful information to the public.

The Freedom of Information Act always had a provision that required certain information to be published as a pro forma matter. That has been expanded to include responses to FOIA requests in which people have—the agency thought that it would be requested again, so they put it out there. But that could be taken much,

much further. So that is one area to exploit—my written testimony goes into some areas where that might be particularly useful.

A second area is that FOIA requests themselves, as a result of the legislation that was passed by the Chairman and Senator Cornyn, there is now a requirement that FOIA requests get a docket number. The requests themselves can be published into a common data base. The responses can be put into a common data base. That would actually probably be a more productive way to process requests, would save money in the long run, and provide valuable information to the public.

Senator WHITEHOUSE. Do you think that the notion of a search engine on FOIA.gov that can go through the websites of different departments is adequate?

Mr. PODESTA. Sure, I mean—no. I think what FOIA.gov does is to try to have a common set of policies, give people some better tools to basically interact with Federal agencies on FOIA, but I think it could definitely go further.

And, again, I think Recovery.gov is a good example in which if you put the data out there, people in the private sector will think of all kinds of interesting ways to utilize that data to create more productivity that can come from having open access to Government information.

Senator WHITEHOUSE. Ms. Cohen.

Ms. COHEN. Yes, there are a couple things. I think your thoughts on the searchable FOIA is excellent. I just want to mention that when we have been talking about these frequently requested records or common records, it is so inconsistent whether or not those are ever posted. I know that virtually every FOIA request I have ever made has never shown up on a Government website except when it was posted before it was responded to, to me. So those sites have a long way to go, but you do need a search engine to go through them. I think there must be several hundred of those sites out there.

And the second thing that I have mentioned in my written testimony is to also spend some time administratively looking at the systems that are used to generate records. One of the real problems here is that the records systems still cannot be searched in a way that then produces an efficient system, so that the review of how agencies are redoing their records systems I think might include a review of whether or not there is transparency in those records systems built in, because there really is not right now.

Senator WHITEHOUSE. Mr. Fitton.

Mr. FITTON. Yes, Senator. Some folks specialize in FOIA'ing FOIAs: Give me the list of all the FOIAs, and look for the juicy ones, and then pursue those a little bit more.

Obviously, putting out large swaths of information is good, and there has been progress in that regard. There has been some concern that a lot of the information, it was reported last week, was not correctly input. I think that is more a matter of competency than anything else.

But as I noted, in matters of public controversy, the Internet is not going to be where you find that. For instance, the decision whether or not to put Fannie and Freddie into conservatorship, we are litigating that right now. Decisions about the bailout, about

why those decisions were made, the deliberative process type of decisions, that is where you get into disputes, and obviously that is where the interest is in terms of the public on matters of controversy or where there may be concerns about the decisionmaking and what went into it. And that is unlikely to get onto the Internet, and if it does get onto the Internet, right now you are going to have difficulty finding it.

Senator WHITEHOUSE. But it would at least enable the resources that these agencies have, limited resources, to respond to FOIA requests to be dedicated to those more challenging ones that you are suggesting rather than chasing around the day-to-day stuff because that could be more readily accessed automatically.

Mr. FITTON. Right.

Senator WHITEHOUSE. And so it would be even helpful in that sense to the more challenges requests. No?

Mr. FITTON. That is right. For instance, the BP oil spill, many thousands of documents have been posted by the administration, appropriately so, on the Internet and we got them separately. But we are happy to use the Internet—if we think the documents are there and we are confident that they are all responsive to a particular request. We do not—believe it or not, we do not want to sue if we can avoid it. We would be happy to avoid litigation.

Chairman LEAHY. Thank you, and I am going to turn the gavel over to Senator Franken, who has been extraordinarily patient, but who has also been very valuable to this Committee and has helped in this area.

Senator FRANKEN [presiding]. Thank you. I came from Indian Affairs, and I just stepped out for some people from Minneapolis City Council, to talk to them, so I think I am picking up—or I may not even be picking up. I may just be repeating what Senator Whitehouse just said, so I do not want to do that. But the gist of what I think I heard, because I heard the last 15 seconds of Mr. Fitton's answer, is that if you put online pretty much everything, I think that Mr. Fitton's premise might have been—I am extrapolating from the last 15 seconds of your answer—that if the administration just puts everything online, they are still not going to put online some of the most controversial stuff, which is the kind of stuff that you want. Is that right?

Mr. FITTON. I would suspect that.

Senator FRANKEN. You would suspect that, and probably have a reason to, right?

Mr. FITTON. Well, there are privileges, you know, there are lawful reasons for withholding information, and often discretionary. Some administrations will be more willing to release information than others, and that is where the litigation comes in.

Senator FRANKEN. Right. But by putting on so much, like in the BP thing, they put on stuff that was very helpful, right? They put up a whole BP site basically about the spill, right?

Mr. FITTON. Right.

Senator FRANKEN. OK. So that is very helpful. And then it sort of makes it more efficient to go after the more controversial stuff if everything else has been online. That is what you have been suggesting, Mr. Podesta, right?

Mr. PODESTA. That is right, Senator. And, you know, I think that as I said, the kinds of things the Government might think of as being useful in that data are probably small in comparison to what citizens could think of to make that data useful once it is up and once it is online. And that is where I think you can get—you know, it is the power of Google. All of a sudden you have got——

Senator FRANKEN. It sounds like a Wikipedia kind of thing where citizens can go in and say, "Why don't you put this up? Why don't you put that up?" Is that what you are talking about?

Mr. PODESTA. I think it is both what they put up but also what you do to make that information useful. I will give you a specific example. We just did a return on investment of every school district in the country based on money that went into that district, State and local and Federal, and what the return was on the outside.

Now, the Department of Education could have done that, but they did not do it, but, you know, we found a way to do that. And I think once that data is available in good data sets, then people will think of imaginative ways that will improve the productivity of Government and, you know, lead to breakthroughs in all kinds of ways.

Senator FRANKEN. Let me ask you about this, because you have been in an administration as Chief of Staff, and during the Clinton administration I am sure there was—I mean I know there was a tremendous number of FOIA requests. And I am, you know, very—you know, I want FOIA to work, and I want people to be able to get the—I think the journalists should be able to get the stuff they want.

Did you ever get the feeling that there were just fishing expeditions during the Clinton administration?

Mr. PODESTA. Of course.

Senator FRANKEN. OK. And——

Mr. PODESTA. And, by the way, there is nothing wrong with that. Sometimes you catch fish.

Senator FRANKEN. OK.

[Laughter.]

Senator FRANKEN. But let me ask you about that, though. As I recall, during that period there seemed to be an incredible amount of requests coming from the House of Representatives, and from other places. Did that in a sense make it harder to comply with actual real—not legitimate but a more serious kind of—Ms. Cohen, why don't you answer this? Does that tend to make it harder for people like you who are really going after something?

Ms. COHEN. Well, I think a lot of people would say that we go on fishing expeditions as well. The nature of those kinds of requests, whether they come from other branches of Government or from journalists, is that they are very broad and they do not know exactly what they are looking for. And I think that is an important thing for both journalists and other people to be able to do. It certainly is—it does make it more difficult on the people who are trying to answer it, but I think those are also the kinds of requests that a place like Judicial Watch is doing.

I do think that if you put more of the things that you have already found on the Internet, it does free up some resources to get to those ones.

Senator FRANKEN. OK, which is where Senator Whitehouse ended and where I started. Let me take a couple moments. Mr. Fitton, thank you for complimenting both the Ranking Member and the Chairman on whistleblowers. I think it is very important to protect whistleblowers. I was a little confused about the visitor logs at the White House and the Caribou Coffee thing. If they are not allowing the visitor logs, why would they go to Caribou Coffee?

Mr. FITTON. Well, they are disclosing them voluntarily after, I think, August of 2009. Anything before that you have to ask them specifically, and they may withhold information. The question is not whether——

Senator FRANKEN. Wait a minute. I am sorry. I was very confused about that.

Mr. FITTON. They are voluntarily disclosing the visitor logs, but they are saying it is a voluntary disclosure, it is not pursued through the Freedom of Information Act. During the Bush administration, we had asked for the visitor logs related to Jack Abramoff, and we were given those logs pursuant to litigation, but also pursuant to the Freedom of Information Act. Then the left started asking the Bush administration for more interesting visitors from their perspective, and the Bush administration said, Enough of this, we are going to say that these logs are not subject to the Freedom of Information Act. The Obama administration continues with that legal position.

The voluntary disclosure is subject to caveats. They can release—withhold names based on—for political reasons, that they are meeting with appointees or someone they do not want to be disclosed within a certain amount of time. So they know they are voluntarily disclosing this information, and then they are going across the street—or so it has been reported in the New York Times—to Caribou Coffee to avoid this voluntary disclosure. So they are saying they are not subject to disclosure under the law, the disclosure is voluntary, and that can be reversed either by this President or any subsequent President. So, you know, we are still in the position of trying to get information pursuant to the law, and we are unable to do it.

Mr. PODESTA. Senator, I think this is one of those examples of no good deed going unpunished. I think the administration has put more information about who goes in and out of the West Wing of the White House than obviously any administration in the past, including the one in which I served. And I think that—you know, so Mr. Fitton's complaint is—and that is regularly updated. They did the process, I do not know, for the first 6 months in August of 2009, but now they regularly and routinely update who goes in and out of the White House. I think it will be difficult, although certainly not impossible, to reverse that decision and decide that—particularly in this administration but in subsequent administrations as well, to decide that the public does not have a right to know who is walking in and out of the West Wing of the White House.

Senator FRANKEN. Thank you.

Mr. FITTON. Just briefly, the Office of Administration voluntarily complied with FOIA even though it did not think it was subject to Freedom of Information, and that changed under the Bush administration. We used to get material from the OA from the Clinton administration and during parts of the Bush administration, and then they shut it off, and it has not been turned on again. It can stop.

Mr. PODESTA. Mr. Fitton and I could go on about this. I spent many quality hours before Judge Lamberth explaining what our information practices were in the Clinton White House with Mr. Fitton's predecessor at Judicial Watch. But I think that—and he did note that, I think, good public practice comes into play and Presidents change and they can move in the wrong direction. But I am not sure exactly what Mr. Fitton's recommendation is for resolving this particular controversy.

Senator FRANKEN. Well, I want to thank you both, and you can continue——

Mr. PODESTA. Cameras in Caribou Coffee.

Senator FRANKEN. I think you can continue the conversation in Caribou Coffee.

[Laughter.]

Senator FRANKEN. Thank you all for coming today. The record will be held open for a week for additional material and questions.

This hearing is adjourned.

[Whereupon, at 12:06 p.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

Questions for the Record

Hearing on "The Freedom of Information Act:
Ensuring Transparency and Accountability in the Digital Age"
March 15, 2011
Submitted by Senator Amy Klobuchar

Questions for Sarah Cohen

1. Mr. Podesta mentioned that it would be useful for the Administration to require federal agencies to automatically publish their FOIA requests, as well as information responsive to those requests, through a centralized and searchable online database. What do you think of that proposal?

Generally, it would be quite useful for agencies to automatically publish their FOIA requests and responses in a central database. I believe it would reduce the amount of work in many agencies and make government activities more transparent. For example, people seeking similar records would better understand what is routinely released, what the records are called, and what information is generally held in the requested records. It might answer specific questions and avoid repetitive or similar requests.

There is one detail that I think could be accommodated in guidance on this issue: Many reporters seek – and sometimes receive – discretionary releases of information that are not always considered public. A typical request would say, "If you regard any of these records exempt from disclosure, I ask that you exercise your discretion to disclose them." These kinds of requests fall in a gray area: they may be properly released for some purposes, such as research and government accountability, but may not be records that the agency determines are "public" in all instances. The letters might still be included in the database, but the agency may need some modest discretion to either further redact or withhold the response from the database in a very limited set of cases, with an explanation in the database itself.

In short, I agree with the position of the Sunshine in Government Initatiave that this proposal would improve both the public's access to government information, accountability, and efficiency of FOIA operations, but I would personally like to assure the practice doesn't drive releases to the least common denominator of required disclosures.

2. Mr. Fitton testified about the grade he would give the Obama Administration on transparency and FOIA issues. What "grade" would you give this Administration?

As a new university professor, I'm learning that letter grades are frought with misunderstanding.

Unlike a student who get an "F" on an assignment, the administration has made a meaningful effort and seems to understand the spirit of the assignment. But unlike one who gets a "B", it has not yet met all of the requirements and stated guidelines.

73178.001

April 6, 2011

The Honorable Amy Klobuchar
Member
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Klobuchar:

It was an honor for me to appear before the Senate Judiciary Committee on March 15, 2011, and offer my testimony at the hearing on "The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age."

My responses to your questions are submitted below for the hearing record.

1. Professor Cohen testified that there were four areas where significant problems remain for journalists and others seeking to use FOIA – delays / response times, fees, access to electronic records, and disclosure of frequently requested records. Do you agree that those areas need significant improvement? Is there an area that you would prioritize first?

   Judicial Watch considers itself to be a member of the media and agrees that all the issues mentioned are of concern. As we are usually granted a fee waiver as a member of the media or in the public interest, the issue of fees does not impact us as significantly as it might other requestors.

   Our primary concern is the failure by agencies to disclose records, if at all, in a timely manner as the FOIA requires.

2. Mr. Podesta mentioned that it would be useful for the Administration to require federal agencies to automatically publish their FOIA requests, as well as information responsive to those requests, through a centralized and searchable online database. What do you think of that proposal?

   This proposal has merit and might allow agencies to more efficiently respond to multiple FOIA requests about a single topic of interest. However, the Freedom of Information Act requires agencies to search for and produce records to each response individually. Throwing documents on-line would be no substitute for the legal obligations agencies have to produce records as the law requires.

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The Honorable Amy Klobuchar
United States Senate
Committee on the Judiciary
Page Two

As instructed by Chairman Leahy, an electronic version of this letter has been sent to the attention of Ms. Julia Gagne.

Thank you for the opportunity to respond to your questions and to appear before this honorable Committee.

Sincerely,

Thomas Fitton
President

cc: The Honorable Patrick Leahy, Chairman
The Honorable Charles E. Grassley, Ranking Member

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OGIS RESPONSE TO QUESTIONS FOR THE RECORD
FROM SENATOR CHARLES GRASSLEY
TO
MIRIAM NISBET

FOLLOWING THE SENATE JUDICIARY COMMITTEE HEARING:

"THE FREEDOM OF INFORMATION ACT: ENSURING TRANSPARENCY AND ACCOUNTABILITY IN THE DIGITAL AGE."

HELD ON MARCH 15, 2011

1. On his first full day in office, President Obama declared openness and transparency to be touchstones of his administration and ordered agencies to make it easier for the public to get information about the government. Specifically, he issued two memoranda purportedly designed to usher in a "new era of open government." The President's memorandum on the Freedom of Information Act ("FOIA") called on all government agencies to adopt a "presumption of disclosure" when administering the law. To further his goals, President Obama directed the Attorney General to issue new FOIA guidelines for agency heads. Attorney General Holder issued FOIA guidelines in a memorandum dated March 19, 2009.

Notwithstanding the orders from the President and the Attorney General, Ted Bridis of The Associated Press ("AP") uncovered that for at least a year, the Department Homeland Security ("DHS") was diverting requests for records to senior political advisers, who delayed the release of records they considered politically sensitive.

Specifically, the AP's July 21, 2010 article revealed that in July of 2009, the DHS introduced a directive requiring a wide range of information to be vetted by political appointees, no matter who requested it. Career employees were ordered to provide Secretary Napolitano's political staff with information about the people who asked for records — such as where they lived, whether they were private citizens or reporters — and about the organizations where they worked.

According to reports, your agency, the Office of Government Information Services ("OGIS"), assisted with the AP receiving nearly 1,000 emails from the DHS, which became the basis for the AP's article.

What was the OGIS's role in obtaining the release of the DHS emails regarding the political vetting of FOIA requests to the AP?

OGIS was contacted on May 6, 2010, by counsel for the Associated Press requesting assistance on a FOIA matter with the Department of Homeland Security. The AP told OGIS that the agency had not responded to a FOIA request within the 20-day statutory time frame and had also not responded to an appeal filed on the basis of a constructive denial within the 20-day response period. The AP asked if OGIS could help resolve the issue of delay in this case.

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As you know, OGIS was created to resolve Federal FOIA disputes by providing mediation services. OGIS interprets "mediation services" as a term that includes formal mediation, facilitation and ombuds services as set out in the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. § 571(3). In this instance, OGIS engaged in facilitation with the AP and DHS to try to resolve the delay issue related to the AP's request. As with all of OGIS's mediation services, this facilitation was conducted in accordance with the ADRA, 5 U.S.C. §§ 571–84, which has a specific provision providing for confidentiality. OGIS strives to strike a balance between confidentiality allowed under ADRA, and openness and transparency, and will discuss the OGIS role generally in this case.

OGIS staff initially contacted DHS FOIA staff by phone to let DHS know about the OGIS case. OGIS received an update on the status of the FOIA response from DHS by phone and was authorized to share that with the AP. OGIS shared with the AP that DHS expected the response to go out in mid-June 2010. When AP had not yet received the response in mid-June, counsel for AP contacted OGIS to ask for a status update. OGIS contacted DHS via phone and email to inquire about the status of the response but was unable to connect with DHS staff. At about the same time, OGIS was scheduled to meet with DHS staff to discuss the OGIS process generally and how OGIS and DHS would work together. At that meeting on June 24, 2010, OGIS inquired about the AP request; DHS staff stated that the response would be sent by the following week. OGIS was contacted by DHS staff subsequently to advise that the response had been sent via FedEx on June 29, 2010.

The AP contacted OGIS when the documents were received and on July 7, 2010, agreed that because the delay was resolved and the response had been received, the OGIS case should be closed.

2. Who from the DHS did the OGIS interact with in connection with the release of the emails?

OGIS initially contacted the DHS FOIA Public Liaison. As the position is statutorily charged with assisting in the resolution of disputes within the agency, the FOIA Public Liaison is usually the first person that OGIS contacts when it receives a case, both to inform that person of the dispute and to determine who would be the appropriate person to help resolve the dispute from within the agency.

The liaison informed OGIS that the proper point of contact to discuss this particular dispute was DHS's deputy associate general counsel. OGIS primarily interacted with DHS OGC to facilitate resolution of this dispute.

3. What reason did the DHS give the OGIS for its not timely complying with the AP's FOIA request?

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The OGIS role is to help to resolve disputes. Here, the dispute was the delay in the AP receiving a response to its FOIA request from DHS. OGIS's focus was to determine when the AP would receive its response and keeping the lines of communication open with the agency to stay updated on the status. OGIS did not learn of any reasons why DHS was unable to comply with the FOIA response in a timely manner.

4. Were all emails and documents responsive to the AP's FOIA request turned over by the DHS or did it withhold any emails or other documents?

The OGIS role was limited to helping resolve the dispute over the delay in response. The AP did not ask for OGIS assistance with the substance of the request and OGIS did not itself review the response or discuss it further with the AP.

5. Once the OGIS learned about the political vetting policy at the DHS, did you report it to anyone? If so, who? If not, why not?

If you are referring to the policy by which senior agency management at DHS was made aware of FOIA requests that might draw public attention and reviewed responses to those requests before release, OGIS learned about that policy by reading it in news reports. At that time, the policy was already publicly known and being widely discussed in news reports, and thus, OGIS did not bring it to anyone's attention.

6. Does the OGIS believe that it has a legal obligation to report any incidents of misconduct in connection with the processing of FOIA requests that it becomes aware of? Describe in detail the OGIS's legal obligations in this regard.

FOIA charges OGIS with reviewing FOIA policies, procedures and compliance of administrative agencies. If OGIS independently learned of FOIA misconduct within an agency, OGIS would have a legal and ethical duty to inquire as to the misconduct and notify any appropriate officials of the facts as OGIS understands them to ensure proper action would be taken.

7. Have you or has the OGIS been contacted by the Department of Justice or any other agency as part of an investigation of the political vetting policy at the DHS? If so, who contacted you and what were you and/or the OGIS asked?

OGIS was contacted by the DHS Office of Inspector General to discuss the office's role in the FOIA request and dispute that led to the release of documents regarding DHS's FOIA procedures. OGIS also spoke to the State Department's Office of Inspector General in connection with the letter from Senator Grassley and Representative Issa to Inspectors General for 29 agencies seeking a review of the extent to which political appointees are systematically made aware of FOIA requests and their role in decision-making.

8. At the hearing, we heard about the FOIA training sessions run by the OGIS. The OGIS also emphasizes its training sessions on its website.

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(a) Prior to the uncovering of the political vetting policy at the DHS, did the OGIS's training sessions address this issue? If so, describe in detail how it was covered.

(b) Since the uncovering of the political vetting policy at the DHS, have the OGIS's training sessions been revised to directly address the improper political vetting of FOIA requests? If so, describe in detail how this issue is now covered in the OGIS's training sessions. In particular, are career employees instructed that they should report any orders from superiors or political staff to vet FOIA requests?

(c) If this issue is not currently covered by the OGIS's training sessions, why isn't it?

The OGIS role in training agency FOIA professionals is limited. OGIS provides *dispute resolution skills* training to help agency FOIA staffs prepare to prevent and resolve disputes within their own agencies and with members of the public. In providing this training issues related to FOIA's requirements are addressed in a variety of exercises. OGIS and the Justice Department's Office of Information Policy (OIP) collaborate in providing this training. OIP provides government-wide FOIA training that covers all aspects of the FOIA process. OGIS also makes presentations about its statutory mission at OIP's FOIA training programs.

OGIS plans to expand its training topics and offerings to help agency FOIA professionals develop the skills they may need to address and resolve disputes that arise in the FOIA process but will continue to defer to OIP to provide substantive FOIA training and legal guidance.

9. Are political appointees required to attend the training sessions given by the OGIS? If so, describe in detail exactly who must attend and which sessions they must attend.

If they are not required to attend, do you believe that mandatory FOIA training sessions for political appointees is appropriate, especially in light of the political vetting of FOIA requests by the DHS?

FOIA does not charge OGIS with conducting training, mandatory or otherwise. OGIS training is voluntary but is widely sought. For the four full-day offerings of OGIS dispute resolution skills training we have held to date for inter-agency participation, the limited number of 20 to 30 course slots were filled within hours of announcing the training. The dozens of FOIA professionals who were unable to join the courses have been encouraged to try to attend future offerings; we offered six additional one-day courses in 2011. Most if not all of the FOIA professionals who attend OGIS training are career employees rather than political appointees.

We believe that training is always helpful for government officials involved in the FOIA process, whether they are FOIA professionals, agency attorneys, or agency managers, and regardless of whether they are career employees or appointed by the President or agency leadership.

10. In August of last year, Representative Darrell Issa and I wrote the Inspectors Generals for 29 agencies and asked them to review whether their agencies were taking

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steps to limit responses to FOIA requests from lawmakers, journalists, activist groups and watchdog organizations. In particular, the IGs were asked to determine the extent to which political appointees are systematically made aware of FOIA requests and their role in decision-making.

The agencies that have not responded are: the DHS, the Central Intelligence Agency, the Federal Housing Financing Authority, the Department of Commerce, the Department of the Interior, the Department of Defense, the Department of Education, the Environmental Protection Agency, the Federal Trade Commission, the Government Accountability Office, the General Services Administration, the Department of Health and Human Services, the National Archives and Records Administration, the National Aeronautics and Space Administration, the Nuclear Regulatory Commission, the Small Business Administration, the Social Security Administration, Veterans' Affairs, and the Energy Department.

What can the OGIS do to obtain answers to my letters from the agencies that have not responded?

As you know, most OIGs operate largely independently of their agencies. Specifically, we have learned that the OIG of the National Archives and Records Administration did respond to you and Representative Issa by letter dated September 1, 2010. (A copy of that letter is attached here.) We have also learned that the Inspectors General from the following agencies have responded to you and Representative Issa: Department of Defense, Department of Commerce, the Nuclear Regulatory Commission, the Social Security Administration, Veterans Affairs, and the National Aeronautics and Space Administration. We also understand that some OIGs have worked with your offices to discuss the scope of their responses.

11. On March 17, 2011, Ted Bridis of *The Associated Press* reported that Catherine Papoi, formerly the Deputy Chief FOIA Officer at the DHS was effectively demoted and denied a promotion. According to news reports, Ms. Papoi had complained to the Inspector General of the DHS about the political vetting policy implemented by Secretary Napolitano's political staff. Also according to news reports, the day after she spoke with investigators, Ms. Papoi was told of her replacement as the Deputy Chief FOIA at the DHS and was told to clear out her office.

The adverse employment action taken against Ms. Papoi appears to be retaliatory. It is sure to deter other career employees in all agencies from reporting misconduct about the handling of FOIA requests and/or any other misconduct.

What is the OGIS doing to counter the negative message sent by the effective demotion of Ms. Papoi?

OGIS has no independent knowledge of any of the facts or circumstances surrounding the situation you describe with Ms. Papoi and has only learned of the matter through news reports and a brief discussion of it during a hearing held by the House Committee on Oversight and

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Government Reform on March 17, 2011. OGIS has not independently inquired about this DHS policy and action, and without definitive facts, OGIS does not believe it to be appropriate to draw any conclusions or present any messages on the issue.

12. By statute, the OGIS should be regularly involved in facilitating or mediating disputes between government agencies and FOIA requesters.

If as part of that process, the OGIS believes that political vetting or other improper conduct has occurred as part of the handling of a FOIA request, does the OGIS have a legal obligation to investigate that misconduct?

If the OGIS maintains that it is not obligated to investigate, does the OGIS have a legal obligation to report the misconduct and if so, to whom must it report it?

If the OGIS maintains that it has no obligation to either investigate or report misconduct in connection with the handling of FOIA requests, in light of the political vetting policy at the DHS, going forward, will the OGIS report suspected misconduct? If so, to whom will it report that misconduct?

As discussed in the response to question 6 above, if OGIS became aware of misconduct in the handling of a FOIA request, OGIS would have a legal and ethical duty to inquire as to the misconduct and notify any appropriate channels of the facts as OGIS understands them to ensure proper action would be taken. The carefully crafted language in FOIA that created OGIS specifically commands OGIS to "review" agency policies, procedures and compliance, and omits such terms as "investigate" or "oversight," which are traditionally invoked to confer investigatory or oversight powers. Therefore, with its review power and authority, OGIS would inquire into the misconduct by conducting the sort of fact-finding that OGIS might engage in with a general FOIA dispute. OGIS would determine on a case-by-case basis the appropriate persons or officials to inform about any suspected or actual misconduct; that may include persons within and outside of an agency such as the Chief FOIA Officer, senior agency management, the agency Inspector General or the chairman of the Congressional committee that has oversight over a particular agency. In this instance, OGIS learned fairly quickly after the news reports, including reports from the Associated Press, that the DHS Inspector General was investigating allegations. That appeared to be an appropriate action and, soon thereafter, OGIS was contacted by the DHS Inspector General.

OGIS has not yet independently encountered misconduct in either its mediation services or agency review processes and would likely only be able to develop a firm strategy for action once such a situation arises.

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National Archives and Records Administration
Office of Inspector General

8601 Adelphi Road, Suite 1300
College Park, Maryland 20740

Via Electronic Transmission

September 1, 2010

The Honorable Charles E. Grassley
United States Senate
Ranking Member, Committee on Finance
Washington, DC 20510-6200

The Honorable Darrell Issa
United States House of Representatives
Ranking Member, Committee on Oversight and Government Reform
Washington, DC 20515-6143

Dear Senator Grassley and Representative Issa:

We are in receipt of your August 23, 2010, letter inquiring whether there is any review of Freedom of Information Act (FOIA) requests at the National Archives and Records Administration (NARA) by political appointees. NARA has only one political appointee, the Archivist of the United States, and he is not involved in decision-making or the process for FOIA requests for NARA operational records. A unit within the General Counsel's office handles such FOIA requests, and they have no process whereby any appointee reviews releases. If a release is expected to garner a fair amount of attention, the General Counsel's office will generally give notice to the Public Affairs office, the Archivist's office, etc. However, this is simply passive notice of what is being released, and does not involve any active participation or review of the FOIA process.

Requests for NARA Office of Inspector General (OIG) records are handled by our office independently from the General Counsel's office. Any withholdings made by the OIG are appealable to the Archivist, and he makes the final decision on release. This process was set up to ensure OIG independence from the agency, and in our experience we have had no incidents or complaints about the process having any political connotations at all.

We welcome the opportunity to work with your offices. If there is anything else we can do for you, or if you wish any further detail or documentation, please do not hesitate to contact me at 301-837-1966. Thank you.

Sincerely,

John Simms
Counsel, Office of Inspector General
National Archives and Records Administration

CC: Hon. Max Baucus, Chairman, U.S. Senate Finance Committee; Hon. Adolphus Towns, Chairman U.S. House of Representatives Committee on Oversight and Government Reform

NARA's web site is http://www.archives.gov

OGIS RESPONSE TO QUESTIONS FOR THE RECORD
FROM SENATOR PATRICK LEAHY
TO
MIRIAM NISBET

FOLLOWING THE SENATE JUDICIARY COMMITTEE HEARING:

"THE FREEDOM OF INFORMATION ACT: ENSURING TRANSPARENCY AND ACCOUNTABILITY IN THE DIGITAL AGE."

HELD ON MARCH 15, 2011

1. **Does the OGIS have any recommendations to the Committee regarding how to improve FOIA compliance and promote open government?**

As stated in Director Nisbet's testimony on March 15, 2011, since September 2009, OGIS had closed 541 cases, 124 of them true disputes between FOIA requesters and agencies (for example, a dispute over application of an exemption or a fee assessment rather than a simple request for information). As of March 15, 2011--nearly half-way through the fiscal year-- OGIS had opened an additional 206 cases, bringing our total to 597. OGIS closed a large number of these cases by conducting facilitation, which is one form of mediation services in which the mediator, in these cases OGIS staffers, assists each party to communicate and to understand the other's position, interests, and needs.

Although OGIS is still working to develop a robust strategy for implementing the second prong of its mission -- to review agencies' FOIA policies, procedures and compliance -- our current approach is to use the data available in the agencies' annual FOIA reports and Chief FOIA Officer reports. During our first year, we discovered the unique opportunity presented in conducting facilitation to note observed agency policies and procedures in action in the context of an actual request or appeal. By using our observations from our facilitated cases to supplement a thorough analysis of all 94 Chief FOIA Officer Reports of 2010, we were able to develop best practices for agencies and requesters for improving FOIA compliance and for promoting open government. OGIS has recommended that agencies adopt these best practices as internal policies and procedures. OGIS's Best Practices chart is attached as Appendix A and is available on OGIS's web site at www.archives.gov/ogis/ .

In addition to our Best Practices, OGIS is working within the Executive Branch review process to provide more formal recommendations to improve FOIA administration.

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2. **Does OGIS have access to the annual agency FOIA reports and other data that it needs to carry-out its duties under the OPEN Government Act?**

The FOIA requires that agencies provide the Attorney General with annual FOIA statistics compiled for the preceding fiscal year. The Attorney General then makes the Annual FOIA Reports of all agencies available electronically at a single site. FOIA also directs agency Chief FOIA Officers to review all aspects of their agencies' FOIA administration and report to the Department of Justice (DoJ) 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) offers specific guidance on the content and timing of such reports. Agencies provide the required data to OIP, which in turn posts the data online. OGIS is able to access the reported data for individual agencies through the department/agency web sites or through the DoJ web site.

3. **How can Congress help to ensure that OGIS has the resources needed to carry out its important responsibilities?**

The Archivist of the United States continues to demonstrate his commitment to supporting OGIS and its mission. OGIS's authorized staffing consists of six professionals and one staff assistant. As of May 2010, OGIS was fully staffed.

In its first year of operation, OGIS successfully leveraged its resources to implement its mission. For example, OGIS collaborated with agency alternative dispute resolution (ADR) personnel to develop and provide dispute resolution skills training to agency FOIA professionals, as well as to the public through the American Society of Access Professionals. This type of training program is a novel approach in the FOIA arena to equip FOIA professionals with communication techniques and strategies. Our strategy is to encourage prevention and resolution of disputes at the earliest possible point in the FOIA request process, both to improve the administration of FOIA and to save agency and OGIS resources.

OGIS's use of facilitation to resolve disputes between FOIA requesters and agencies is a cost-effective way to implement its mission to provide mediation services to resolve disputes because the OGIS staff conducts the facilitation rather than an outside neutral party, which would incur costs to the government. OGIS has observed that this type of "mediation services" is very successful in resolving disputes and thus far, we have been able to resolve approximately 80-85% of our cases in a reasonably timely manner.

We have not been able to develop fully a robust approach to our mission to review agencies' FOIA policies, procedures and compliance. However, as noted above, in conducting facilitation of our cases we are able to observe agency policies and procedures in action in the context of an actual request or appeal. In addition, we have succeeded in engaging in collaborative review by offering our services to review agency FOIA regulations with agencies that are considering revising FOIA regulations or practices. A few agencies have already worked with OGIS in that capacity and we plan to continue the collaborative review process going forward with as many other agencies as possible. To further this goal, OGIS continues to invite agencies to participate in collaborative reviews of their FOIA processes and to gather ideas from the public and Federal agencies about ways in which OGIS can best accomplish this prong of its mission in a cost-effective way.

In the current budgetary environment OGIS is committed to fulfilling its statutory mission with its existing resources.

Questions for the Record
Hearing on "The Freedom of Information Act:
Ensuring Transparency and Accountability in the Digital Age"
March 15, 2011
Submitted by Senator Amy Klobuchar

Questions for John Podesta

1. Professor Cohen testified that there were four areas where significant problems remain for journalists and others seeking to use FOIA – delays / response times, fees, access to electronic records, and disclosure of frequently requested records. Do you agree that those areas need significant improvement? Is there an area that you would prioritize first?

I agree that these are problems. I also believe they are related and should be looked at together. Delays and fees are more likely if information is not well managed in electronic formats. And if information is well managed in electronic formats, it is easier to disclose proactively through the Internet. As I note in my testimony, the need to rely on FOIA requests to access government information should decline as more of this information is made available and disseminated. Fewer FOIA requests should also reduce administrative burdens and improve the speed and quality of agency responses. That's why I recommend building a searchable database where the public can view all FOIA requests and responses. Such a system would help address all of Professor Cohen's concerns and should be a top priority.

2. Mr. Fitton testified about the grade he would give the Obama Administration on transparency and FOIA issues. What "grade" would you give this Administration?

Compared to the previous administration, the Obama administration gets an A+. But President Obama set a higher bar when he promised the most transparent administration in the nation's history. I also believe the administration should be judged against the opportunity to expand transparency, not just against its predecessors. The Internet and other advancements in information technologies open possibilities that never existed before. We should ask whether the administration is taking full advantage of this opportunity.

Judged by these standards, I give the administration a B. It's a mostly positive record, but there's room for improvement.

Let's start with the positives. As noted in my written testimony, the administration deserves high marks for expanding electronic disclosure through websites such as Recovery.gov, Data.gov, and the IT Dashboard. These websites not only serve the goal of transparency, but also help government cut waste and make better decisions.

The administration has also adopted a sound policy framework for greater openness. I cite Attorney General Holder's FOIA memorandum and the Open Government Directive in my testimony. But in assessing the administration's transparency record beyond FOIA, several other policy changes should be recognized as well.

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The 9/11 Commission identified over-classification as a key problem in sharing information necessary to prevent terrorist attacks. In response, President Obama in December 2009 issued an executive order designed to prevent over-classification and reduce the backlog of classified records that are 25 years old or more (E.O. 13526). Less than a year later, he also signed into law the "Reducing Over-Classification Act," complementing the new executive order.

The previous administration, after the 9/11 attacks, put in place policies that made it even harder to share information. In particular, the Bush White House ordered federal agencies to "safeguard" information that is "sensitive but unclassified." Agencies adopted their own, often overly restrictive practices for making sensitive-but-unclassified designations. President Obama issued another executive order (E.O. 13556) in November replacing this ad hoc system with a government-wide standard, under the label "controlled unclassified information," that is designed to avoid a shadow classification system and promote greater information sharing. This E.O. further makes clear that a CUI designation does not exempt the information from FOIA requests.

The previous administration also went to court to block public access to White House visitor logs. In September 2009, the Obama administration became the first administration to disclose the names of White House visitors, which are searchable through the White House website.

The administration's record is not perfect, however. In my testimony, I talked about some of the problems implementing changes in FOIA policy. President Obama's executive order on classification and declassification suffers from similar implementation problems. For example, the Department of Defense, which produces more classified information than any other federal agency, has not updated its internal regulations for classifying information, as the E.O. requires. Some agencies have also resisted the requirement to automatically declassify records 25 years old or more—something called for not only in President Obama's executive order, but also in previous executive orders by Presidents George W. Bush and Clinton.

Another problem is the continued use of the so-called "state secrets" privilege to block information from being disclosed in litigation. The previous administration invoked the state secrets privilege in 48 known cases, far more than any previous administration, according to OpenTheGovernment.org's 2010 secrecy report card. In response, Attorney General Holder issued a memorandum in 2009 that puts the burden on federal agencies to justify state secrets claims; the privilege can only be invoked if an agency proves court disclosure will cause "significant harm" to national security.

This tough standard has resulted in fewer state secrets claims, but the Obama administration has continued to rely on the privilege in a number of cases originated during the previous administration. The problem in such cases is that we lack sufficient means to verify the government's assertions, because courts lack clear standards for checking these assertions and have generally deferred to the executive branch.

Without independent verification, there is a risk that government will use the privilege as a way to block legitimate judicial review or the disclosure of information that is simply embarrassing. I

urge the administration to support the efforts of Sen. Leahy and other members of this committee to enact legislation setting forth the judiciary's responsibilities in reviewing state secrets claims.

Finally, even though recovery funds are expiring, the Recovery.gov model should live on, and the administration should develop a plan to ensure this happens. How do we improve on Recovery.gov and expand the approach to other government spending? And how do we bring this same level of transparency to other government business, such as regulation and credit programs? Recovery.gov was an enormous accomplishment, but it's time to take the next big step forward.

QUESTIONS FOR THE RECORD FROM SENATOR CHARLES GRASSLEY

TO

MELANIE PUSTAY

FOLLOWING THE SENATE JUDICIARY COMMITTEE HEARING:

"THE FREEDOM OF INFORMATION ACT: ENSURING TRANSPARENCY AND ACCOUNTABILITY IN THE DIGITAL AGE."

HELD ON MARCH 15, 2011

1. According to its website:

> The Office of Information Policy (OIP) is responsible for encouraging agency compliance with the Freedom of Information Act (FOIA) and for ensuring that the President's FOIA Memorandum and the Attorney General's FOIA Guidelines are fully implemented ***across the government***. OIP develops and issues policy guidance to ***all agencies*** on proper implementation of the FOIA. ... OIP provides individualized guidance to agencies on questions relating to the application of the FOIA, regularly conducts training programs for FOIA personnel across the government, including specialized agency programs, and provides general advice to the public on use of the FOIA. In addition to its policy functions, OIP ***oversees agency compliance with the FOIA***....

(Emphasis added).

Thus, the OIP's responsibilities are not limited to the Department of Justice ("DOJ"). It is responsible for overseeing FOIA compliance by all agencies "across the government."

Last year, Ted Bridis of *The Associated Press* uncovered that for at least a year, the Department Homeland Security ("DHS") was diverting requests for records to senior political advisers, who delayed the release of records they considered politically sensitive.

Specifically, the AP's July 21, 2010 article revealed that in July of 2009, the DHS introduced a directive requiring a wide range of information to be vetted by political appointees, no matter who requested it. Career employees were ordered to provide Secretary Napolitano's political staff with information about the people who asked for records — such as where they lived, whether they were private citizens or reporters — and about the organizations where they worked.

At the hearing, you testified that "if" the story was true, the DOJ would have serious concerns. You also testified that the DOJ has not investigated the DHS's political vetting policy.

The AP's article is now nine months old. It was based on and quoted DHS emails. Those emails either say what they say or they don't.

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(a) Has the DOJ obtained copies of the DHS emails at issue?

Response: The Office of Information Policy (OIP) has not obtained copies of the DHS emails.

(b) Did the DOJ ever review the DHS emails?

Response: OIP has not reviewed the DHS emails, but has seen excerpts of them in news articles.

(c) Does the DOJ know whether the DHS withheld any emails or other documents which were responsive to the AP's FOIA request?

Response: OIP does not have any independent knowledge of whether DHS withheld documents in response to the AP's FOIA request. The AP has not sought the assistance of OIP in connection with its request.

(d) Was any consideration at all given by the DOJ to commencing an investigation of the DHS's political vetting of FOIA requests? If so, describe in detail what consideration was given. If any consideration was given and any documents were prepared by the DOJ in connection with that analysis, provide copies of those documents.

Response: OIP became aware of the processing procedures at DHS through news reports. OIP does not have independent investigatory responsibilities and so it had no occasion to consider whether to commence an investigation of DHS. OIP's formal interagency oversight authority is exercised in connection with agencies' Annual FOIA Reports and Chief FOIA Officer Reports, which by law agencies must submit to the Department of Justice. OIP develops guidelines for those reports, issues guidance and provides training to agencies to help them complete the reports, and reviews and compiles summaries of both agency Annual FOIA Reports and Chief FOIA Officer Reports. Nonetheless, as the Office responsible for encouraging agencywide compliance with the FOIA, OIP contacted the Chief FOIA Officer at DHS upon reading the news reports, and was assured that the procedures for handling FOIA requests had been revised and that the new procedures were designed to ensure that responses were not unnecessarily delayed.

(e) Who made the decision that the DOJ would not conduct an investigation of the DHS's political vetting policy?

(f) Describe in detail the justification or reasoning behind the DOJ's conclusion that an investigation should not be commenced. If any documents were created by the DOJ in connection with its decision not to investigate the DHS's political vetting policy, provide copies of those documents.

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Response to (e) and (f): As explained above, OIP has no investigatory authority and so had no occasion to consider whether an investigation was warranted. After reading the news reports, however, OIP did contact the Chief FOIA Officer at DHS and was assured that the procedures for handling requests had been revised.

(g) If the AP's article is accurate, what laws were violated and what are the potential penalties for those violations?

Response: OIP can only speak to the legal requirements of the FOIA. Under the FOIA, there are provisions establishing time periods to respond to FOIA requests. If those time periods are not met, FOIA requesters are deemed to have exhausted their administrative remedies and may seek relief in court. The agency, in turn, can then request a stay of those court proceedings by demonstrating that it faces exceptional circumstances and is exercising due diligence in responding to FOIA requests. The court would then decide whether a stay was appropriate and, if so, for how long a period. A detailed discussion of these statutory provisions is contained in the *United States Department of Justice Guide to the Freedom of Information Act*, which is available at http://www.justice.gov/oip/foia_guide09.htm.

(h) Is the OIP the unit within the DOJ that would conduct an investigation of potential misconduct in the processing of a FOIA request? If not, which unit within the DOJ would investigate such misconduct?

Response: OIP, as mentioned above, has no investigatory authority. OIP believes that an agency's own Office of the Inspector General is the most appropriate office to review an allegation of potential misconduct connected with FOIA processing at the agency.

(i) Has any unit of the federal government investigated the DHS's political vetting policy? If so, which unit and what conclusions were reached? If you have copies of any documents created as part of the investigation please provide copies.

Response: OIP is aware through news reports that DHS's Office of the Inspector General is conducting a review.

(j) Has any disciplinary action been taken against the political appointees who created and/or implemented the political vetting policy at the DHS?

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Response: OIP has no knowledge of whether disciplinary action has been taken against any political appointees at DHS in connection with the handling of FOIA requests.

(k) Assuming that it has actually been discontinued, what corrective actions have been taken to prevent the DHS's political vetting policy from being repeated there or in other agencies?

Response: DHS is in the best position to provide an explanation of the corrective steps taken specifically at DHS. As to ensuring that proper FOIA procedures are followed at all agencies, OIP engages in a wide variety of initiatives to help agencies fully comply not only with the legal requirements of the FOIA, but also with the President's FOIA Memorandum and that Attorney General's FOIA Guidelines. First, OIP writes the *Department of Justice Guide to the FOIA,* which is a legal treatise addressing all aspects of the law, including all its procedural provisions. Second, OIP issues guidance to agencies on proper implementation of the statute and the new guidelines, which includes guidance on the procedural aspects of the law and the need to ensure that there is an effective and efficient system in place for responding to requests. Third, OIP trains thousands of FOIA professionals each year on all aspects of the FOIA, including the law's procedural requirements. Fourth, OIP provides daily legal counseling services to FOIA professionals, who can call OIP on a dedicated phone line and speak to an attorney about any matter connected with the administration of the FOIA. Fifth, agencies are required to file two reports each year to the Department of Justice. The Annual FOIA Report contains detailed statistics regarding the numbers and disposition of FOIA requests, and the time taken to respond. The Chief FOIA Officer Report describes narratively the steps taken to improve transparency at the agency, specifically including the steps taken to ensure that the agency has an effective and efficient FOIA process. Sixth, the Department now makes available on a new website called FOIA.Gov all the detailed statistics on agency FOIA compliance in order to "shine a light" on FOIA compliance itself. The statistics are displayed graphically and allow not only the Department, but any member of the public or any interested party, to compare and contrast the data between agencies and over time. Through all these initiatives OIP is both encouraging proper compliance with the FOIA and ensuring agency accountability.

2. According to the news reports, the Office of Government Information Services ("OGIS") mediated or facilitated the AP's request for emails from the DHS. Those emails became the basis for Ted Bridis' July 2010 article. Once the OGIS learned about the political vetting policy at DHS, did it have a legal obligation to report what it had learned to any other agency, including but not limited to the DOJ? If so, describe in detail the OGIS's legal obligations under the circumstances.

Response: While OIP is unaware of any legal requirement to report "political vetting" of FOIA requests, we would encourage any agency that becomes aware of facts that raise a concern as to whether proper FOIA procedures are being followed to bring such facts to OIP's attention. Although OIP has no investigatory powers, we would raise the issue with the agency's Chief FOIA Officer and any other appropriate official.

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3. In a February 10, 2011 blog posting, Christian Adams set forth his detailed analysis of FOIA logs for the DOJ's Voting Section in its Civil Rights Division. Mr. Adams is a former DOJ attorney. His review of the logs reveals that requests from liberals or politically connected civil rights groups are often given same day turn-around. By contrast, requests from conservatives or Republicans faced long delays, if they are fulfilled at all. Indeed, according to Mr. Adams' analysis in no instance did a conservative or Republican requestor receive a reply in the time period prescribed by FOIA.

On March 1, 2011, Representative Frank Wolf questioned Attorney General Holder about Mr. Adams' blog posting. The Attorney General testified that he had looked into the issues and assured Congressman Wolf that there is no ideological component to how the DOJ answers FOIA requests. The Attorney General maintained that Mr. Adams' analysis was misplaced and compared "apples to oranges." You repeated that phrase and the Attorney General's conclusion at the hearing.

Describe in detail the DOJ's investigation into the allegations made in Mr. Adams' article, including the date it commenced and the date it was completed.

If a report has been written in connection with the investigation, please provide a copy.

If the investigation is ongoing, describe in detail what has been done to date and what remains to be done.

Response: In response to inquiries from Chairman Smith, Chairman Issa, Chairman Wolf, and Representative Nadler, the Department has begun a review of the allegations raised in the blog posting you have cited. The Department has provided these Members with a detailed explanation of that review to date, including the different types of requests made to the Voting Rights Section of the Civil Rights Division, and has found no evidence to substantiate the allegations in the blog post. The letter to Chairman Wolf, in response to his questions at the hearing cited, is attached.

4. Mr. Adams' blog posting identified 16 FOIA requests by liberals or other friends of the administration and 11 FOIA requests by conservatives or Republicans. Two of the 11 requests from conservatives or Republicans had received no reply. In order to accept the Attorney General's and your testimony, it would seem to mean that all of the FOIA requests from conservatives or Republicans were "complex" and all of the liberal FOIA requests were "simple."

Moreover, in connection with the FOIA hearing, Mr. Adams submitted written testimony. In relevant part, it statements as follows:

> Attorney General Eric H. Holder, Jr. testified before an appropriations subcommittee chaired by Representative Frank Wolf on Tuesday, March 1, 2011. When confronted by Mr. Wolf with the data about the log which I described in the

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Pajamas Media story, the Attorney General claimed that there may be differing degrees of complexity in the differing FOIA requests. This is inaccurate. There is no difference in complexity in request for submission files created under Section 5 of the Voting Rights Act. The comparison is an "apples to apples" comparison.

Further contradicting the Attorney General's testimony is the structure of the files in question. The Section 5 submission files are already pre-segregated between public and non-public content. The public and non-public content occupy literally different portions of the file folder. I have seen them myself. It takes hardly any effort whatsoever to access the requested Section 5 file, walk to a copier machine, and copy the public portion of the file and mail it to the requestor. The Attorney General should look more carefully at the issue, for he will discover different requests are being treated differently.

What is your response to Mr. Adams' written statement?

Please provide copies of all of the FOIA requests identified in Mr. Adams' article.

Response: The Civil Rights Division explains that it is inaccurate to state that the "public portion" of Section 5 submission files can simply be copied and mailed to a requester. In fact, before producing any files in response to a request, the Voting Section must review files for completeness (i.e., to ensure that every document related to the submission that has been created or received up to the moment of the request – whether transmitted by letter, email, or otherwise – has been added to the Section 5 file) and when necessary, must refer the files to the Division's FOIA Branch to make any redactions that are appropriate under the FOIA. In addition, while files for pending Section 5 submissions are generally accessible on site, files for closed Section 5 submissions may need to be retrieved from archives off-site, which entails additional delay. While the Voting Section makes every effort to fulfill incoming requests efficiently, the process is more complex than the statement cited suggests.

The Department is currently working on compiling copies of the FOIA requests identified in Mr. Adams' article.

5. At the hearing, we heard about the FOIA training sessions run by the OIP. The OIP also emphasizes its training sessions on its website.

(a) Prior to the uncovering of the political vetting policy at the DHS, did the OIP training sessions address this issue? If so, please describe in detail how it was covered.

Response: OIP provides a wide range of FOIA training to FOIA professionals as a key part of our mission to encourage agency compliance with the FOIA. This training covers all aspects of the FOIA, from procedural considerations, to the scope of the exemptions, to the requirements for assigning fee categories and assessing fee waiver requests, to litigation

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considerations. The principles announced in the President's FOIA Memorandum and the Attorney General's FOIA Guidelines have been incorporated into all these training sessions. The sessions address not only the legal requirements established by the FOIA statute and the case law interpreting it, but also include practical, procedural approaches to managing the FOIA process. The training is primarily designed for FOIA professionals who are career public servants at federal agencies. These training sessions have not expressly addressed the issue of any possible "political vetting" of requests, but have addressed the proper procedures that should be followed by agencies.

(b) Since the uncovering of the political vetting policy at the DHS, have the OIP's training sessions been revised to directly address the improper political vetting of FOIA requests? If so, describe in detail how this issue is now covered in OIP's training sessions. In particular, are career employees instructed that they should report any orders from superiors or political staff to vet FOIA requests?

(c) If this issue is not currently covered by the OIP training sessions, why isn't it?

Response to (b) and (c): OIP's FOIA training programs focus on the proper implementation of the statute. That was the case before the news reports you reference and remains the case afterward. Moreover, OIP has been, and is always available to respond to any specific question that may be raised about an agency's internal review process. Ensuring that agencies have efficient and effective systems in place to respond to requests is one of the focuses of the Attorney General's FOIA Guidelines. Indeed, it is one of five specific elements that agencies are required to address each year in their Chief FOIA Officer Reports.

6. Are political appointees required to attend the training sessions given by the OIP? If so, describe in detail exactly who must attend and which sessions they must attend.

If they are not required to attend, do you believe that mandatory training sessions for political appointees is appropriate, especially in light of the political vetting of FOIA requests by the DHS?

Response: OIP provides training to thousands of federal employees each year, both at the courses offered by OIP and at agency-specific FOIA conferences. OIP also provides training at conferences sponsored by the American Society of Access Professionals and other organizations, and gives executive briefings to senior officials at agencies upon request. Some of the attendees at these various sessions are political appointees. There is no requirement, however, that any group attend FOIA training. OIP does believe that it is important for all employees of agencies to be aware of their obligations under the FOIA. The Attorney General's FOIA Guidelines expressly state that the FOIA is everyone's responsibility, not just that of the FOIA professionals within an agency.

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7. According to its website, the OIP publishes the *United States Department of Justice Guide to the Freedom of Information Act*, which is a comprehensive legal treatise addressing all aspects of the FOIA.

Prior to the uncovering of the political vetting policy at the DHS, did the Guide address this issue?

If not, has the Guide been revised to directly address the improper political vetting of FOIA requests? If the Guide has not been revised, why hasn't it?

Response: The *United States Department of Justice Guide to the FOIA* is a legal treatise that contains a comprehensive discussion of all aspects of the FOIA, as well as the President's Memorandum on the FOIA and the Attorney General's FOIA Guidelines. Because it is a legal treatise, the *Guide* is based on case law and policy documents. The current edition, the 2009 edition, does not address the issue of "political vetting" inasmuch as there is no existing case or policy document specifically addressing the issue. In the absence of such an authority to cite to, the next revision of the *Guide* likewise would not specifically address the topic. The current *Guide* does contain, and future revisions will continue to contain, detailed discussions of all the legal requirements of the FOIA, including its time limits and the principle that the identity of the FOIA requester generally has no bearing on their right of access under the statute. (The three narrow exceptions to this rule, which are not relevant here, are discussed at pp. 40-46 of the current *Guide*).

8. On March 17, 2011, Ted Bridis of *The Associated Press* reported that Catherine Papoi, formerly the Deputy Chief FOIA Officer at the DHS was effectively demoted and denied a promotion. According to news reports, Ms. Papoi had complained to the Inspector General of the DHS about the political vetting policy implemented by Secretary Napolitano's political staff. Also according to news reports, the day after she spoke with investigators, Ms. Papoi was told of her replacement as the Deputy Chief FOIA at the DHS and was told to clear out her office.

Is the OIP investigating Ms. Papoi's effective demotion?

Are any other units of the DOJ investigating Ms. Papoi's effective demotion? If so, which ones?

Response: As mentioned above, OIP has no investigative authority. OIP has no knowledge of whether any other office within DOJ is investigating.

9. The adverse employment action taken against Ms. Papoi appears to be retaliatory. It is sure to deter other career employees in all agencies from reporting misconduct about the handling of FOIA requests or any other misconduct.

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What is the OIP/DOJ doing to counter the negative message sent by the demotion or effective demotion of Ms. Papoi?

Response: As mentioned above, OIP has no investigative authority and cannot speak to the allegations referenced in your question. More generally, however, OIP makes available to all agency FOIA professionals a FOIA Counselor line, which is a dedicated phone line staffed by OIP attorneys. Agency FOIA professionals can use the FOIA Counselor line to discuss with OIP any issue connected with the FOIA. OIP responds to nearly 3000 calls each year on its FOIA Counselor line. In addition, on our new website FOIA.Gov we have a dedicated feedback line specifically for agency personnel. In addition, OIP regularly responds to a wide variety of questions from agency FOIA professionals at our many training programs, and OIP personnel are available during those training programs to speak to FOIA professionals about any issue they may have. In these ways, OIP is available to support agency FOIA professionals in our collective efforts to not only ensure that the FOIA is being implemented properly, but also that all agencies are working to achieve a more open and transparent government in keeping with the Attorney General's FOIA Guidelines.

10. In August of last year, Representative Darrell Issa and I wrote the Inspectors Generals for 29 agencies and asked them to review whether their agencies were taking steps to limit responses to FOIA requests from lawmakers, journalists, activist groups and watchdog organizations. In particular, the IGs were asked to determine the extent to which political appointees are systematically made aware of FOIA requests and their role in decision-making.

The agencies that have not responded are: the DHS, the Central Intelligence Agency, the Federal Housing Financing Authority, the Department of Commerce, the Department of the Interior, the Department of Defense, the Department of Education, the Environmental Protection Agency, the Federal Trade Commission, the Government Accountability Office, the General Services Administration, the Department of Health and Human Services, the National Archives and Records Administration, the National Aeronautics and Space Administration, the Nuclear Regulatory Commission, the Small Business Administration, the Social Security Administration, Veterans' Affairs, and the Energy Department.

What can the OIP do to obtain answers to my letters from the agencies that have not responded?

Response: As you know, OIP is responsible for encouraging agencywide compliance with the FOIA and for ensuring that the President's Memorandum on the FOIA and the Attorney General's FOIA Guidelines are fully implemented. Responses to Congressional inquiries are generally handled by the agencies themselves. With respect to the letters you reference, which were directed to agency Inspectors General, it is likely that the respective Offices of the Inspector General will handle the matter directly. As such, it would not be appropriate for OIP to interpose itself in that process.

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Questions from Chairman Patrick Leahy
To Melanie Pustay
Hearing on "The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age"

STATUTORY EXEMPTIONS

1. I have been troubled for some time about the increasing number of statutory exemptions to FOIA that are finding their way into new legislation. According to guidance that the Department provided to Federal agencies last year, there are more than 60 statutory exemptions to FOIA on the books. **Has the Department reviewed the existing statutory exemptions to FOIA to determine whether all of these exemptions are still needed? If not, will the Department conduct this review and report back to the Committee?**

   Response: In order to shine more light on the issue of Exemption 3 the Department's Office of Information Policy (OIP) has compiled a chart which includes all statutes that have been found by the courts to be proper Exemption 3 statutes. The chart is available on OIP's website at http://www.justice.gov/oip/exemption3-october-2010.pdf and is updated as new decisions are rendered. OIP is also currently in the process of preparing a chart listing all statutes asserted by agencies under Exemption 3 during Fiscal Year 2010, including the number of times those statutes were asserted by each agency. When finished, we will make this chart publicly available on OIP's website. This analysis will give a factual predicate for any review of the use of Exemption 3 statutes as it will allow for a comparison of those statutes that are used extensively and those that are used only a handful of times.

MILNER DECISION

2. During the hearing, you testified that the Department is reviewing the Supreme Court's decision in Milner v. Navy and that the Department may propose legislation to address

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that decision and the so-called "High 2" Exemption to FOIA. **Will you consult with me on this issue and keep the Committee informed of any legislative proposals related to the Milner case?**

Response:

OIP has serious concerns about the impact of the *Milner* decision and as a result is actively considering the issue and possible solutions. OIP will be pleased to consult with the Committee, and will keep the Committee informed, regarding any legislative proposals related to the *Milner* case.

ONLINE DISCLOSURES

3. In the digital age, computers and other technologies make it much easier for the Government to share information with the public. The Electronic Freedom of Information Act Amendments of 1996, which I authored, requires that agencies post records that are frequently requested under FOIA online. **How many Federal agencies are complying with this law? What is the Department doing to ensure that Federal agencies fully utilize electronic reading rooms and new technologies to release more information to the public?**

Response: A key part of both the President's Memorandum on the FOIA and the Attorney General's FOIA Guidelines was the focus on proactive disclosures. Making information available to the public without the need to submit a FOIA request is a vital aspect of increasing transparency. In keeping with that premise, OIP issued guidance on the new transparency guidelines advising agencies to signficantly increase the amount of material made available on their websites. OIP encourages agencies to post far more than what is frequently requested and to anticipate interest in records even before one request is made. To further emphasize this important responsibility, OIP has added to its basic FOIA training seminar for federal employees a specific session on proactive disclosures which emphasizes both the legal requirements to post certain records, including those that become frequently requested, and the policy imperative to post information as a means of making known to the public what the agency is doing. Agencies are answering this call. All agencies were required to describe the steps they have taken to increase proactive

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disclosures in their Chief FOIA Officer Reports. Those Reports are all collected on OIP's website, at http://www.justice.gov/oip/reports.html, and illustrate a wide range of initiatives being utilized by agencies to increase proactive information disclosure. Many agencies have adopted innovative ways to make information available, using social networking sites and holding webinars to increase public awareness of agency activities. Other agencies reported making improvements to the quality of the material they posted. OIP has created a summary of success stories from the key agencies that are taken from their Chief FOIA Officer Reports, which can be found here: http://www.foia.gov/2011foiapost03.html. These success stories highlight agency efforts to improve transparency through proactive disclosures.

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SUBMISSIONS FOR THE RECORD

Statement of J. Christian Adams
Senate Judiciary Committee
March 15, 2011

For over five years, I was an attorney in the Voting Section of the Civil Rights Division at the Department of Justice. I received Freedom of Information requests from citizens and saw firsthand the efforts to comply with the law and provide the information to the public. I also received, as did the entire Division, training in various policies of the Department as they might implicate these requests.

I am currently an attorney in private practice. I am also a contributor to *Pajamas Media*, an internet news and information publication that has 19 million hits a month. I cover a variety of issues for *Pajamas Media*, but most notably the Department of Justice and elections.

As an initial matter, it is relevant to note that *Pajamas Media* sued the Department of Justice in federal court on January 18, 2011 because the Department failed to comply with important requests made under the Freedom of Information Act. The case is styled *OSM Media, LLC, dba Pajamas Media and PJTV v. United States Department of Justice*, (U.S.D.C D.C., case no: 1:11-CV-00103-EGS). The information was initially sought by a Freedom of Information Act request in approximately June 2010. The request was renewed by certified mail in October 2010. No reply whatsoever was received by the Department of Justice, and thus the lawsuit was filed in January 2011. As of this date, the Department of Justice has *still failed to provide* the information requested.

The obstruction by DOJ should greatly concern every media outlet regardless of the worldview of the outlet. It should especially trouble all new media outlets. The Department of Justice should not provide favored access to only large, friendly and well established news outlets, and treat other media outlets as somehow having secondary rights under the law.

While I was at the Department of Justice, a curious training took place for staff members at the Great Hall at the Robert F. Kennedy Building, otherwise known as "Main Justice." The trainers

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noted that it was Department policy to refuse to provide public documents, including case pleadings *already filed* with various federal clerks of court by the Department, in response to Freedom of Information Act requests from the public. In other words, the Department would not even provide requested documents which it had already filed in court, according to this training.

This struck many in the audience as a most curious, and legally indefensible, position to take. I recall one senior attorney commenting, "no wonder people don't have a very high opinion of their government given they can't even get public documents from them," or words to that effect. To many Department staffers in attendance for this curious lecture, the announced policy seemed legally indefensible, politically inconsistent with promises of transparency, and most of all, contrary to good government.

Since leaving the Department of Justice in 2010, I have come into possession of documents consisting of a log of Freedom of Information Act data. (The "logs.") These logs contain a variety of information, including the index number of a request to the Civil Rights Division at the Department of Justice, the name and affiliation of the requestor, the information requested and the date on which the request was complied with, if any. These logs are authentic and were originally created by the Department of Justice itself.

The logs show a pattern of politicized FOIA compliance within the DOJ's Civil Rights Division. For example, Republican election attorney Chris Ashby of LeClair Ryan made a request for the records of five submissions made under Section 5 the Voting Rights Act. Ashby waited nearly eight months for a response. Afterwards, Susan Somach of the "Georgia Coalition for the People's Agenda," a group headed by Rev. Joseph Lowery, made requests for 23 of the same type of records. While Ashby waited many months for five records, Somach waited only 20 days for 23 records. The requested records were identical in kind.

It should not matter the political persuasion of the requestor. Administrations change but the law does not. Today's favored group will be tomorrow's excluded outlet, unless the Department of Justice follows the letter of the law for all requests.

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Under the Obama DOJ, FOIA requests in the log from conservative media never obtained any response from the Civil Rights Division, while National Public Radio obtained a response in five days.

Attorney General Eric H. Holder, Jr. testified before an appropriations subcommittee chaired by Representative Frank Wolf on Tuesday, March 1, 2011. When confronted by Mr. Wolf with the data about the log which I described in the *Pajamas Media* story, the Attorney General claimed that there may be differing degrees of complexity in the differing FOIA requests. This is inaccurate. There is no difference in complexity in request for submission files created under Section 5 of the Voting Rights Act. The comparison is an "apples to apples" comparison.

Further contradicting the Attorney General's testimony is the structure of the files in question. The Section 5 submission files are already pre-segregated between public and non-public content. The public and non-public content occupy literally different portions of the file folder. I have seen them myself. It takes hardly any effort whatsoever to access the requested Section 5 file, walk to a copier machine, and copy the public portion of the file and mail it to the requestor. The Attorney General should look more carefully at the issue, for he will discover different requests are being treated differently.

The Department of Justice did not always stonewall FOIA requests from unfriendly media sources.

In 2006, Charlie Savage, then at the *Boston Globe*, requested all of the resumes of the recently hired attorneys in the Bush Civil Rights Division. DOJ leadership was convinced rushing out the resumes of dozens of lawyers far before the deadline was a good thing. They were produced in mere days, well under the statutory deadline.

In about June of 2010, *Pajamas Media* requested the exact same information from the DOJ that Charlie Savage requested in 2006 – except for attorney hires made in the Obama DOJ. Recall the Bush administration turned over all the resumes of attorneys well before the statutory FOIA deadline.

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The request by *Pajamas Media* was ignored.

Then on October 13, 2010 the request was renewed by certified mail. Still, no response was received as required by law.

Remember, the request made by the *Boston Globe* in 2006 was the same request made by *Pajamas Media* in 2010, and forms the basis of the lawsuit against the Department of Justice.

Attorney General Holder should take note, for it is yet another "apples to apples" comparison. In 2006, the Bush administration produced the apples in a few days. In 2010, the Obama administration is a defendant in federal court because it won't produce the same apples after more than eight months. So on January 18, 2011, the case of *Pajamas Media v. United States Department of Justice* was filed in the United States District Court in D.C.

The data in the logs reveal the priorities of the Civil Rights Division – transparency for friends, stonewalls for the unfriendly.

Those administration friends enjoying speedy compliance with their Freedom of Information Act requests include:

* Gerry Hebert, partisan liberal and former career Voting Section lawyer who testified against now-Senator Jeff Sessions when he was nominated to the federal judiciary. Same day service.

* Kristen Clarke, NAACP Legal Defense Fund. Same day service.

* Ari Shapiro of National Public Radio. Five day service.

* Nicholas Espiritu of the Mexican American Legal Defense Fund. Next day service.

* Eugene Lee of the Asian Pacific American Legal Center. Three day service.

* Edward DuBose, President of Georgia NAACP. Same day service.

* Raul Arroyo-Mendoza of the Advancement Project. Same day service.

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* Nina Perales, of the Mexican American Legal Defense Fund. Two day service.

* Tova Wang, of Demos. Three day service.

* Mark Posner and Robert Kengle of the Lawyers Committee for Civil Rights Under Law. Same day service.

* Brian Sells formerly of the ACLU and now of the DOJ Voting Section. One day service.

* Natalie Landreth, Native American Rights Fund. Same day service.

* Fred McBride, ACLU redistricting coordinator. Same day service.

* Jenigh Garrett, NAACP Legal Defense Fund. Same day service.

* Joaquin Avila, well known election law professor in Seattle who advocates for the rights of illegal aliens to vote in American elections. Next day service.

In contrast, well known conservatives, Republicans or political opponents had to wait many months for a response, if they ever got one.

* Michael Rosman, Center for Individual Rights. Six month wait.

* Jennifer Rubin (seeking records relating to employees, like Charlie Savage did). No reply at all.

* Congressman Frank Wolf. Five month wait.

* Jed Babbin, Editor at Human Events. Six month wait.

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* Jim Boulet of the English First Foundation. No reply at all.

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* Jenny Small of Judicial Watch. Five month wait.

* Republican Pennsylvania State Representative Stephen Barrar. Four month wait.

* Jason Torchinsky, former DOJ and now ace GOP lawyer. No reply at all.

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It should be noted that the logs reveal plenty of mundane compliance to requestors of no particular note. Other times, very short delays mark a request from an administration friend. *But in no instance does a conservative or Republican requestor receive a reply in the time period prescribed by law.* The logs demonstrate an unmistakable pattern – friends zoom in the express lane, while foes are stuck waiting on the shoulder.

No administration should be allowed to violate the law to conceal details about their governance, regardless of whether they are Republicans or Democrats. The Committee could inquire further into this issue by asking the Department of Justice:

1. To provide all FOIA logs for all components within the Civil Rights Division to the Committee, including the Office of Assistant Attorney General.

2. To provide the notes and records of the presentation where Department training ("Professionalism training") instructed employees that documents filed in court cannot be turned over to the public.

3. To provide the resumes of all attorneys hired by the Civil Rights Division since January 2009, the same information over which *Pajamas Media* has had to sue in federal court, and of the same kind that was provided to the *Boston Globe* in 2006 in a few days.

4. To provide the names of the individual employees responsible for FOIA compliance in each section of the Civil Rights Division so that the Committee may follow up with further inquiries about FOIA compliance.

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I thank you for your time and attention.

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Bombshell: Justice Department Only Selectively Complies with Freedom of Information Act (PJM Exclusive)

Posted By J. Christian Adams On February 10, 2011 @ 12:00 am In Uncategorized | 88 Comments

Eric Holder's Justice Department has even politicized compliance with the Freedom of Information Act. According to documents I have obtained, FOIA requests from liberals or politically connected civil rights groups are often given same day turn-around by the DOJ. But requests from conservatives or Republicans face long delays, if they are fulfilled at all.

The documents show a pattern of politicized compliance within the DOJ's Civil Rights Division. In particular, I have obtained FOIA logs that demonstrate as of August 2010, the most transparent administration in history [1] is anything but. The logs provide the index number of the information request, the date of the request, the requestor, and the date of compliance.

For example, Republican election attorney [2] Chris Ashby of LeClair Ryan made a request for the records of five submissions made under Section 5 of the Voting Rights Act. Ashby waited nearly eight months for a response. Afterwards, Susan Somach [3] of the "Georgia Coalition for the Peoples' Agenda," [4] a group headed by Rev. Joseph Lowery [5], made requests for 23 of the same type of records. While Ashby waited many months for five records, Somach waited only 20 days for 23 records.

Under the Obama DOJ, FOIA requests from conservative media never obtained any response from the Civil Rights Division, while National Public Radio obtained a response in five days.

In 2006, Charlie Savage, then at the not-yet-insolvent *Boston Globe*, requested all of the resumes of the recently hired attorneys in the Bush Civil Rights Division — including mine. DOJ leadership was convinced rushing out the resumes of dozens of lawyers far before the deadline was a good thing.

Savage apparently has never made a similar request to the Obama Justice Department, even though the inspector general has opened an investigation into political payback and discrimination under Eric Holder. I wrote at PJM [6]:

> Savage could bolster his credibility by making the same inquiries of this Justice Department as he did to the Bush DOJ. For starters, he could examine the preposterous hiring practices in the Civil Rights Division since Obama's inauguration. The more time that passes without an inquiry from Savage and the *New York Times*, the more partisan his badgering of the Bush DOJ appears.

Yet Savage won the Pulitzer [7] for attacks on the Bush administration.

In spring of 2010, Pajamas Media requested the exact same information from the DOJ that Charlie Savage requested in 2006 — except for hires made in the Obama DOJ. Recall the Bush administration turned over all the resumes of attorneys as fast as they could, and well before the statutory FOIA deadline.

PJM's request was ignored. Then on October 13, 2010, the request was renewed by certified mail. Still, no response as required by law.

So on January 18, 2011, the case of *Pajamas Media v. United States Department of Justice* was filed in the United States District Court in D.C. The most transparent administration in history? Hogwash.

Don't be fooled thinking that anyone was congratulating the DOJ's 2006 zeal in rocketing resumes to the *Boston Globe*. The Bush DOJ's eagerness to speed attorney resumes to the

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Boston Globe was rewarded with savage attacks. Republicans mistakenly bet that being champions of good government would earn them kudos. The only thing it earned was a kick in the teeth.

That's not to say that anyone should have violated the FOIA, as the Obama DOJ has done with PJM's request. But why would you grant favors to political opponents who plan to cut your throat? I suspect the current leadership of the DOJ takes that for granted. Notice they have not suffered a whiff of scrutiny until now.

The data in the FOIA logs I obtained reveal the priorities of the Civil Rights Division — transparency for friends, stonewalls for the unfriendly. Those enjoying speedy compliance with their Freedom of Information Act requests include:

- Gerry Hebert, noted free speech opponent [8], partisan liberal, and former career Voting Section lawyer who testified [9] against now-Senator Jeff Sessions when he was nominated to the federal judiciary. Same day service.

- Kristen Clarke [10], NAACP Legal Defense Fund. Clarke sought the dismissal [11] of the voter intimidation case against the New Black Panther party. Same day service.

- Ari Shapiro of National Public Radio. Five day service.

- Nicholas Espiritu [12] of the Mexican American Legal Defense Fund. Next day service.

- Eugene Lee [13] of the Asian Pacific American Legal Center. Three day service.

- Edward DuBose, president of Georgia NAACP. Same day service.

- Raul Arroyo-Mendoza [14] of the Advancement Project. Same day service.

- Nina Perales of the Mexican American Legal Defense Fund. Two day service.

- Tova Wang [15] of Demos. Three day service.

- Mark Posner and Robert Kengle of the Lawyers Committee for Civil Rights Under Law.
Kengle is the same former DOJ attorney who did not want [16] to do election coverage in Mississippi where a federal court found that white voters were being discriminated against. Same day service.

- Brian Sells, formerly of the ACLU and now of the DOJ Voting Section. (Paging Charlie Savage). One day service.

- Natalie Landreth [17], Native American Rights Fund. Same day service.

- Fred McBride, ACLU redistricting coordinator. Same day service.

- Jenigh Garrett, NAACP Legal Defense Fund. Same day service.

- Joaquin Avila [18], well-known election law professor in Seattle who advocates [19] for the rights of illegal aliens to vote in American elections. Next day service.

In contrast, well-known conservatives, Republicans, or political opponents had to wait many months for a response, if they ever got one:

- Michael Rosman [20], Center for Individual Rights. Six month wait.

- Jennifer Rubin [21] (seeking records relating to employees, like Charlie Savage did). No reply at all.

- Congressman Frank Wolf. Five month wait. Wolf now chairs the Appropriations Subcommittee in charge of the DOJ budget. Oops.

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- Jed Babbin, editor at Human Events [22]. Six month wait.

- Jerry Seper, *Washington Times*. Six month wait.

- Jim Boulet of the English First Foundation [23]. No reply at all.

- Jenny Small of Judicial Watch [24]. Five month wait.

- Republican Pennsylvania state Representative Stephen Barrar. [25] Four month wait.

- Jason Torchinsky [26], former DOJ and now ace GOP lawyer. No reply at all.

- Ben Conery [27], *Washington Times*. Five month wait.

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Politicized compliance with FOIA might be an administration-wide pattern. The revelation [28] that the Obama Department of Homeland Security has politicized the FOIA process may be just the tip of the iceberg.

If so, what should we make of patterns of lawless noncompliance with the FOIA? If nothing else, it exposes the rank hypocrisy of those heady days in 2008 when transparency was a campaign promise. In the worst case, we have an administration willing to violate the law to conceal details about their governance.

Even this should outrage members of the mainstream media — unless of course they already zoom along in the DOJ information fast lane.

(Watch J. Christian Adams' PJTV interview here. [29])

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URLs in this post:

[1] most transparent administration in history: **http://www.whitehouse.gov/blog/change_has_come_to_whitehouse-gov/**
[2] Republican election attorney: **http://www.rnla.org/bio/BioDetail.asp?MemberID=3472**
[3] Susan Somach: **http://www.povertyfrontiers.org/ev_en.php?ID=4619_201&ID2=DO_TOPIC**
[4] "Georgia Coalition for the Peoples' Agenda,": **http://gcpagenda.org/index.php**
[5] Rev. Joseph Lowery: **http://www.youtube.com/watch?v=7pEH37JIgBU**
[6] PJM: **http://pajamasmedia.com../../../../blog/eric-holders-made-up-defense/?singlepage=true**
[7] Pulitzer: **http://www.pulitzer.org/archives/7175**
[8] noted free speech opponent: **http://www.campaignfreedom.org/newsroom/detail/hypocrisy-and-smears-typical-of-the-campaign-legal-center**
[9] testified: **http://www.republicoft.com/2009/07/14/he-said-she-said/**
[10] Kristen Clarke: **http://naacpldf.org/kristen-clarke**
[11] sought the dismissal: **http://pajamasmedia.com../../../../blog/american-hero-coates-negates-a-year-of-justice-department-spin-on-new-black-panther-case/**

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[12] Nicholas Espiritu: **http://lashawnbarber.com/archives/2009/01/06/california-supreme-court-to-hear-in-state-tuition-case/**
[13] Eugene Lee: **http://www.apaforprogress.org/eugene-lee-named-one-top-lawyers**
[14] Raul Arroyo-Mendoza: **http://www.meetup.com/beltwayatheists/members/6887279/**
[15] Tova Wang: **http://electionlawcenter.com/2010/11/05/a-reponse-to-tova-wang-at-demos.aspx?ref=rss**
[16] did not want: **http://pajamasmedia.com../../../../../blog/doj-voting-section-deputy-chief-misled-civil-rights-commission-on-black-panthers-case/**
[17] Natalie Landreth: **http://www.narf.org/profiles/landreth.html**
[18] Joaquin Avila: **http://www.law.seattleu.edu/Images/news/features/avila.jpg**
[19] advocates: **http://archive.frontpagemag.com/readArticle.aspx?ARTID=14775**
[20] Michael Rosman: **http://www.cir-usa.org/bios.html**
[21] Jennifer Rubin: **http://voices.washingtonpost.com/right-turn/**
[22] Human Events: **http://www.humanevents.com/**
[23] English First Foundation: **http://www.englishfirstfoundation.org/**
[24] Judicial Watch: **http://www.judicialwatch.org/department-justice-black-panther-voter-intimidation-case-dismissal-investigation**
[25] Stephen Barrar.: **http://www.stevebarrar.com/**
[26] Jason Torchinsky: **http://www.holtzmanlaw.net/torchinsky/**
[27] Ben Conery: **http://www.washingtontimes.com/news/2009/oct/20/justice-dept-blocks-ncs-nonpartisan-vote/**
[28] revelation: **http://dailycaller.com/2011/02/04/janet-napolitano-checks-high-stakes-poker-game-darrell-issa/**
[29] here.: **https://www.pjtv.com/?cmd=mpg&mpid=174&load=4856**

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Witnesses: Open records law still difficult to use

(AP) – 2 hours ago

WASHINGTON (AP) — Experts on the U.S. Freedom of Information Act are telling Congress that the law remains an unwieldy and inefficient tool for obtaining government records despite President Barack Obama's promise to reinvigorate the law and improve his administration's transparency.

John Podesta, president of the progressive Center for American Progress, says in testimony prepared for the Senate Judiciary Committee that federal agencies have not implemented Obama's order aggressively enough. The hearing is expected later Tuesday. Podesta, a former White House chief of staff in the Clinton administration, also says there is evidence some agencies have reduced their backlogs of information requests through administrative maneuvering instead of providing the requested information.

Sarah Cohen, a Duke University journalism professor testifying for a coalition of media associations, says in her testimony that the act is very difficult to navigate and useful only to the most patient and persistent journalists.

Another witness, Thomas Fitton of Judicial Watch, also is critical. Judicial Watch, a conservative watchdog group, said it has filed 44 lawsuits to force the Obama administration to comply with the law.

The administration is highlighting the progress it says has been made since January 2009, when Obama said he would make government more open and federal agencies would disclose more information rapidly.

At an event Monday celebrating Sunshine Week, when news organizations promote open government and freedom of information, Associate Attorney General Tom Perrelli said agencies are releasing more records than before. And more documents are being provided in complete form, he said.

"Where we once might have looked at a document, noticed a piece that could be released, and redacted the rest, we're now more often determining that we can release the whole thing," Perrelli said.

An Associated Press analysis of new federal data found agencies took action on fewer requests for federal records from citizens, journalists, companies and others last year even as significantly more people asked for information. The administration disclosed at least some of what people wanted at about the same rate as the previous year, according to the AP's review of the 35 largest government agencies.

Miriam Nisbet, director of the office of government information services at the National Archives and Records Administration, and Melanie Pustay, director of the office of information policy at the Justice Department, also were scheduled to testify at the Senate hearing.

On the Net:

- Senate Judiciary Committee: http://judiciary.senate.gov/

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Testimony of Sarah Cohen

Knight Professor of the Practice of Journalism

Duke University

"Ensuring Transparency and Accountability in the Digital Age"

On behalf of the Sunshine In Government Initiative

Senate Judiciary Committee

March 15, 2011

Chairman Leahy, Ranking Member Grassley and the members of the Senate Judiciary Committee, I would like to thank you for the invitation to discuss recent developments in the administration of the Freedom of Information Act and the need to improve it in the digital age. I appreciate your longstanding commitment to accountability and open records.

After nearly 20 years as a reporter and editor, much of that time working in investigative teams at The Washington Post, I joined Duke University's Sanford School of Public Policy in 2009. I also serve on the board of directors of Investigative Reporters and Editors, a 4,500-member educational association that works to improve public affairs reporting, partly through training in the use of FOIA and state public records laws. I am speaking today on behalf of the Sunshine in Government Initiative, a coalition of media associations promoting open government.

In my own career, obtaining records using the Freedom of Information Act was critical to stories ranging from the quality of drinking water in Washington, D.C. to the use of federal homeland security grants. More recently, the law has been used by journalists reporting on possible Medicare fraud, sex discrimination in the Texas National Guard and human trafficking.

These stories and many others could not have been done without access to records locked inside technological and physical file cabinets throughout government. But the practice of open government requires constant vigilance and attention, and I appreciate this Committee's continued interest in preserving and improving this important tool.

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President Obama's day-one initiative to embrace accountability through open government has resulted in some notable policy changes that are beginning to affect day-to-day practice.

The Labor Department's Open Government plan includes public access to an integrated enforcement database. The Consumer Product Safety Commission has issued final rules for access to a Congressionally mandated database of consumer complaints and Saferproducts.gov was slated to go online last week. Some agencies have intermittently released the desk calendars of senior officials and FOIA request logs. And the disclosure of subcontracts and sub-grants required in the 2006 Federal Funding Accountability and Transparency Act began in October.

President Obama has also initiated important policies to encourage more openness, although we have yet to see those changes fully implemented.

For example, Attorney General Holder loosened the guidelines for releasing internal documents and correspondence, requiring agencies to cite significant and specific harm rather than uniformly denying requests under the broad Exemption b(5), which covers information that would be protected from discovery in a civil lawsuit. That policy allowed more public scrutiny of the response to the Deepwater Horizon oil spill last year. Inter- and intra-agency e-mails and reports, even those that are less than flattering, are at least sometimes easier to obtain and contain fewer redactions under the new policy. The policy also gives reporters strong arguments to appeal redactions and denials under the b(5) exemption. The president also recently ordered regulatory agencies to post on their websites

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enforcement databases, including identifiers that would help the public compare organizations across agencies.

However, administrations change, and these actions can be reversed as quickly as they began. The policies have so far reached the ground inconsistently and only in selected agencies. In addition, much of President Obama's Open Government Initiative has been geared at consumer data and collaborative government, especially through social media. These initiatives do little to improve the basic job of public affairs journalism to provide insight into the workings of our government. Reporters' requests usually delve into agency administrative records: correspondence, grant applications and audits, contracts, calendars of senior officials, compliance and inspection reports, and rosters of political appointees. They are seeking the artifacts of governing, not the products of well-planned public information efforts. For these records, the FOIA rather than a presidential initiative remains a vital tool.

That tool simply does not appear to work as intended – and hasn't for the generation in which I've been a reporter. The FOIA process remains exceedingly difficult to navigate and is useful only to the most patient and persistent journalists.

Certain problems described to this Committee in the past have not been resolved. Some agencies still redact all personally identifiable information without concern for the public interest in releasing it, not just information that would constitute an unwarranted invasion of privacy. State agencies often interpret privacy protections less broadly than their federal counterparts. After the widely reported death of a prominent state politician, the Federal Bureau of Investigations

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invoked the Privacy Act in denying a reporter the files about the person even though the law does not apply to people after death. In addition, the proliferation of b(3) exemptions remains a concern – one that I know this Committee has worked hard to address. That work has surely made them less common than they might have been.

But today I would like to describe four other impediments to the effective use of FOIA among investigative and other public affairs reporters that have not changed in recent years: Delays and response times; fees; access to electronic records; and disclosure of frequently requested records. Each of these issues poses a particular problem in at least some agencies. Each also provides a different lens focusing on the same underlying problem: the widespread default position that records belong to the government, not to the public. The public must convince officials to release records instead of the government convincing the public that portions must be kept secret.

Delays and response times

Some agencies have reported substantial improvement in backlogs over the past two years.

However, my own experience and that of other journalists is not one of faster response to FOIA requests. Admittedly, reporters' requests tend to be difficult. They ask for entire databases or broad document collections that must be extracted from systems that were never designed for public access, even though they hold some publicly available information. The subjects are often, by nature, politically sensitive.

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I have *never* received a final response to a FOIA within the required time frame. Some reporters joke about sending birthday cards to their FOIAs, as the response times are measured in years, not days. I spoke with a reporter last week whose request has languished four years during which she held six different beat assignments at two separate employers. Another requested records related to the treatment of soldiers' brain injuries and has not yet received access to documents he won on appeal about a year after the initial request. A third has been trying to agree to fees estimated by an agency, but cannot find anyone to take her call who can look up her case – she starts over each time she calls.

This ability to wait out a FOIA request until it is no longer relevant or the reporter is no longer employed at a shrinking news organization has been, and remains, the biggest power imbalance between agencies and journalists. The Office of Government Information Services has found some success prodding agencies to negotiate and respond, but thus far we have seen little in the way of effective recourse for long delays.

One consistent and growing source of delay has been the requirement to vet potential trade secrets and other confidential information contained in contracts, grant proposals and other federal documents such as airplane certifications. Agencies must send the documents back to the originator and provide an opportunity for them to strike confidential portions. The records are then held hostage to the priorities of the subject of the FOIA, who is permitted to request – and usually receives – b(4) exemptions. Reporters say that agency officials do not adequately challenge claims of harmful disclosures or demand timely response.

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A reporter who covered Iraq contracting for three years for the Los Angeles Times told me he has never received a contract through the FOIA process, despite numerous attempts. A non-profit investigative reporting center in Washington has been negotiating for 18 months for grant applications for a Recovery Act program, but has been told it will take up to another year to fulfill his request once this review process begins.

Fees

Copying fees can also become barrier to access. Last year, when the Wall Street Journal and Center for Public Integrity attempted to acquire Medicare billing data historically used by health care consultants and researchers, they were told the cost would exceed $90,000. After filing a lawsuit, the fee was negotiated to about $12,000 – a level still far too high for all but the most financially healthy and committed news organizations.

The center that is awaiting Recovery Act grant materials was denied a waiver for more than $10,000 in copying fees because, the agency said, the documents would not likely shed light on government operations. The reporter has been working with OGIS for about a year on the issue, but has not yet gotten confirmation that it's been resolved.

Electronic records

Almost 15 years ago, Congress recognized that records held in electronic form had become among the most vexing issues in FOIA. At the time, agencies refused to release electronic versions of their documents and instead printed out

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boxes of listings and charged thousands of dollars for the paper. The reforms in the 1996 E-FOIA , we thought, had eliminated that problem.

However, agency records are *still* not held in a form capable of easy extraction or redaction, while some agencies go out of their way to ensure that the records will not be usable in electronic form. I have heard an increasing number of complaints from reporters that they have received databases printed onto static image files, rendering them nearly useless. The agencies say that providing the original format would allow for mischief and misuse. (One of these agencies was recently instructed by a U.S. District Court judge to release other records to a different requester in the original data form.) Most requests for correspondence and other documents are fulfilled by printing them, redacting, then re-scanning into unsearchable images.

Information on agency websites

Proactive disclosure of documents and databases that was envisioned in the E-FOIA for posting on Internet websites is still inconsistent.

In 2009, the Department of Homeland Security's Chief FOIA Officer directed its components to post frequently requested records such as historical daily schedules of senior officials, executed awards, Congressional correspondence and FOIA logs. As of last week, only the FOIA logs had been consistently posted. The most recent contract posted on its FOIA website was from 2008 and Secretary Napolitano's schedule was last updated in July. This example shows that even when agencies attempt to institute proactive disclosures, it is difficult to sustain momentum.

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Records that have been requested by multiple news organizations are not routinely posted on websites. Several reporters have requested and received correspondence related to the Deepwater Horizon oil spill, but that information is not readily available in voluminous electronic reading rooms related to the disaster. Reports required by Congress on Iraq and Afghanistan reconstruction efforts are not posted on Defense Department sites, and original nursing home inspections with reviewers' comments are unavailable on the Centers for Medicare and Medicaid website. These records could easily fall under a definition of "frequently requested records" under the law, but agencies have varying thresholds for posting them.

Failing to proactively release these documents means that citizen journalists, reporters in smaller, local news organizations across the country and public interest groups may not have access to the same information as their larger Washington-based cousins.

Even if these were posted, the chance that regular citizens or reporters without beat specialties would find them is slim. Most departments and agencies have no centralized location for their proactive disclosures or frequently requested records. In 2009, an Associated Press editor assigned a reporter to identify all of the major agency reading rooms so the wire service could set up system to monitor them. After a week of studying the websites of just four departments, the reporter had found 97 reading rooms. The editor decided the effort was futile.

What can Congress do to improve the implementation of FOIA? The biggest change would be to encourage the same commitment to releasing records as there is

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to protecting classified information and privacy. I am convinced that, until transparency is built into each phase of governance, the culture of secrecy will prevail. Specifically, Congress could:

- Go even further than legislation enacted in recent years to enforce reasonable deadlines and appropriate use of FOIA exemptions, building the current policy of the presumption of openness into the law.
- Provide more authority for the Office of Government Information Services and require agencies to comply with its recommendations.
- Require agencies to review plans for new computer and information systems with the express purpose of extracting public portions, just as it certifies privacy and security capabilities now.
- Encourage the Executive Branch to make disclosure a routine part of Paperwork Reduction Act information collection reviews. In addition, the government could review its need for each piece of truly confidential information. If it's never reported, it doesn't have to be redacted.
- Require proactive disclosure in a central location by cabinet-level agency of common types of records such as correspondence logs, calendars, FOIA logs, grant audits, lists final awards of contracts and grants and political appointees along with frequently requested records.

It is possible that these measures could allow more efficient use of scarce FOIA funding to respond more quickly and accurately. Building transparency into new systems – e-mail and case management systems, for example -- would reduce the work required to extract their records.

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Similarly, the effort that goes into justifying and defending each redaction is reduced when there are fewer to justify in the first place. Creating processes to produce small collections of electronic records on a regular schedule may end up costing less than responding to the inevitable intermittent large requests. Posting records proactively in an obvious virtual location might reduce the number and complexity of FOIA requests.

Mr. Chairman, you have called the public's access to records "a cornerstone of our democracy." I appreciate the efforts made by Congress and President Obama to open our government to scrutiny, even when that effort may reflect poorly on its performance. I worry, though, that recent changes cannot be seen as fully implemented or longstanding until the compliance with current policy and deadlines is more consistent, and a structure is erected to prevent this or the next president from reverting to secrecy.

There will be times when the need for records to hold government accountable conflicts with other, equally important values such as privacy and security. I believe journalists and their news organizations would be happy to negotiate and perhaps even litigate on these substantive matters if they could be assured that the law usually worked as it should.

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

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Opening Statement
Tom Fitton, President
Judicial Watch

"The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age"

Hearing of the U.S. Senate's Committee on the Judiciary

March 15, 2011, 226 Dirksen Senate Office Building

Good morning, I'm Tom Fitton, President of Judicial Watch. Judicial Watch is a conservative, non-partisan educational foundation dedicated to promoting transparency, accountability and integrity in government, politics and the law. We are the nation's largest and most effective government watchdog group.

Thank you, Chairman Leahy and Sen. Grassley for hosting this hearing. It is an honor for me, on behalf of Judicial Watch, to appear before this committee. I want to take some time to extend personal thanks to you, Chairman Leahy, and you, Senator Grassley, for not only your leadership on government transparency but your often unheralded work on behalf of government whistleblowers. You helped at least one of our clients many years ago, and I'm sure you've helped many other whistleblowers over the years. These brave folk are often alone in their efforts to expose government wrongdoing, so your help is crucial to saving jobs and careers.

Essential to Judicial Watch's anti-corruption and transparency mission is the Freedom of Information Act (FOIA). Judicial Watch used this tool effectively to root out corruption in the Clinton administration and to take on the Bush administration's penchant for improper secrecy. Founded in 1994, Judicial Watch has nearly 17 years' experience in using FOIA to advance the public interest. Judicial Watch is, without a doubt, the most active FOIA requestor and litigator operating today.

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

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

We have filed over 325 FOIA requests with the Obama administration. And we have filed 44 FOIA lawsuits in federal court against this administration.

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

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And once we're forced to go to federal court, the Obama administration continues to fight us tooth and nail. The Obama administration's litigious approach to FOIA is exactly the same as the Bush administration's – so one can imagine the difficulties we encounter litigating these issues in court against the Obama Justice Department.

Judicial Watch has been digging hard into the scandals behind the collapse of Fannie Mae and Freddie Mac and their role in helping trigger the global financial and related housing crises. A key component of this investigation involves the role political corruption played in the failure of adequate congressional oversight and the catastrophic collapse of these "government-sponsored enterprises" in 2008. That is why we filed a Freedom of Information Act (FOIA) lawsuit (*Judicial Watch, Inc. v. U.S. Federal Housing Finance Agency*, USDC Case No. 9-1537; http://www.judicialwatch.org/judicial-watch-v-u-s-federal-housing-finance-agency) against the Obama administration to get a hold of documents related to Fannie's and Freddie's campaign contributions over the last several election cycles.

Since American taxpayers are on the hook for trillions of dollars, potentially including already $153 billion alone for Fannie and Freddie, we deserve to know how and why this financial collapse occurred and who in Washington, D.C., is responsible.

Unfortunately the Obama administration disagrees.

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

Here is the exact language the Obama agency used in its court filing (http://www.judicialwatch.org/files/documents/2010/jw-v-fhfa-defmem4sj-01292010.pdf):

> ...Any records created by or held in the custody of the Enterprises (Fannie Mae and Freddie Mac) reflecting their political campaign contributions or policies, stipulations and requirements concerning campaign contributions necessarily are private corporate documents. They are not "agency records" subject to disclosure under FOIA.

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

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

independent directors, officers, and shareholders. Since that time, FHFA, a federal agency subject to FOIA, has assumed full legal custody and control of the records of these previously independent entities. Hence, these records are subject to FOIA like any other agency records.

In addition to the problem of walling off FHFA's control of our nation's mortgage market through Fannie and Freddie from public accountability, the Obama Treasury Department has been seemingly incapable of disclosing even basic information on the various government bailouts.

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

This Committee might also be interested to learn about the truth behind the Obama White House's repeated trumpeting of the release of Secret Service White House visitor logs.

In fact, the Obama administration is refusing to release tens of thousands of visitor logs and insists, repeating a Bush administration last-ditch legal position that the visitor logs are not subject to the Freedom of Information Act.

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

In the fall of 2009, Judicial Watch staff visited with senior White House official Norm Eisen, then-Special Counsel to the President for Ethics and Government, to discuss Judicial Watch's pursuit of the White House visitor logs. The White House encouraged us to publicly praise the Obama administration's commitment to transparency, saying it would be good for them and good for us. However, the Obama team refused to abandon their legally indefensible contention that Secret Service White House visitor logs are not subject to disclosure under FOIA law.

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

As with Fannie and Freddie, the Obama administration continues to advance its ridiculous and bogus claim that the visitor logs "are not agency records subject to the FOIA." But the Obama administration doesn't have a legal leg to stand on. As we noted in our original complaint (*Judicial Watch, Inc. v. United States Secret Service*, USDC Case No. 9-2312; http://www.judicialwatch.org/files/documents/2009/jw-v-usss-complaint-12072009.pdf) filed on December 7, 2009, the administration's claim "has been litigated and rejected repeatedly" by the courts. In fact, it has been rejected by every court that has considered it.

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To date, every court that has reached this issue has concluded that the White House Secret Service visitor logs are agency records and must be processed in response to a properly submitted FOIA request.

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

And now we know from published reports that White House officials have been meeting with lobbyists and interests at a nearby Caribou Coffee shop or across the street in an anonymous conference center to specifically prevent disclosure of visitors who might otherwise have their names disclosed as a result of visiting the White House complex itself.

On major issue after major issue, FOIA is ignored by this administration.

Many have been reading the news about the astonishing 1,000 + Obamacare waivers issued by the Department of Health and Human Services. Judicial Watch first began asking for documents about this issue last October. We sued in January. (*Judicial Watch, Inc. v. Department of Health & Human Services*, USDC Case No. 10-2328; http://www.judicialwatch.org/files/documents/2010/jw-v-hhs-complaint-12302010.pdf.) Five months after our initial request, we do not have one document about these highly controversial waivers. Given the obvious public interest in this matter, this stonewall seems to us nothing more than arrogant lawlessness.

My final example is the Department of Homeland Security's handling of a report detailing the agency's investigation of an illegal alien, Carlos Martinelly-Montano, who is charged with killing a Virginia nun in a drunken driving accident in August 2010. We asked for that report, was rebuffed, and so we sued last year. (*Judicial Watch, Inc. v. U.S. Department of Homeland Security*, USDC Case No. 10-2054; http://www.judicialwatch.org/files/documents/2010/jw-v-dhs-complaint-12022010.pdf.) The administration told the court that they would release this final report to us in late January. And then, when their own self-imposed deadline came, we were told the "final" report was actually a draft and they would not disclose it. The "final" report, we (and the court were told), was still being worked on. Well, we received that "final" report last week. It was dated November 24, 2010. Yet we had been told as recently as last month that it was still being edited! This gamesmanship and trifling with the courts is beyond the pale for an administration supposedly devoted to unprecedented transparency.

So on major transparency issues, the Obama administration has come down on the side of secrecy. The Obama administration's releasing "high value data sets" from government bureaucracies is meaningless in the face of key decisions to keep politically explosive material out of the public domain.

As far as Judicial Watch is concerned, the Obama administration gets a failing grade on transparency.

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

> Liberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge, as their great Creator, who does nothing in vain, has given them understandings, and a desire to know; but besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge; I mean, of the characters and conduct of their rulers.

Thank you.

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United States Department of State

Washington, D.C. 20520

MAR 28 2011

Case No.: 200501660

Mr. Jack O'Brien
11109 Belton Street
Upper Marlboro, MD 20774

Dear Mr. O'Brien:

I refer to your request dated April 1, 2004 to the Department of Justice for the release of certain material under the Freedom of Information Act (Title 5 USC Section 552). The Department of Justice has asked us to respond directly to you regarding two of the documents retrieved in response to your request, these documents being of UK origin.

We have determined that these two documents (numbered J2 and J6) may be released. They are enclosed.

We are pleased to have been of service to you.

Sincerely,

Al Galovich
Co-Director, Acting
Office of Information Programs and Services

Enclosures:
As stated.

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Rt Hon David Blunkett MP

The Right Honourable David Blunkett MP was appointed Home Secretary on 8 June 2001.

Mr Blunkett was first elected to Parliament in June 1987, representing the Sheffield Brightside seat. He was Opposition spokesman on Environment (Local Government) from 1988 - 92 and then Shadow Secretary of State for Health 1992 - 94, Education 1994 - 95 and Education and Employment when the Departments merged from 1995. From 2 May 1997, he served as Secretary of State for Education and Employment.

Born in June 1947, he was educated at the Sheffield School for the Blind, Royal Normal College for the Blind, Shrewsbury Technical College, Sheffield Richmond College of Further Education, the University of Sheffield and Huddersfield College of Education. He is a former member of the National Association of Teachers in Further and Higher Education; and is currently a member of the public service union UNISON.

His early political career was spent in local government, on the South Yorkshire County Council from 1973 - 77 and on Sheffield City Council from 1970 - 88, where he was chair of the Social Services Committee from 1976 - 80 and Leader from 1980 - 87.

Mr Blunkett has a National Certificate in Business Studies as well as A levels, a degree and Post Graduate Certificate in Education. He also has advanced RSA typing and 100 words per minute Braille shorthand.

His special interests range from education and local government to community development and citizenship and the role of civil society. He enjoys walking, sailing, music and poetry. Mr Blunkett has three sons.

Mr Blunkett said of his appointment:

> "I am privileged to have been appointed Home Secretary. It is one of the most challenging and potentially rewarding jobs in Government.
>
> "I will be looking to build on the foundations laid by my predecessor Jack Straw who has done an excellent job at the Home Office.
>
> "As new Home Secretary I will be looking to listen and learn.
>
> "But I enter this job with key priorities in mind: tackling crime, particularly violent crime and fighting those trafficking in drugs, people, or guns, with every available

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Date 3/2/2011 Exemption

http://www.homeoffice.gov.uk/ministers/blunkett.htm

tool at our disposal.

"I am very pleased indeed that the Prime Minister has asked me to take on the full co-ordination of our anti-drugs strategy which will be linked to our policy on tackling alcohol-related crime.

"The challenge is to remove the scourge of drugs from our communities. The job of the police and the well being of families are being bedevilled by not just drug pushers but the traffickers behind them who are making multi-million pound profits out of the misery of others.

"Overall, I want to play a significant role in the development of coherent social policy for the Government as a whole and look forward to being able to offer an holistic approach to the challenge ahead."

Home Office Ministers

List of Home Secretaries

Home Office front page

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Home Office

Home Secretary

The Honourable John Ashcroft
Attorney General of the United States of America
US Department of Justice
950 Pennsylvania Avenue, NW
Room 2107
Washington DC 20530
USA

11 OCT 2001

Dear John

NEW EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM

Since the appalling events of 11 September took place, the need for strong, swift extradition procedures between our two jurisdictions is all the greater. In my view they are now of paramount importance. You know that we in the United Kingdom will be willing, where we are able, to provide the greatest measure of assistance to your law enforcement agencies in their efforts to bring those implicated in those events to justice. In this context, I would like to reform the outdated provisions of the present US-UK extradition treaty, and bring it into force in the United Kingdom under simplified extradition legislation.

One key element in the treaty would be the retention of the provisions to disapply the political defence for terrorist offences. Always important, in these times such provisions are absolutely vital. Of course, those US terrorist cases which we are currently considering are being dealt with with our customary care and rigour.

I would be keen to hear your reaction to my proposal. You have my continuing assurance of my Government's support.

Best wishes.

David Blunkett

DAVID BLUNKETT
RESTRICTED – POLICY

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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
March 15, 2011

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Committee On The Judiciary
Hearing On "The Freedom Of Information Act: Ensuring Transparency And Accountability In The Digital Age"
March 15, 2011

Today, the Committee holds an important hearing on the Freedom of Information Act (FOIA). When Congress enacted FOIA more than 40 years ago, this watershed law ushered in a new and unprecedented era of transparency in government. Four decades later, FOIA continues to give citizens access to the inner workings of their government and to guarantee the right to know for all Americans.

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 public access to government information, officials can make decisions in the shadows, sometimes in collusion with special interests, escaping accountability for their actions. In the digital age, FOIA remains an indispensable tool in protecting the people's right to know.

As Americans from every corner of our Nation commemorate Sunshine Week 2011, they have many good reasons to cheer. I am pleased that one of President Obama's first official acts when he took office was to issue a historic new directive to strengthen FOIA. Just yesterday, the Department of Justice launched the new FOIA.gov website, which compiles all of the Department's FOIA data in one online location.

The Attorney General has also issued new FOIA guidance to help make our government agencies more open to the American people. Last year, the Obama administration also issued another FOIA memorandum instructing federal agencies to update their FOIA training and guidance.

The Congress has also made good progress in strengthening FOIA. Last year, the Senate unanimously passed the Faster FOIA Act – a bill that Senator Cornyn and I introduced to establish a bipartisan Commission to study FOIA and to make recommendations to Congress on ways to further improve FOIA. We will reintroduce this bill later this week.

I hope that the Congress will quickly enact this good government legislation.

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There is also reason to cheer the recent unanimous decision by the Supreme Court in Federal Communications Commission v. AT&T Inc., concluding that corporations do not have a right of personal privacy under the Freedom of Information Act. I am pleased that, in reaching this decision, our highest court honored congressional intent about the narrow scope of the personal privacy exemption to FOIA.

These FOIA victories have made our Government more open and accountable to the American people. But, our Government is still not as open and accessible to its citizens as it could – and should – be.

Implementation of FOIA continues to be hampered by the increasing use of exemptions – especially under section (b)(3) of FOIA.

Last year, Senators Grassley, Cornyn and I worked together on a bipartisan basis to repeal an overly-broad FOIA (b)(3) exemptions in the historic Wall Street reform bill, so that the American public will have access to important information about the state of our financial system.

It is also essential that the American people have a FOIA law that is not only strengthened by reform, but properly enforced. A report released yesterday by the National Security Archive found that, while there has been some progress in implementing the President's FOIA reforms, only about half of the Federal agencies surveyed have taken concrete steps to update their FOIA guidance and assess their FOIA resources. FOIA delays also continue to be a problem. Twelve of the agencies surveyed had pending FOIA requests that were more than six years old, according to the report. That is simply unacceptable.

I am pleased that we have representatives from the Department of Justice and the Office of Government Information Services to discuss the Obama administration's efforts to address these concerns and strengthen FOIA. We are also fortunate to have a distinguished panel of FOIA experts to provide valuable perspectives on the importance of FOIA in guaranteeing the public's right to know.

I have said many times before – during both Democratic and Republican administrations – that freedom of information is neither a Democratic issue, nor a Republican issue. It is an American issue. I value the bipartisan partnership on FOIA matters that I have shared with Senator Cornyn over the years. I will continue to work with Senator Cornyn, Senator Grassley and others on this Committee to advance freedom of information, so that the right to know is preserved for future generations. I thank all of the distinguished witnesses that are appearing before the Committee today. I look forward to today's discussion.

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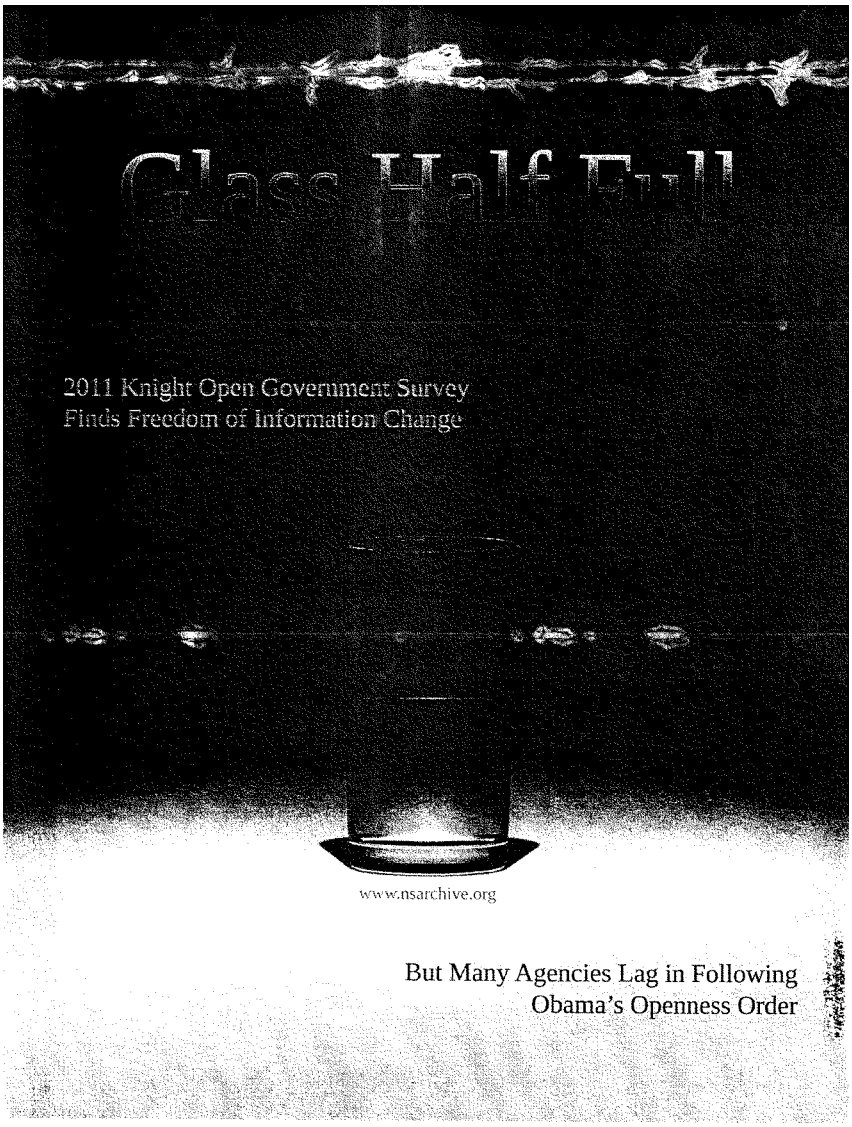
Glass Half Full
2011 Knight Open Government Survey
Finds Freedom of Information Change
www.nsarchive.org
But Many Agencies Lag in Following
Obama's Openness Order

THE KNIGHT OPEN GOVERNMENT SURVEY 2011

CONDUCTED BY
THE NATIONAL SECURITY ARCHIVE
THE GEORGE WASHINGTON UNIVERSITY

WWW.NSARCHIVE.ORG

MARCH 14, 2011

EXECUTIVE SUMMARY

Washington DC, 14 March 2011 – The Obama administration is only about halfway toward its promise of improving Freedom of Information responsiveness among federal agencies, according to the new Knight Open Government Survey by the National Security Archive, released today for Sunshine Week at www.nsarchive.org.

On his first full day in office, January 21, 2009, President Obama issued a presidential memorandum instructing federal agencies to "usher in a new era of open government." In March 2010, however, the 2010 Knight Open Government Survey found that only 13 out of 90 agencies had actually made concrete changes in their FOIA procedures. The resulting national headlines sparked a new White House call to all agencies to show concrete change. This year, the 2011 Knight Open Government Survey found that half of the federal agencies have complied – up from 13 to 49.

"At this rate, the president's first term in office will be over by the time federal agencies do what he asked them to do on his first day in office," commented Eric Newton, senior adviser to the president at the John S. and James L. Knight Foundation. "Freedom of information laws exist to help all of us get the information we need for this open society to function. Yet government at all levels seems to have a great deal of trouble obeying its own transparency laws."

Modeled after the California Sunshine Survey and subsequent state "FOI Audits," the Archive's series of Knight Open Government Surveys since 2002 use open government laws to determine whether or not agencies are obeying those same laws. Recommendations from previous Knight Open Government Surveys led directly to laws and executive orders which have: set explicit customer service guidelines, mandated FOIA backlog reduction, assigned individualized FOIA tracking numbers, forced agencies to report the average number of days needed to process requests, and revealed the (often embarrassing) ages of the oldest pending FOIA requests.

"The Obama administration told us last year that one year was too short a time to show real change," said Tom Blanton, director of the National Security Archive. "This year's Knight Survey reveals a glass half full of open government, and some persisting deep problems including FOIA requests marooned for years in never-ending referrals among agencies."

The 2011 Knight Open Government Survey team filed FOIA requests with the 90 federal agencies that have chief FOIA officers, asking for copies of concrete changes in their FOIA regulations, manuals, training materials, or processing guidance as a result of the "Day One" Obama memorandum, and the March 2010 White House memorandum from then-Chief of Staff Rahm Emanuel and White House Counsel Bob Bauer. The Emanuel-Bauer Memo incorporated a two-step process, telling agencies to 1) update all FOIA material, and 2) assess whether FOIA resources were adequate.

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Several agencies demonstrated significant changes in their processes, major upgrades to their Web postings on FOIA, and improved responsiveness to requesters. But others showed no change as yet, or failed even to respond in a timely fashion to the Knight Survey requests. In one egregious case, the U.S. Postal Service stated it had "no responsive records." It said it had never received the Emanuel-Bauer memo.

"Perhaps the Postal Service lost that memo in the mail," commented Nate Jones, the Archive's FOIA coordinator who managed the Knight Survey requests. He noted that 17 agencies are still working on the request after 117 business days when the law requires a reply within 20 business days, and that four agencies did not even acknowledge receiving the Archive's FOIA request despite numerous follow-up calls and faxes. "That indifference toward FOIA shows just how far some agencies lag behind implementing the law that President Obama called 'a profound national commitment to ensuring an open government,'" Jones said.

In particular, the Archive found significant change among the responsive agencies in the area of discretionary releases of information. Before the Obama proclamations, agencies withheld most drafts of internal documents, and even staff-level reports, under the 5th exemption to the FOIA that applies to "pre-decisional" or "deliberative process" information. Openness advocates had long argued that this kind of material was exactly what was necessary to bring the greatest transparency and accountability to government decision-making. Now, agency reporting shows declining use of the so-called "b(5)" exemption, and the 2011 Knight Survey even received multiple responses from the high-scoring agencies that included their own drafts and internal e-mails about how to respond to the Emanuel-Bauer memo. A standout here was the Department of the Interior, which provided copies of e-mail exchanges noting how the agency's own IT restrictions kept FOIA officers from seeing key FOIA blogs – a problem no doubt now remedied.

Agency responses to the Archive's FOIA requests also highlighted the real potential of online proactive disclosure as the most efficient way to inform the public and reduce the burden of individual request processing. The highest-scoring agencies in the 2011 Knight Survey provided multiple examples of online publication of materials that previously had to be requested under FOIA, but now are accessible with the click of a mouse. A notable example here was the Consumer Product Safety Commission, which finally this month is fulfilling a Congressional mandate from 2008 to put online its consumer complaints database – dealing with product defects in baby cribs, drywall, and the like. Manufacturers and Congressional critics had threatened to hold up the public's online access to this important safety information, but Obama administration commitment clearly carried the day.

In contrast, 12 federal agencies reported still-pending FOIA requests more than six years old, when the law requires a 20-business-day response time. The Archive's findings suggest a major part of the problem is the "daisy-chain" of referrals between agencies, since 10 out of the 12 with ancient requests reported similarly ancient referrals.

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2011 Knight Open Government Survey

This chart shows which agencies have reported action on the president's open government order:

AS OF 3/10/11

FEDERAL AGENCY	CONCRETE ACTION ON TWO STEPS	CONCRETE ACTION ON ONE STEP	DOCUMENTS RELEASED, NO CONCRETE ACTION	NO DOCUMENTS	WITHHELD DOCUMENTS	NO FINAL RESPONSE TO FOIA REQUEST	NO ACKNOWLEDGEMENT OF FOIA REQUEST
AMTRAK	■						
COMMISSION ON CIVIL RIGHTS	■						
DEPARTMENT OF AGRICULTURE	■						
DEPARTMENT OF DEFENSE	■						
DEPARTMENT OF THE INTERIOR	■						
DEPARTMENT OF HEALTH AND HUMAN SERVICES	■						
NUCLEAR REGULATORY COMMISSION	■						
OFFICE OF GOVERNMENT ETHICS	■						
OCCUPATIONAL SAFETY & HEALTH REVIEW COMM.	■						
SURFACE TRANSPORTATION BOARD	■						
DEPARTMENT OF TREASURY	■						
TENNESSEE VALLEY AUTHORITY	■						
DEPARTMENT OF VETERANS AFFAIRS	■						
CORPORATION FOR NAT'L & COMMUNITY SERVICE		■					
UNITED STATES COPYRIGHT OFFICE		■					
COMMODITY FUTURES TRADING COMMISSION		■					
CONSUMER PRODUCT SAFETY COMMISSION		■					
DEPARTMENT OF HOMELAND SECURITY		■					
OFFICE OF THE DIRECTOR OF NAT'L. INTELLIGENCE		■					
DEPARTMENT OF LABOR		■					
OFFICE OF NATIONAL DRUG CONTROL POLICY		■					
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION		■					
ENVIRONMENTAL PROTECTION AGENCY		■					
FEDERAL ENERGY REGULATORY COMMISSION		■					
FEDERAL TRADE COMMISSION		■					
GENERAL SERVICES ADMINISTRATION		■					
NATIONAL ARCHIVES & RECORDS ADMINISTRATION		■					
BROADCASTING BOARD OF GOVERNORS		■					
DEFENSE NUCLEAR FACILITIES SAFETY BOARD		■					
FEDERAL DEPOSIT INSURANCE CORPORATION		■					
FEDERAL HOUSING FINANCE AGENCY		■					
FEDERAL LABOR RELATIONS AUTHORITY		■					
FEDERAL OPEN MARKET COMMITTEE		■					
FEDERAL RESERVE SYSTEM		■					
DEPARTMENT OF HOUSING & URBAN DEV.		■					
INTER-AMERICAN FOUNDATION		■					
U.S. INTERNATIONAL TRADE COMMISSION		■					
FEDERAL MINE SAFETY & HEALTH REVIEW COMM.		■					
NATIONAL CAPITAL PLANNING COMMISSION		■					
NATIONAL CREDIT UNION ADMINISTRATION		■					
NATIONAL LABOR RELATIONS BOARD		■					
NATIONAL MEDIATION BOARD		■					
NATIONAL SCIENCE FOUNDATION		■					
OFFICE OF MANAGEMENT AND BUDGET		■					
OFFICE OF SCIENCE AND TECHNOLOGY POLICY		■					

FEDERAL AGENCY	CONCRETE ACTION ON TWO STEPS	CONCRETE ACTION ON ONE STEP	DOCUMENTS RELEASED, NO CONCRETE ACTION	NO DOCUMENTS	WITHHELD DOCUMENTS	NO FINAL RESPONSE TO FOIA REQUEST	NO ACKNOWLEDGEMENT OF FOIA REQUEST
PENSION BENEFIT GUARANTY CORPORATION		■					
SMALL BUSINESS ADMINISTRATION		■					
SECURITIES AND EXCHANGE COMMISSION		■					
SOCIAL SECURITY ADMINISTRATION		■					
FEDERAL COMMUNICATIONS COMMISSION			■				
AMERICAN BATTLE MONUMENTS COMMISSION							
COMM. FOR PURCHASE FROM BLIND OR DISABLED							
DEPARTMENT OF TRANSPORTATION							
FARM CREDIT SYSTEM INSURANCE CORPORATION							
FEDERAL MEDIATION AND CONCILIATION SERVICE							
INTERNATIONAL BOUNDARY & WATER COMMISSION							
MILLENNIUM CHALLENGE CORPORATION							
NATIONAL ENDOWMENT FOR THE ARTS							
NATIONAL INDIAN GAMING COMMISSION							
OVERSEAS PRIVATE INVESTMENT CORPORATION							
PEACE CORPS							
THE POSTAL REGULATORY COMMISSION							
RAILROAD RETIREMENT BOARD							
SELECTIVE SERVICE SYSTEM							
U.S. TRADE AND DEVELOPMENT AGENCY							
FEDERAL RETIREMENT THRIFT INVESTMENT BRD.							
U.S. POSTAL SERVICE							
INSTITUTE OF MUSEUM AND LIBRARY SERVICES					■		
NATIONAL ENDOWMENT FOR THE HUMANITIES					■		
AGENCY FOR INTERNATIONAL DEVELOPMENT						■	
COUNCIL ON ENVIRONMENTAL QUALITY						■	
CENTRAL INTELLIGENCE AGENCY						■	
DEPARTMENT OF COMMERCE						■	
DEPARTMENT OF ENERGY						■	
DEPARTMENT OF JUSTICE						■	
DEPARTMENT OF STATE						■	
DEPARTMENT OF EDUCATION						■	
EXPORT-IMPORT BANK						■	
FEDERAL ELECTION COMMISSION						■	
FEDERAL MARITIME COMMISSION						■	
NATIONAL AERONAUTICS & SPACE ADMIN.						■	
NATIONAL TRANSPORTATION SAFETY BOARD						■	
OFFICE OF PERSONNEL MANAGEMENT						■	
OFFICE OF SPECIAL COUNSEL						■	
OFFICE OF THE U.S. TRADE REPRESENTATIVE						■	
PUBLIC HEALTH SERVICE						■	
CHEMICAL SAFETY & HAZARD INVESTIGATION BRD.							■
COURT SERVICES & OFFENDER SUPERVISION AGY.							■
LEGAL SERVICES CORPORATION							■
MERIT SYSTEMS PROTECTION BOARD							■

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Previous Knight Open Government Surveys prepared by the National Security Archive include:

- Sunshine and Shadows: The Clear Obama Message For Freedom of Information Meets Mixed Results (March 15, 2010)
http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB308/index.htm

- Mixed Signals, Mixed Results: How President Bush's Executive Order on FOIA Failed to Deliver (March 16, 2008)
http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB246/index.htm

- 40 Years of FOIA, 20 Years of Delay (July 2, 2007)
http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/index.htm

- File Not Found: 10 Years After E-FOIA, Most Federal Agencies are Delinquent (March 12, 2007)
http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/index.htm

- Pseudo-Secrets: A Freedom of Information Audit of the U.S. Government's Policies on Sensitive Unclassified Information (March 14, 2006)
http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB183/press.htm

- A FOIA Request Celebrates Its 17th Birthday: A Report on Federal Agency FOIA Backlog (March 12, 2006)
http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB182/press.htm

- Justice Delayed is Justice Denied: The Ten Oldest Pending FOIA Requests (November 17, 2003)
http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB102/press.htm

- The Ashcroft Memo: "Drastic" Change or "More Thunder Than Lightning"? (March 14, 2003)
http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/press.htm

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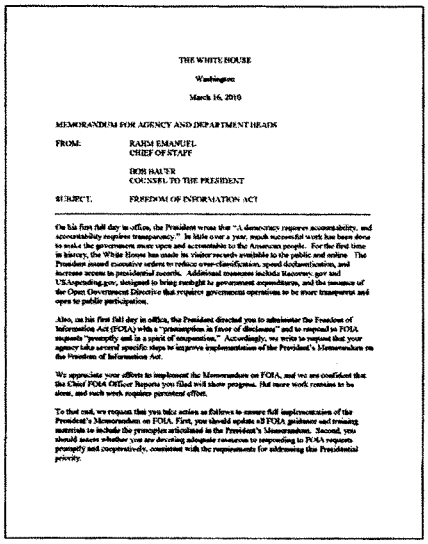
INTRODUCTION

On his first full day in office, January 21, 2009, President Obama issued a presidential memorandum instructing federal agencies to "usher in a new era of open Government."[1] The 2010 Knight Open Government Survey, *Sunshine and Shadows: The Clear Obama Message for Freedom of Information Meets Mixed Results,* found that only 13 out of 90 agencies had actually responded to the president's order with concrete changes in their FOIA procedures during the first year of Obama's administration.[2] Norm Eisen, the special counsel to the president for ethics and government reform, responded to the survey's results by telling *The New York Times* that, "it will probably take another year before the changes are fully seen."[3]

Sparked by national headlines regarding the openness gap, White House Chief of Staff Rahm Emanuel and White House Counsel Bob Bauer sent a memo on March 16, 2010 to each agency that explained, "more work remains to be done." This work included two "specific steps:"[4]

- "Updat[ing] all FOIA guidance and training materials to include the principles articulated in the President's Memorandum."
- And, "Assess[ing] whether you are devoting adequate resources to responding to FOIA requests promptly and cooperatively."



THE WHITE HOUSE

Washington

March 16, 2010

MEMORANDUM FOR AGENCY AND DEPARTMENT HEADS

FROM: RAHM EMANUEL
CHIEF OF STAFF

BOB BAUER
COUNSEL TO THE PRESIDENT

SUBJECT: FREEDOM OF INFORMATION ACT

On his first full day in office, the President wrote that "A democracy requires accountability, and accountability requires transparency." In little over a year, much successful work has been done to make the government more open and accountable to the American people. For the first time in history, the White House has made its visitor records available to the public and online. The President issued executive orders to reduce over-classification, speed declassification, and increase access in presidential records. Additional measures include Recovery.gov and USAspending.gov, designed to bring sunlight to government expenditures, and the issuance of the Open Government Directive that requires government operations to be more transparent and open to public participation.

Also, on his first full day in office, the President directed you to administer the Freedom of Information Act (FOIA) with a "presumption in favor of disclosure" and to respond to FOIA requests "promptly and in a spirit of cooperation." Accordingly, we write to request that your agency take several specific steps to improve implementation of the President's Memorandum on the Freedom of Information Act.

We appreciate your efforts to implement the Memorandum on FOIA, and we are confident that the Chief FOIA Officer Reports you filed will show progress. But more work remains to be done, and such work requires persistent effort.

To that end, we request that you take action as follows to ensure full implementation of the President's Memorandum on FOIA. First, you should update all FOIA guidance and training materials to include the principles articulated in the President's Memorandum. Second, you should assess whether you are devoting adequate resources to responding to FOIA requests promptly and cooperatively, consistent with the requirements for addressing this Presidential priority.

One year later – encouraged by Eisen's reaction – the National Security Archive conducted the 2011 Knight Open Government Survey, *Glass Half Full: Freedom of Information Change, But Many Agencies Lag in Following Obama's Openness Order*, to audit the federal agencies' progress on FOIA. The National Security Archive utilized the same methodology it employed in its eight previous Open Government Surveys – using Freedom of Information Act requests to test FOIA compliance by agencies. In this case, the Archive requested documents that would demonstrate whether the agencies had fulfilled the two specific steps mandated by the Emanuel-Bauer memo.

[1] http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/
[2] http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB308/index.htm
[3] http://www.nytimes.com/2010/03/15/us/politics/15open.html?_r=1
[4] http://www.whitehouse.gov/sites/default/files/rss_viewer/foia_memo_3-16-10.pdf

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KEY FINDINGS

The 2011 Knight Open Government Survey finds that the Obama administration – which the president pledged would be the "most open and transparent administration in history" – is only about halfway toward its promise of improving Freedom of Information Act responsiveness among federal agencies. In summary, systematic Freedom of Information requests by the National Security Archive found:

- 49 agencies took concrete action in response to the Emanuel-Bauer memo, but only 24 agencies actually updated their FOIA training materials and guidance, and only 13 agencies fulfilled both steps required by the Emanuel-Bauer memo.

- 41 agencies failed to complete either of the steps mandated by the Emanuel-Bauer memo: 17 could not provide concrete records showing that they had followed the memo's instructions; two agencies withheld documents by incorrectly citing FOIA exemptions; 17 agencies are still working on the request after more than 100 business days (even though only 20 business days are allowed by law); one agency provided documents which showed no evidence of following the memo; and four agencies have not even acknowledged our request despite numerous calls and faxes.

- The Archive's analysis of FOIA data reported by the agencies on their releases and denial decisions shows mixed progress with a tentative move toward greater releases of documents through FOIA, although some agencies that were improving last year have now regressed.

- Ancient requests – as old as 18 years – still languish in the FOIA system. Twelve agencies have outstanding FOIA requests older than six years. This year's Survey showed that the albatross-like interagency consultation process is a major contributor to delay.

- Expenditure data reported by agencies show the total cost of FOIA is less than $1.24 per American, per year. Isn't it worth the cost of a pack of gum each year to know what your government is up to?

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RECOMMENDATIONS

Based on the findings of the 2011 Knight Open Government Survey, the National Security Archive urges White House Chief of Staff William Daley and White House Counsel Bob Bauer to issue a new memo addressed to all agency heads telling them to speed up their adoption of the President's Freedom of Information policies. Without renewed and repeated White House pressure, many agencies will continue to lag. The new "Daley-Bauer Memo" should instruct agencies to:

- Change their training manuals and guidance materials immediately to reflect the President's presumption for disclosure.
- Create a high-level "openness team" within each agency to address Freedom of Information performance together with the whole spectrum of the President's openness reforms.

These two marching orders would reinforce the best practices found by the Archive in our series of Knight Open Government Surveys over the past nine years. The Emanuel-Bauer Memo definitely had an effect on agencies, but more is needed.

Only 24 out of 90 federal agencies this year could show concrete changes to their actual training materials on FOIA as a result of the new Obama policies, and unless bureaucracies make such tangible changes, the White House calls for openness will produce sound but not substance.

Similarly, agencies that showed the most progress across multiple metrics – not only FOIA responsiveness but online publication of information and datasets – tended to be the ones that applied real leadership to the challenge, with groups of senior officials engaged. Such "openness teams" included top officials not only from the FOIA office, but the public relations and communications shops, the counsel's office, the chief information officer, technology experts, senior fiscal and operational managers, and the agency head or deputy.

The challenge for these "openness teams" is wide-ranging. In the first two years of the Obama administration, the President's openness reforms included the "Day One" memorandum on the presumption of openness, the Attorney General's memorandum on FOIA, the Open Government Directive, the expansion of online and proactive disclosure of information, the Executive Order placing restrictions on the proliferation of "controlled unclassified information," and the Executive Order calling for fundamental classification reviews in those agencies holding security classified information, among other initiatives. These laudable reforms deserve highest-level and coordinated attention in each agency, not the business-as-usual "stovepipe" approach.

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IMPLEMENTATION OF OBAMA FREEDOM OF INFORMATION ACT POLICY AND PROCEDURE

In the 2010 Knight Open Government Survey, only 13 of the 90 agencies provided documentation that demonstrated concrete changes in guidance, training materials, or practices. Following the publication of those results, White House Chief of Staff Rahm Emanuel and White House Counsel Bob Bauer stated to federal agencies that "more work remains to be done" in implementing President Obama's January 21, 2009 memorandum on the Freedom of Information Act and Attorney General Eric Holder's March 19, 2009 memorandum on required FOIA practices.

The March 16, 2010 Emanuel-Bauer Memorandum instructed federal agencies to undertake "several specific steps" to fulfill the FOIA requirements stipulated by the President and Attorney General. Using the system to test the system, the National Security Archive sent FOIA requests to 90 federal agencies and departments asking for documents related to the two steps specifically mentioned in the Emanuel-Bauer memorandum:[5]

- "updat[ing] all FOIA guidance and training materials to include the principles articulated in the President's Memorandum"
- "assess[ing] whether you are devoting adequate resources to responding to FOIA requests promptly and cooperatively."

The agencies' compliance or non-compliance with these two steps is the basis for the 2011 Knight Open Government Survey. Responsive agencies were graded on whether or not they showed concrete steps toward addressing either demand. The 2010 Knight Survey's metrics were also integrated to note the level of response across all agencies and the level of improvement or regression since the 2010 Knight Survey.

The metric used to gauge agency responses to the FOIA request is as follows:

1) **Two Steps Forward**: Agency final response yields documents that demonstrate both steps of the Emanuel-Bauer memorandum being fulfilled.
2) **One Step Forward**: Agency final response yields documents that demonstrate one of the steps of the Emanuel-Bauer memorandum being fulfilled.

[5] The 90 agencies are listed on the Department of Justice Office of Information Policy website, available at http://www.justice.gov/oip/foiacontacts.htm.

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3) **No Documents**: Agency final response states that the agency has no documents pertaining to the FOIA request, or agency final response yields documents but they are withheld under FOIA exemption b(5)[6].
4) **No Decision**: Agency has acknowledged receipt of the FOIA request, but has not sent a final decision.
5) **No Response**: Agency did not acknowledge receipt of the FOIA request.

To fulfill the first step asked for by the Emanuel-Bauer Memorandum, agencies had to provide evidence that they had updated their FOIA guidance and training materials to "include the principles articulated in the President's memorandum." Similarly, the second step required evidence of an agency assessment of resources dedicated to responding to FOIA requests "promptly and cooperatively." Internal communications discussing "intentions" or "plans" without evidence of any action taken, or mere dissemination of the Emanuel-Bauer, Holder, or Obama memoranda were not considered concrete. Furthermore, attendance at FOIA training sessions without evidence of a review of training material used was not considered concrete.

Fifty of the 90 agencies (55%) surveyed sent final decisions that contained documents or links to FOIA websites with relevant literature. Forty-nine of these agencies are cataloged under the "One Step Forward" or "Obama Two-Step" category. These results represent marked improvement in overall Executive Branch efforts to comply with the FOIA policies put forward by President Obama[7] compared with the 13 of 90 agencies (14%) who performed similarly in the 2010 Knight Survey.

[6] Privileged interagency or intra-agency memoranda or letters.
[7] Full documentation of the survey as of 3/13/2011 is available in the Appendices.

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"The Obama Two-Step" *(13 of 90, 14%)*

Agencies that Fulfilled Both Steps (13)

- Amtrak
- Commission on Civil Rights
- Department of Agriculture
- Department of Defense
- Department of the Interior
- Department of Health and Human Services
- Nuclear Regulatory Commission
- Office of Government Ethics
- Occupational Safety and Health Review Commission
- Surface Transportation Board
- Department of Treasury
- Tennessee Valley Authority
- Department of Veterans Affairs

13 agencies fulfilled both steps of the Emanuel-Bauer memorandum. Nine agencies also showed concrete responses to the Obama administration's FOIA policy in last year's Survey.[8] Documents from these "best FOIA practice agencies" include high-level conversations about improving openness, revised training materials, and internal deliberations about FOIA which likely would have previously been denied by the FOIA exemption that covers pre-decisional agency process. Here is one example of discretionary release, by the Department of the Interior, regarding Obama's day-one memo on the FOIA.

Date 01/23/2009 07:21 AM
Subject: RE: FOIA Memorandum Issued by President Obama - Jan. 21, 2009

Alex,

I do find a bit of humor in not being able to visit this blog site on FOIA because we at DOI are blocking access.

If you have another link or can get one unblocked, that would be great.

Roy

Since the Department of the Interior began discussing how to improve their FOIA practices soon after Obama's memo, released improved training materials, and granted public access to internal deliberative emails, it is also likely that the Department was quick to stop blocking its employees from accessing blogs about FOIA.

[8] The Department of Defense, Department of Health and Human Services, Department of the Interior, Environmental Protection Agency, Federal Energy Regulatory Commission, Nuclear Regulatory Commission, Occupational Safety and Health Review Commission, Social Security Administration, Surface Transportation Board.

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Updated FOIA Training Materials and Guidance (11)

- Commodity Futures Trading Commission
- Department of Homeland Security
- Office of the Director of National Intelligence
- Department of Labor
- Office of National Drug Control Policy
- Equal Employment Opportunity Commission
- Environmental Protection Agency
- Federal Energy Regulatory Commission
- Federal Trade Commission
- General Services Administration
- National Archives and Records Administration

Assessment of Resource Allocation (25)

- Broadcasting Board of Governors
- Corporation for National and Community Service
- Consumer Product Safety Commission
- Defense Nuclear Facilities Safety Board
- Federal Deposit Insurance Corporation
- Federal Housing Finance Agency
- Federal Labor Relations Authority
- Federal Open Market Committee
- Federal Reserve System
- Department of Housing and Urban Development
- Inter-American Foundation
- U.S. International Trade Commission
- Federal Mine Safety and Health Review Commission
- National Capital Planning Commission
- National Credit Union Administration
- National Labor Relations Board
- National Mediation Board
- National Science Foundation
- Office of Management and Budget
- Office of Science and Technology Policy
- Pension Benefit Guaranty Corporation
- Small Business Administration
- Securities and Exchange Commission
- Social Security Administration
- United States Copyright Office

One Step Forward *(36 of 90, 40%)*

Among the 36 agencies that have fulfilled only one of the steps in the Emanuel-Bauer memorandum, 17 provided some documentation of either training session attendance or outlines for fulfilling both Emanuel-Bauer steps in the future.[9] The Federal Communications Commission did not demonstrate either of the steps in a concrete manner, but did indicate that the Emanuel-Bauer Memorandum and guidance from the Department of Justice FOIA Post[10] were circulated and discussed.

This 2011 Knight Survey gives credit to 49 agencies for taking concrete steps to improve FOIA, even though the findings show only 24 of those agencies actually addressed the Emanuel-Bauer call for them to update their FOIA guidance and training materials. Therefore, calling the results a "Glass Half Full" may well overstate the degree to which agencies are getting the message.

[9] Broadcasting Board of Governors, Corporation for National and Community Service, Consumer Product Safety Commission, Defense Nuclear Facilities Safety Board, Department of Labor, Environmental Protection Agency, Federal Housing Finance Agency, Federal Labor Relations Authority, Federal Reserve System, Department of Housing and Urban Development, National Labor Relations Board, National Credit Union Administration, National Mediation Board, Office of Science and Technology Policy, Small Business Administration, Securities and Exchange Commission, Social Security Administration.

[10] http://www.justice.gov/oip/foiapost/mainpage.htm.

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No Records (17 of 90, 18%)

- American Battle Monuments Commission
- Commission for Purchase From Blind or Disabled
- Department of Transportation
- Farm Credit System Insurance Corporation
- Federal Mediation and Conciliation Service
- International Boundary and Water Commission
- Millennium Challenge Corporation
- National Endowment for the Arts
- National Indian Gaming Commission
- Overseas Private Investment Corporation
- Peace Corps
- Postal Regulatory Commission
- Railroad Retirement Board
- Selective Service System
- U.S. Trade and Development Agency
- Federal Retirement Thrift Investment Board
- U.S. Postal Service

Documents Withheld (2 of 90, 2%)

- Institute of Museum and Library Services
- National Endowment for the Humanities

"Not Even Rahm Emanuel Could Reach" *(19 of 90, 21%)*

The agencies that claimed no records could be found or withheld documents under the b(5) exemption show signs of poor or obtuse FOIA practices. Documents demonstrating concrete changes should be publicly available – other agencies with positive responses showed action through annual FOIA officer reports and updated FOIA guides. In their response, the United States Postal Service claimed that they had not received the Emanuel-Bauer memorandum, and thus had no documents pertaining to it.

One of the more interesting responses we received was from the United States Postal Service which wrote that it had "no record" of receiving the "Emanuel-Bauer Memo." Despite this claim, the USPS added that it had taken steps to address the very issues that the memo identified. However, our methodology identified the USPS as responding with "no records." In the US federal bureaucracy, if there is no paper trail, it is likely that nothing substantial happened.

RECORDS OFFICE

UNITED STATES POSTAL SERVICE

November 22, 2010

Nate Jones
The George Washington University
The National Security Archive
Gelman Library, Suite 701
2130 H Street, NW
Washington, DC 20037

RE: FOIA Case No. 2011-FPRO-00002

Dear Mr. Jones:

This is in response to your Freedom of Information Act (FOIA) request dated October 1, 2010 in which you seek access to Postal Service records. You requested:

> **All documents related to "the several specific steps" that White House Chief of Staff Rahm Emanuel and White House Counsel to the President Bob Bauer instructed your agency to take in a 16 March 2010 memo to all agency and department heads.**

This office consulted with the Office of the Postmaster General, the Office of the Chief FOIA Office and Consumer Advocate, and the Law Department. We also searched our own Records Office files. We have no record of receiving this memo, and therefore have no responsive records. However, as general information, we have taken steps in the last two years to address the issues identified in the memo.

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- Agency for International Development
- Council on Environmental Quality
- Central Intelligence Agency
- Department of Commerce
- Department of Energy
- Department of Justice
- Department of State
- Department of Education
- Export-Import Bank
- Federal Election Commission
- Federal Maritime Commission
- National Aeronautics and Space Administration
- National Transportation Safety Board
- Office of Personnel Management
- Office of Special Counsel
- Office of the United States Trade Representative
- Public Health Service

"Still on Hold" *(17 of 90, 18%)*

These agencies have acknowledged receipt of the National Security Archive FOIA request, but have not sent a final decision. FOIA requires a response within 20 business days (plus a 10-day extension for "unusual circumstances") – 117 business days have passed since the FOIA request was submitted.

The documentation required to demonstrate the most basic level of compliance with the Emanuel-Bauer Memorandum – evidence of an assessment of resources dedicated to FOIA – should be at the desk of every FOIA Officer (often as part of the most recent FOIA Officer Report). As previously noted, agencies unable to provide concrete evidence of updated training material and guidance often cited attendance at Department of Justice FOIA training sessions. Yet the Department of Justice has been unable so far to present these frequently mentioned materials. Why that is the case is unknown, but it is a telling commentary on Justice's ostensible leadership in this area.

"AWOL on FOIA" **(4 of 90, 4%)**

- Chemical Safety and Hazard Investigation Board
- Court Services and Offender Supervision Agency
- Legal Services Corporation
- Merit Systems Protection Board

These agencies have failed even to acknowledge receipt of the National Security Archive FOIA request. This is despite at least two follow-up telephone calls to each agency's FOIA liaison. In the 2010 Knight Survey, 17 of 90 agencies fell into this category. The evaluation of this response remains the same: the failure of these agencies to respond within 117 business days raises serious concerns when the law *requires a response* within 20 business days. Three agencies remain in this category for a consecutive year.[11] The chief FOIA officers for these agencies are:

- **Renee Barley, FOIA Officer, Court Services and Offender Supervision Agency, (202) 220-5355**
- **Patricia Batie, FOIA Officer, Legal Services Corporation, (202) 295-1625**
- **Arlin Winefordner, FOIA/PA Officer, Merit Systems Protection Board, (202) 653-7200 ext. 1162**

[11] Court Services and Offender Supervision Agency, Legal Services Corporation, Merit Systems Protection Board.

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RELEASE AND DENIAL DECISIONS: BIG STEPS, SMALL STEPS – GENERALLY FORWARD

Last year, the Department of Justice pointed to an increase in the "records released in full" response to FOIA requests to demonstrate that it had embraced the Obama and Holder FOIA policies of discretionary release.[13] In response, the 2010 Knight Survey tracked the number of requests granted, granted in part, and denied to see if more information was indeed reaching the public. This year's Survey used the same methodology to track the Obama administration's progress.

AGENCY	Percent Change: Requests Released in Full	Percent Change: Requests Released in Part	Percent Change: Requests Denied in Full
Energy	20.8	64.5	-7.4
Trans.	19	4.8	-24.6
Hous.Urb.Dev.	85.2	5	-53
Archives	6.1	5.9	-42.9
Sec.Exch.Comm.	11	5.6	-12.9
Agri.	90.4	-24.8	-18.3
Commerce	-2.7	20.8	-2.3
Interior	10.9	13.8	15.6
Justice	21	18.2	16.8
State	2254.1	63.7	137.9
EPA	8.6	0	40.8
Gen. Services	-95.3	88.7	-60.8
NASA	15.4	-5.6	-51.5
Nuc.Reg.Comm.	4	28.2	5.3
Manag.Budg.	-23.5	62.5	-53.8
Soc.Security	18.1	-51.2	-89.1
Treasury	-18.2	2.1	-0.7
Veterans	-50.4	53.9	-18.8
CIA	22	5.9	-23
Homeland Sec.	-7.8	-18.9	-46.4
Defense	12	-0.9	-7.3
Labor	7	3.2	-15.2
Education	-2.8	13.9	-1.4
Health Hu.Serv.	4.9	67.6	358.3
Natl.Sci.Found.	28.7	46.1	17.6
SmallBus.Admin.	18.8	7.5	4.2
Person.Manag.	Did not submit data[12]		

[12] As of March 11, 2011, the Office of Personnel Management had not posted its Annual FOIA Report online. The FOIA requires the report be submitted to the Department of Justice by February 1, 2011.
[13] http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012602048.html

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As we have done in previous Knight Surveys, here we have focused on the 28 agencies responsible for more than 90 percent of FOIA requests sent to the federal government. Though the results remain mixed, a gradual move toward better discretionary release practices appears to be underway when compared to last year's results.

The methodology used to assess release and denial decisions is the same as that used in the 2010 Survey. Agencies that increase the number of full and partial releases and reduce full denials are highlighted in green since more information is reaching the public. Mixed results are cataloged in the yellow or orange categories. The highlight color is determined by the number of data points indicating greater release or reduced withholding of documents: two data points for yellow, and one for orange. Agencies that released fewer records and denied more records than in 2010 are highlighted in red.

The Department of State stands as a major outlier in these results. According to the data, the Department of State released more than 22 times the number of requests, in full, over the previous year. While the Department did report withholding more in 2011 than it did in 2010, the improvement in releases indicates either that State has substantially improved its FOIA process, or that it is dealing with an anomaly in the types of requests being processed.

2010 Agency Rating	2011 Agency Rating
Agri.	Agri.
Justice	Justice
Manag.Budg.	Manage.Budg.
Small Bus.Admin.	[illegible]
CIA	[illegible]
Homeland Sec.	[illegible]
Commerce	Commerce
Defense	[illegible]
Interior	Interior
Education	[illegible]
EPA	EPA
Gen.Services	Gen.Services
Health.Hum.Serv.	[illegible]
Veterans	Veterans
[illegible]	Energy
[illegible]	[illegible]
Hous.Urb.Dev.	Hous.Urb.Dev.
Archives	Archives
[illegible]	[illegible]
[illegible]	[illegible]
Sec.Exch.Comm.	Sec.Exch.Comm.
Soc.Security	Soc.Security
[illegible]	State
[illegible]	Trans.
[illegible]	NASA
[illegible]	Nuc.Reg.Comm.
[illegible]	Treasury
Agen.Intl.Dev.	[illegible]

When compared to the results of the 2010 Survey, some trends can be seen. Generally, agencies which did poorly in 2010 improved in 2011 and agencies that did well in 2010 regressed slightly in 2011.

Overall, the number of agencies in the green increased (four to five), the number of agencies in the yellow increased (ten to twelve), and the number of agencies in the red decreased (five to one). Though the results remain largely mixed, a gradual move towards better discretionary release practices appears to be underway.

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BACKLOGS AND CONSULTATIONS

Aging Backlogs

Previous Knight Surveys pioneered the method of requesting and reporting agencies' oldest active FOIA requests. The (often staggering) age of agencies' oldest requests became a key metric the Archive used to examine FOIA statistics. The "Ten Oldest" request metric was adopted by George W. Bush's Executive Order on FOIA and codified by the OPEN Government Act of 2007. Now, each agency is required by law to report its ten oldest requests in its annual FOIA report.

This audit finds that marooned FOIA requests – some as old as 18 years – remain a key obstacle to transparency. 12 key agencies – including the National Archives, the Central Intelligence Agency, Department of Defense, Department of Justice, and Department of State – have requests older than six years.

Agency	Oldest FOIA	Age (years)	Oldest Consultation	Age (years)
Archives	7/10/1992		7/10/1992	
Defense	3/16/1993		3/4/1999	
CIA	10/7/1998		11/24/2003	
Health Hum.Serv.	1/19/2001		n/a	0.00
State	2/8/2001		8/13/2004	
Energy	2/14/2001		6/14/2001	
Treasury	7/1/2002		7/14/2009	
Interior	10/9/2002		2/1/2010	
Justice	9/4/2003		12/20/2007	
Homeland Sec.	10/27/2004		4/10/2008	
Energy Reg.Comm.	10/27/2004		n/a	0.00
EPA	12/1/2004		1/30/2006	

Are Consultations the Cause?

Previous Knight Surveys pointed to a lack of tracking systems, personnel turnover, resource constraints, and other systemic problems as sources for delay. This year's Knight Survey highlights a core source of systemic delay in the current requirement for agency "consultations" for any documents in which other agencies claim "equity."

When an agency determines that another agency or other agencies have "equity" or "ownership" of a record requested by FOIA, that record is forwarded to the other agencies for an additional review. After subsequent review, the record is sent back to the originating agency that then completes the FOIA request. This process causes inevitable delays. Out of the 12 agencies with outstanding requests older than six years, ten showed similarly ancient consultation dates.

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AGGREGATE FOIA DATA

Year	Requests Received	Requests Processed	Full or Partial Releases	Costs	Backlog	Appeals Received	Appeals Processed
2000[14]	2,235,201	2,214,402		$253,049,516	169,180		
2001[15]	2,246,212	2,236,796		$287,792,041	177,969		
2002[16]	2,402,938	2,428,496		$300,105,323	148,599		
2003[17]	3,266,394	3,260,694		$323,050,337	155,343		
2004[18]	4,016,751	3,975,388	3,766,715	$323,124,343	175,602	9,207	7,542
2005[19]	19,950,683[20]	19,908,571		$349,561,403	220,097		
2006[21]	21,412,571	21,384,435		$398,500,000	247,867		
2007[21]	21,758,651	21,792,896		$369,431,500	217,237		
2008[22]	605,491[23]	623,186	377,626	$338,403,831	133,295	8,800	11,179
2009[24]	557,825	612,893	382,117[25]	$382,244,225	77,377	9,804	9,579

Federal agency reporting on Freedom of Information Act performance has been wildly inconsistent over the years, as the following table demonstrates. Previous Knight Surveys have shown that data points such as "median response time" – solemnly reported by agencies to Congress – had little basis in actual practice. Cumulative data from agency reports over the past ten years indicates enormous swings in the most basic of data – the number of actual FOIA requests filed each year. The variance in request counts over the ten-year period from 2000 to 2009 – a high of 21 million, a low of 558,000 – actually represents changes in counting rules, not level of public interest. From 2000 to 2004, some agencies, such as the Department for

[14] Summary of Annual FOIA Reports for Fiscal Year 2000, Department of Justice: http://www.justice.gov/archive/oip/foiapost/2002foiapost3.htm

[15] Summary of Annual FOIA Reports for Fiscal Year 2001, Department of Justice: http://www.justice.gov/archive/oip/foiapost/2002foiapost27.htm

[16] Summary of Annual FOIA Reports for Fiscal Year 2002, Department of Justice: http://www.justice.gov/archive/oip/foiapost/2003foiapost31.htm

[17] Summary of Annual FOIA Reports for Fiscal Year 2003, Department of Justice: http://www.justice.gov/archive/oip/foiapost/2004foiapost22.htm

[18] Compiled from 2004 Annual FOIA Reports (Not Reported on Department of Justice website).

[19] Summary of Annual FOIA Reports for Fiscal Year 2006, Department of Justice: http://www.justice.gov/oip/foiapost/2007foiapost11.htm

[20] Beginning in 2005, the Social Security Administration changed how it designates and records certain first-party access requests. The result of this change is the large increase in reported FOIA requests.

[21] Summary of Annual FOIA Reports for Fiscal Year 2007, Department of Justice: http://www.justice.gov/oip/foiapost/2008foiapost23.htm

[22] Summary of Annual FOIA Reports for Fiscal Year 2008, Department of Justice: http://www.justice.gov/oip/foiapost/2009foiapost16.htm

[23] 5/22/2008: The Department of Justice instructs agencies to "only include Privacy Act (PA) requests in their Annual FOIA Reports if the FOIA is utilized in any way to process the request. [...] Conversely, when an agency conducts a PA search exclusively (i.e. with a 'system of records') and does not claim a PA exemption for any records located, that request should not be included in this Report." This results in the sharp drop in requests received and processed - primarily from the elimination of PA requests reported by the Department of Agriculture, Department of Health and Human Services, Department of Labor, Department of Veterans' Affairs, and the Social Security Administration. "2008 Guidelines for Agency Preparation of Annual FOIA Reports," http://www.justice.gov/oip/foiapost/guidance-annualreport-052008.pdf

[24] Summary of Annual FOIA Reports for Fiscal Year 2009, Department of Justice: http://www.justice.gov/oip/foiapost/2010foiapost18.htm

[25] Summary of Agency Chief FOIA Officer Reports with Findings and OIP Guidance for Improvement, Department of Justice: http://www.justice.gov/oip/foiapost/2010foiapost23.htm

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Veterans Affairs, counted first-person Privacy Act requests with FOIA requests, since they were based on the same legal principles of access to government information and processed by the same agency staff in a combined FOIA/PA office. Then, in 2005 the Social Security Administration changed the way it designated and recorded first-party access requests, essentially counting every request it received from individuals concerning their social security accounts as a FOIA request. As a result, the number of requests received, government-wide, ballooned from around 4 million to 20 million. On May 22, 2008, the Department of Justice instructed agencies no longer to include Privacy Act requests in their annual FOIA reports, unless "the FOIA is utilized in any way to process the request." This instruction resulted in the drop from over 21 million requests to around 600,000 requests in both 2008 and 2009. Remarkably, the cost of administering FOIA remained far more constant than the reported number of FOIA requests, totaling in the last fiscal year about $1.24 per American citizen. That amount will buy you a pack of gum at the grocery store.

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METHODOLOGY

Implementation of the Emanuel-Bauer Memorandum

On October 1, 2010 the Archive submitted FOIA requests to 90 federal agencies in order to determine their compliance with the instructions stipulated in the Emanuel-Bauer Memorandum of March 16, 2010. The Archive's FOIA request asked for:

> ***All documents related to "the several specific steps" that White House Chief of Staff Rahm Emanuel and White House Counsel to the President Bob Bauer instructed your agency to take in a 16 March 2010 memo to all agency and department heads. The memo is available at http://www.whitehouse.gov/sites/default/files/rss_viewer/foia_memo_3-16-10.pdf***
>
> ***The "specific steps" that the memo instructed your office to implement include:***
>
> 1) ***"updat[ing] all FOIA guidance and training materials to include the principles articulated in the President's memorandum" and***
> 2) ***"assess[ing] whether you are devoting adequate resources to responding to FOIA requests promptly and cooperatively."***

The requests were sent to the central FOIA processing office of each agency. After the statutory 20-business day limit had expired, the Archive contacted each tardy agency by telephone.

The proliferation of FOIA websites across federal agencies created a wrinkle that complicated the application of this methodology. Seven agencies sent no response to the FOIA request and 17 agencies have not sent a final decision, but among the range of responses from the 69 remaining agencies, 23 agencies included a link to their FOIA website.[26] Among these 23 agencies, four sent responses indicating that no documents had been found[27] and one withheld documents under the b(5) exemption.[28] Since President Obama's memorandum directed agencies to "use modern technology to inform citizens about what is known and done by their government," the content of agency FOIA websites was included in this audit. When prompted

[26] The agencies that included internet links in their responses include: Broadcasting Board of Governors, Commodity Futures Trading Commission, Defense Nuclear Facilities Safety Board, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, Federal Labor Relations Authority, Federal Open Market Committee, Inter-American Foundation, U.S. International Trade Commission, Federal Mine Safety and Health Review Commission, National Capital Planning Commission, National Mediation Board, National Science Foundation, Office of Government Ethics, Office of Science and Technology, Social Security Administration, Surface Transportation Board, Department of Treasury, Tennessee Valley Authority.

[27] Federal Deposit Insurance Corporation, Inter-American Foundation, Federal Mine Safety and Health Review Commission, National Science Foundation.

[28] Federal Housing Finance Board.

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by the agency response, the provided internet link was followed where the most recent FOIA officer report was viewed along with any additional documents recommended by the FOIA response.

Release and Denial Decisions

Data on the number of records released in full, released in part, and denied in full were derived from each agency's Annual FOIA Report for FY 2009 and FY 2010. Annual reports are required by the FOIA to be submitted to the Department of Justice by February 1st each year. In cases where the Annual FOIA Report was on neither the Department of Justice's website, nor the respective agency's website, an indication of "no data" is used.

Using the data in the reports, the Archive calculated the percent change from FY 2009 to FY 2010 in records released in full, released in part, and denied in full because of exemptions. Agencies with decreases in denials and increases in records released in full and in part are highlighted in green, which indicates overall improvement in releases by the agencies. Agencies with increases in denials and decreases in records released in full and in part are highlighted in red, which indicates that agencies are sharing fewer records.

Agencies with ambiguous data are highlighted in yellow and orange. For the agencies in these categories, the Archive measured each agency's positive indicators, which are defined as an increase in records released in full, an increase in records released in part, and a decrease in denials of records. If two of the three positive indicators are present, the agency is highlighted in yellow. If only one of the three positive indicators is present, the agency is highlighted in orange.

Backlogs and Consultations

Data for the oldest FOIA request and the oldest consultation was obtained from the agencies' Annual FOIA Reports for Fiscal Year 2010.

Aggregate FOIA Statistics

The FOIA statistics were pieced together from several sources on the Department of Justice's FOIA website. The summaries of the Annual FOIA Reports from the Department of Justice's FOIA Post website were the primary sources for this aggregated data. When summaries were unable to provide the information needed, the aggregate statistics were compiled at the Archive using the Annual FOIA Reports. Unfortunately and inexplicably, not all summaries were available on the Department of Justice website. The Archive has since filed a FOIA request with the Department of Justice requesting the summaries not available on their website. We have not received a response.

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TESTIMONY OF MIRIAM NISBET

DIRECTOR OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

ON

"THE FREEDOM OF INFORMATION ACT: ENSURING TRANSPARENCY AND ACCOUNTABILITY IN THE DIGITAL AGE"

MARCH 15, 2011

Good morning, Mr. Chairman, Senator Grassley, and members of the committee, I am Miriam Nisbet, Director of the Office of Government Information Services at the National Archives and Records Administration. Thank you for the opportunity to appear before you during Sunshine Week to discuss the work of my office, an important part of the freedom of information and open government initiatives of the Federal Government.

As you know, the Office of Government Information Services, referred to in short as OGIS, has been hard at work carrying out its statutory mission since opening in September 2009. While we have worked to resolve disputes under the Freedom of Information Act, or FOIA, and to develop strategies to review agency FOIA policy, procedures and compliance, we have realized that much of our work falls under the designation that Congress gave us as the "FOIA ombudsman." As an ombudsman, OGIS acts as a confidential and informal information resource, communications channel and complaint handler. We see the ombudsman role as the most fitting way for OGIS to work with members of the public and with Federal agencies to improve the administration of FOIA. OGIS supports FOIA – not by championing requesters over agencies or

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vice versa. We work to encourage a more collaborative and accessible FOIA process for everyone in the FOIA community.

The first OGIS report issued just this month details the work our office has done. It focuses on our first fiscal year and discusses both our internal workload and experiences as well as what we have seen in working with the public and the 94 Executive Branch departments and agencies. This is only the beginning, but we are already off to quite a start. In the first five months of FY 2011 we opened an average of 38 cases a month compared to an average of 17 cases a month for the same time period in FY 2010.

In the first 18 months, we heard from requesters from 43 states, the District of Columbia, Puerto Rico and 12 foreign countries who asked for assistance on everything from how to make a Freedom of Information Act request to which agency might have records they are seeking, and from how to navigate fee categories and waivers to how to request mediation services over denials of information. We answered questions, provided information, listened to complaints and tried to help in any way we could. For the more substantive disputes, we facilitated discussions between the parties, both over the phone and in person, and worked to help them find mutually acceptable solutions.

The statutory term "mediation services" includes the following: formal mediation, facilitation and ombuds services. OGIS continues to offer formal mediation as an option for resolving disputes, but has not yet had a case in which the parties agreed to participate in that process. We have found that the less formal method of facilitation by OGIS staff members, a novel approach

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when applied to FOIA, provides a very similar process, and parties are more willing to engage with OGIS and with each other without the perceived formality of mediation. OGIS-conducted facilitation is cost effective, as it bypasses hiring outside mediators to perform similar services.

Since September 2009, OGIS has closed 541 cases, 124 of them true disputes between FOIA requesters and agencies (for example, a dispute over application of an exemption or a fee assessment rather than a simple request for information). As a facilitator for the FOIA process to work as it is intended, we were not calling balls or strikes, but letting the parties try to work matters out with our assistance in an effort to avoid litigation. In three-quarters of the disputes we handled, the parties walked away satisfied. We believe that OGIS involvement helped to resolve their disputes.

A realization we quickly faced is that defining success is a challenge. The final result of our process is not both parties getting exactly what they want – sometimes not even close – but if we are able to help them in some way, by providing more information or by helping them understand the other party's interests, we have provided a valuable service. When OGIS first set out to fulfill this part of its statutory mission we spoke of changing a culture or mindset, from one of reacting to a dispute in an adversarial setting to one of actively managing conflict in a neutral setting. Today, after 18 months of working to prevent and resolve FOIA disputes, the experience has revealed that our work may well go deeper than a culture change. We now see that the task before us also includes seeking more acceptable outcomes than "win-lose" scenarios. With this goal in mind, we continue to work on how we will define success with our customers – both requesters and agencies.

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To date, OGIS cases have involved 36 Federal Departments and Agencies, including all 15 Cabinet-level agencies, some of which contacted OGIS with questions or for assistance with a dispute. We heard from agency FOIA professionals who wanted suggestions on how best to work with difficult requesters and who asked for OGIS assistance in resolving disputes related to FOIA responses. One area where we have had success this year is working with multiple agencies that have received essentially the same FOIA request to help facilitate a strategy for responding with some consistency across government. We have found that agency professionals faced with these sometimes daunting requests are greatly relieved to hear that someone else is working on the same thing and may be able to help. We also continue to provide agency FOIA Public Liaisons and their staffs with the tools they need to improve their approach to FOIA requests and to make the process less adversarial. One year ago OGIS developed and began offering dispute resolution skills training for agency FOIA professionals, helping build their skill sets to provide better customer service to requesters and also to work more successfully with other offices within their own agencies. More of this type of alternative dispute resolution (ADR) training is scheduled for this year, and our hope is that equipping FOIA professionals with these skills will help solve or prevent disputes.

Though we have heard from many agency professionals and members of the public, we know outreach continues to be essential. Increasingly, agencies are letting requesters know about OGIS as a resource – we know of 11 agencies that routinely do so – and we have had some OGIS customers come in by way of Congressional recommendation, but there are still agencies that have not yet begun to include the OGIS "pitch" in their letters to FOIA requesters. My staff and I

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regularly meet with members of the requester community and attend meetings, conferences and events attended by requesters to let them know about OGIS services. We also are meeting with agency FOIA staffs, alternative dispute resolution professionals and general counsels' offices and participating in agency FOIA training offered by the Justice Department and by agencies themselves to get the word out. Our approach to providing information to agency FOIA professionals includes a sample facilitation, which has resulted in positive feedback from participants and has proven to be very effective in lessening the fear factor of how OGIS will work with agencies to resolve disputes.

Because we have had so many requests for mediation services, we have also been challenged in setting up a comprehensive review strategy to fulfill that prong of our statutory mission. We see and hear a lot about agency policy, procedures and compliance as we work to resolve disputes and answer inquiries, but are setting up a more robust method to accomplish the goals of this prong of our mission in our second year. For now, the review plan includes using existing data to create value-added reporting to topics such as backlogs or referrals and consultations and to offer what we call collaborative reviews of agency FOIA operations alongside willing agencies. By using our observations from our caseload as well as a thorough analysis of all 94 Chief FOIA Officer Reports of 2010, we were able to develop some best practices for agencies and requesters. We also have succeeded in engaging in collaborative review by offering our services to review agency FOIA regulations with agencies that are considering revising FOIA regulations or practices. A few agencies have already worked with OGIS in that capacity and we plan to continue the collaborative review process going forward. To further this goal, OGIS continues to invite agencies to participate in collaborative reviews of their FOIA processes and to gather ideas

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from the public and Federal agencies about ways in which OGIS can best accomplish this prong of its mission in a cost-effective way.

OGIS has a unique perspective on the way FOIA works. As an entity that works side-by-side with agency FOIA professionals to improve the process from within and that also works closely with requesters on the outside to address shortcomings, we have seen the importance of building relationships – and trust – among the members of the FOIA community. It takes a lot of us to make FOIA work – agency FOIA staffs, general counsels, requesters, the Justice Department's Office of Information Policy, the White House and of course all of you in Congress – and OGIS gets to work with all of these stakeholders to help build a better FOIA. It's an exciting process and while we have just gotten started and see it as a long-term effort, we are pleased to see so many positive results in the short term and to see that our process works. We will continue to engage with all members of the FOIA community to improve the FOIA process by reviewing what works and what does not, resolving disputes and providing assistance wherever we can.

Please do not hesitate to contact us with any questions or if we can help you – or any of your constituents – on FOIA issues. Thank you for the opportunity to testify; I look forward to answering any questions you may have.

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John F. Kennedy Division 5

Jack O'Brien, Vice President
11109 Belton Street
Upper Marlboro, Maryland 20774

April 12, 2011

Senator Patrick Leahy
Chairman
Judiciary Committee
United States Senate
Washington, DC 20510

Re: S-627, Faster FOIA Act of 2011

Dear Senator Leahy:

It has taken the Department of State seven (7) long years to respond recently to a simple Freedom of Information Act request. Our request was for information about the ther. proposed extradition treaty between the United States and Britain. We submitted our request in 2004. Now in 2011 we finally have a response.

Given the complexity of the issue, it is incredible that all the Department of State had on the matter was three pages.

I hereby request that this letter and the attached documents be entered into the records of this legislation -- S-627, Faster FOIA Act of 2011. We hereby request written confirmation.

Sincerely,

Jack O'Brien
Vice President

04/14/2011 7:15AM

Testimony for the
U.S. Senate
Committee on the Judiciary
Senator Patrick Leahy, Vermont, Chairman

on
"The Freedom of Information Act:
Ensuring Transparency and Accountability in the Digital Age"

by

John D. Podesta
President and CEO
Center for American Progress Action Fund

March 15, 2011

Mr. Chairman, members of this committee, I am pleased to be here during Sunshine Week to talk about the Freedom of Information Act, our bedrock law for ensuring government openness and accountability.

This hearing comes at a momentous time for FOIA. Last week's Supreme Court ruling narrows the overbroad interpretation of FOIA's Exemption 2, which allows the federal government to withhold information "related solely to the internal personnel rules and practices of an agency."[1] Lower court rulings have allowed federal agencies to use this as a catch-all exemption to hide information well beyond personnel matters. Now, thanks to the Court's 8-1 decision, this is no longer acceptable.

We should celebrate this victory but the last several years show that agency culture and longstanding practice on FOIA are not easily upended, even when confronted with new policy and legal interpretation. Indeed, President Obama has delivered in many respects on his promise to have the most transparent administration in the nation's history, but the results on FOIA remain disappointing.

That's not because of FOIA policy—the administration has the right policy. Attorney General Eric Holder's FOIA memorandum, issued at the president's direction, gives federal agencies a simple instruction: "In the face of doubt, openness prevails."[2] And the Office of Management and Budget's Open Government Directive instructs agencies to reduce significant backlogs of pending FOIA requests by 10 percent each year.[3]

The problem is in the implementation. Federal agencies in the year after the Holder memo increased their use of legal exemptions to keep more records secret, according to the Associated Press.[4] There is also evidence that agencies have reduced backlogs through administrative maneuvers, not by providing requested information.[5] And the Justice Department continues to defend expansive agency interpretations of FOIA exemptions, including in the case that the Supreme Court just overturned.[6]

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The question we face now is this: How do we turn good policy into reality? I suggest three steps:

- First, require automatic Internet disclosure for most information.
- Second, build a searchable online database where the public can track FOIA requests and view agency responses.
- Third, improve the quality of information used to assess FOIA implementation.

Let's take these one at a time.

Requiring automatic disclosure

When FOIA became law in 1966, then-Attorney General Ramsey Clark simply and profoundly summarized its core principles in these words:

- That disclosure be the general rule, not the exception
- That all individuals have equal rights of access
- That the burden be on the Government to justify the withholding of a document, not on the person who requests it
- That individuals improperly denied access to documents have a right to seek injunctive relief in the courts
- That there be a change in Government policy and attitude[7]

These principles still guide us today but they should be updated for the digital age. Disclosure should be the general rule not just in response to requests but as a matter of course. And it should be done through the Internet—so everyone has actual access, not just the right to access. Government should bear the burden of justifying withholding not just information but also its dissemination via the Internet. Building on Ramsey's final point, we need a change in government policy and attitude to expand automatic electronic disclosure.

The more information provided automatically through the Internet, the fewer FOIA requests government receives. Automatic disclosures not only reduce administrative burdens and costs; they improve the speed and quality of agency responses to FOIA requests that do come in.

The administration deserves credit for expanding Internet disclosure. The Open Government Directive instructed federal agencies to "proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA." Agencies were specifically required to disclose at least three new "high value datasets" through the web portal Data.gov, which has registered more than 300,000 government datasets since its creation in May 2009.

There is also far more information available on federal spending than when President Obama took office. Recovery Board Chairman Earl Devaney recently noted the game-changing nature of Recovery.gov. "For so many years, information on program spending was buried in the bowels of government," he wrote in a blog post. "Just ask any news reporter or watchdog group that has filed an FOIA request and waited patiently, perhaps for a year or longer, before the government

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provided the information. There's no need to file an FOIA request to get what you want from the Recovery Board."[8] Recovery funds are expiring but this approach to tracking and reporting spending promises to live on through USASpending.gov and other new online resources such as the IT Dashboard.

We should now take the same approach for other types of government records, including information related to regulation, legal actions, credit programs, budget decisions, government performance, ethics disclosures, and more. Americans still too often have to resort to FOIA requests for information that should already be in the public domain. It is not enough to direct agencies to proactively disclose information through the Internet—such discretion results in inconsistent disclosure and fractured presentation. Instead, we should set specific standards for what agencies must automatically disclose, and establish central portals, like Recovery.gov, where the public can find related information across agencies. The administration can do this on its own but congressional action may be necessary to add teeth.

Opening FOIA requests and responses

FOIA itself would benefit from automatic Internet disclosure. The public, in most cases, cannot see what FOIA requests have been submitted to federal agencies or what information was provided in response to requests. Only a handful of federal agencies and offices post their FOIA logs showing requests they have received, and even fewer provide their responses.[9]

The administration is preparing to launch a "FOIA Dashboard" that will provide "report cards" on agency compliance with FOIA.[10] The website, to be located at FOIA.gov, will show the number of FOIA requests received, granted, and denied by each agency—information already available through annual agency FOIA reports. This should make it easier for the public to understand and compare agency performance under FOIA but a compilation of aggregate data is unlikely to be a game changer like Recovery.gov.

For that, we need access to specific requests and responses. The Center for American Progress in November recommended that President Obama issue an executive order requiring federal agencies to automatically publish their FOIA requests, as well as information provided in response to requests, through a centralized, searchable, online database.[11]

New technologies and recent FOIA advancements make this imminently doable. Indeed, the Mexican government already has such a system in place.[12] And the executive branch should be well-positioned thanks to the Leahy-Cornyn OPEN Government Act of 2007, which requires agencies to assign tracking numbers to FOIA requests and provide information on the status of each request through a telephone line or Internet service.[13]

A searchable FOIA database would have benefits for both the public and government. Before filing FOIA requests, members of the public could search for responses related to the information they are seeking. If the information is already provided, they wouldn't have to go through the hassle of filing a FOIA request, and agencies wouldn't have to respond to a duplicative request, reducing administrative burden and cost.

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The database would also function as a window into agency FOIA compliance. Not only would we be able to see the number of requests granted or denied; we would be able to evaluate whether specific responses fulfilled the law's requirements. A centralized system, moreover, would make it easier to track interagency referrals of FOIA requests, which are a frequent source of lengthy FOIA delays.

How to administer this tool and put it to use would be another matter to consider. As one possibility, a "FOIA Board," similar to the Recovery Board, could be established to take responsibility for the website and provide oversight. An independent body, armed with this information, could push for better FOIA responses and provide interagency coordination to break the logjam of endless referrals.

Assessing FOIA implementation

To fully evaluate FOIA implementation, however, we need still more information. Annual agency FOIA reports provide useful data on requests granted and denied, reasons for denials, response times, backlogs, and more. But the Department of Justice does not disclose the number and percentage of FOIA denials it chooses to defend. Nor do agencies report what they have done to comply with the Holder memo and other FOIA policies, or how much money they spend on FOIA implementation. This information is needed to assess whether Justice Department lawyers are heeding the Holder memo, whether agencies are doing anything different as a result of the administration's new policy, and whether resources are adequate for timely and forthcoming FOIA responses.

The Holder memo changed instructions for Justice Department lawyers deciding whether to defend agency denials of FOIA requests. The previous policy issued by the previous administration's attorney general, John Ashcroft, promised agencies a legal defense "[w]hen you carefully consider FOIA requests and decide to withhold records, in whole or in part."[14] The Holder memo states that the Justice 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."

By this language, Justice Department lawyers should be less likely to defend FOIA denials. But the department refuses to provide data to assess whether this is true, and the anecdotal evidence suggests that it isn't.[15]

This should change not only so we can assess Justice's compliance with the Holder memo but also to send a message to other federal agencies about their compliance. Agencies will be able to learn what is unacceptable by reviewing the cases Justice refuses to defend. And they will be more likely to grant requests if they see Justice may not offer a defense.

This message appears to be needed, judging by the National Security Archive's Knight Open Government Survey, which reviews implementation of the administration's FOIA policy. The archive, which just released its second annual survey results, has encountered tremendous difficulty answering this simple question: What changes have agencies made in guidance, training materials, or practices as a result of the administration's new FOIA policy? Indeed, the

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archive had to submit FOIA requests to obtain this information. Only 13 out of 90 agencies surveyed for last year's report provided documentation showing that changes were made.

After these results were reported, the White House issued a memo directing agencies to "update all FOIA guidance and training materials to include the principles articulated in the President's Memorandum" (which directed the Holder memo). Now about half the agencies report concrete changes—an improvement, to be sure, but still way behind schedule.

Perhaps not surprisingly the archive finds "no clear upward trend in agency discretionary disclosures" under FOIA. In 2009 just four of the 28 agencies that handle most FOIA requests both released more documents under FOIA and denied fewer FOIA requests. In 2010 five agencies met these benchmarks—and they were entirely different agencies than 2009, again suggesting no clear trend.

These findings highlight the stubbornness of agency culture and disposition toward FOIA. But money is likely another contributing factor. If staffing and other resources are inadequate, FOIA responses may be slow and unforthcoming regardless of agency disposition. Last year's White House memo also asked agencies to "assess whether you are devoting adequate resources to responding to FOIA requests promptly and cooperatively, consistent with the requirements for addressing this Presidential priority."

These assessments, if they occurred, have not been disclosed in annual agency FOIA reports—budget numbers may be provided but there is little about whether resources are adequate. Nor do many agencies detail FOIA-related spending in their budget requests to Congress; instead, FOIA spending is counted with spending on public relations or other responsibilities. Agencies should be asked to publicly answer three simple questions at the end of every fiscal year: What did you spend on FOIA implementation? For what purposes did you spend this money (defending denials or fulfilling requests, for example)? And was this money adequate to meet the objectives of current FOIA policy?

Conclusion

As we look forward at how we can expand openness and accountability, we must also make sure we don't backtrack. Two Senate bills introduced last month would broadly criminalize any disclosure of classified information to unauthorized people.

To be sure, protecting vital government information from improper disclosure is an important priority, but these proposals sweep too broadly. There is a serious risk that the bills, if enacted, would have a chilling effect on those who engage in legitimate activities, including informing the public about vital national security decisions. Government officials might come to fear that their everyday words and actions would later be used against them. We have come this far without an official secrets act, and cannot afford to sacrifice our hard-won progress to shortsighted doubts.

If the Freedom of Information Act teaches us one thing, it's that the free flow of information is essential to a democratic society.

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Indeed, our system depends on an engaged citizenry that has the necessary information to hold government accountable and to participate in the policymaking process. We know from experience that government is smarter, more responsive, and more ethical when its actions are open to public scrutiny. As former Supreme Court Justice Louis Brandeis famously said, sunlight is "the best of disinfectants."

FOIA has provided sunlight but in the digital age it can provide even more. Seizing this opportunity requires not just wise policy but follow through and everyday commitment—from the administration and from Congress.

Mr. Chairman, as I know firsthand, your commitment cannot be questioned—and this hearing is more evidence of that. I am honored to be here today. Thank you for the opportunity to testify. And thank you for your leadership.

Endnotes

[1] *Milner v. Dep't of the Navy*, No. 09-1163 (U.S. Mar. 7, 2011).
[2] Eric Holder, *The Freedom of Information Act (FOIA)* (Department of Justice, 2009).
[3] Peter R. Orszag, *Open Government Directive* (Executive Office of the President, 2009).
[4] Sharon Theimer, "AP Review: Use of FOIA Exemptions Rose in 2009," Associated Press, March 16, 2010, available at http://www.firstamendmentcenter.org/news.aspx?id=22715.
[5] For example, some agencies have reportedly asked requesters to reaffirm interest in their requests. If a requester does not respond by a set date, agencies remove the case from their backlog.
[6] The Court's ruling returned the case to lower courts to decide whether the information could be withheld through other exemptions, such as "information compiled for law enforcement purposes."
[7] Ramsey Clark, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (Department of Justice, 1967).
[8] "Chairman's Corner," available at: http://www.recovery.gov/News/chairman/Pages/08Feb2011.aspx
[9] Data provided to American Progress by Anne Weisman, chief counsel, Citizens for Responsibility and Ethics in Washington, March 6, 2011.
[10] Office of Information Policy, *Chief Freedom of Information Act Officer Report for 2011* (Department of Justice, 2011).
[11] Center for American Progress, "The Power of the President: Recommendations to Advance Progressive Change" (2010).
[12] "INFOMEX Gobierno Federal," available at https://www.infomex.org.mx/gobiernofederal/home.action.
[13] *Honest Leadership and Open Government Act of 2007*, Public Law 110-81, 110th Cong. (September 14, 2007).
[14] John Ashcroft, *The Freedom of Information Act* (Department of Justice, 2001).
[15] David Sobel, Testimony before the House Subcommittee on Information Policy, Census, and National Archives, "Administration of the Freedom of Information Act, Current Trends," March 18, 2010, available at http://www.eff.org/files/filenode/foia/sobel_foia_testimony_03_18_10.pdf.

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Department of Justice

STATEMENT OF

MELANIE PUSTAY
DIRECTOR
OFFICE OF INFORMATION POLICY

BEFORE THE

COMMITTEE ON JUDICIARY
UNITED STATES SENATE

ENTITLED

"THE FREEDOM OF INFORMATION ACT:
ENSURING TRANSPARENCY AND ACCOUNTABILITY IN THE DIGITAL AGE"

PRESENTED

MARCH 15, 2011

Testimony of Melanie Ann Pustay,

Director of the Office of Information Policy

United States Department of Justice

Good afternoon Chairman Leahy, Ranking Member Grassley, and Members of the Committee. I am pleased to be here this morning to address the subject of the Freedom of Information Act (FOIA) and the efforts of the Department of Justice ~~(DOJ~~ to ensure that President Obama's January 21, 2009 Memorandum on the FOIA, as well as Attorney General Holder's FOIA Guidelines, are fully implemented. As the lead federal agency responsible for implementation of the FOIA across the government, we at the Department of Justice are strongly committed to encouraging compliance with the Act by all agencies and to promoting open government.

As you know, the Attorney General issued his new FOIA Guidelines during Sunshine Week two years ago, on March 19, 2009. Attorney General Holder's FOIA Guidelines address the presumption of openness that the President called for in his FOIA Memorandum, the necessity for agencies to create and maintain an effective system for responding to requests, and the need for agencies to proactively and promptly make information available to the public. The Guidelines discuss the critical role played by agency Chief FOIA Officers and stress that improving FOIA performance requires their active participation. The Attorney General called on agency Chief FOIA Officers to review their agencies' FOIA administration each year and to report each year to the Department of Justice on the steps taken to achieve improved transparency. These reports were completed for the first time in March 2010, and then again just

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last week. Chief FOIA Officer Reports illustrate the broad array of activities agencies have undertaken to improve their administration of the FOIA and to improve transparency overall. Based on our review of both the Chief FOIA Officer Reports and agency Annual FOIA Reports, it is clear that agencies have made real progress in applying the presumption of openness, improving the efficiency of their FOIA processes, reducing their backlogs of pending FOIA requests, expanding their use of technology, and making more information available proactively. While there is always work that remains to be done, for the second year in a row agencies have shown that they are improving FOIA compliance and increasing transparency.

Agencies are meeting the demand for public information by proactively posting information of interest to the public. For example, United States Department of Agriculture's Animal and Plant Health Inspection Service drastically reduced the number of FOIA requests it received in 2010, slashing its incoming requests by 42% after posting a wide variety of agency reports, enforcement actions, and prior FOIA responses. In response to public interest in the Upper Big Branch mine tragedy, the Mine Safety Health Administration created an Upper Big Branch Single Source page on its website, which allowed it to quickly post a substantial volume of information about the mine, including enforcement actions and related records for the eighteen months preceding the accident and updates on the status of MSHA's accident investigation. Despite being overwhelmed with FOIA and media information requests, the Mine Safety and Health Administration was able to provide the mining community and the general public with access to information related to this major accident. Similarly, the Department of the Interior was able to meet public demand for information on the Deepwater Horizon oil spill by creating a special Deepwater Horizon electronic library.

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This past fiscal year many agencies were able to reduce their FOIA backlogs. For example, the Department of the Army implemented a Backlog Reduction Project, which included site visits to local subordinate components to determine reasons for backlogs and to offer training on methods to improve efficiency and to gain leadership support for FOIA programs. As a result of these efforts, the Department of the Army was able to achieve a backlog reduction of 68%. Similarly, the Department of Health and Human Services' Center for Medicare and Medicaid Services created a backlog strike force and reduced its backlog by 66%. The Federal Reserve Board cut its backlog in half. Indeed, fifteen of the twenty-five key agencies reduced their backlogs in Fiscal Year 2010, for an overall backlog reduction for that group of agencies. These are just a few of the many examples of notable agency accomplishments that are detailed in agency Chief FOIA Officer Reports which were just posted last week.

Likewise, across the government, there was an overall reduction in the FOIA backlog. This was accomplished despite the fact that the number of FOIA requests made of federal agencies increased, with nearly 600,000 requests made in Fiscal Year 2010, as compared with approximately 550,000 in Fiscal Year 2009.

There was also an increase in the number of requests in response to which documents were released in full. For the twenty-five key agencies the number of requests where records were released in full increased as compared to last year. I am particularly proud to report that the Department of Justice, for the second straight year in a row, increased the numbers of responses to FOIA requests where records were released in full and increased the numbers where records

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were released in part. We also improved the average processing time for simple and expedited FOIA requests. All of these things are concrete examples of improvements made to the administration of the FOIA across the government. There is still work to be done, but progress is clearly being made.

My Office, the DOJ's Office of Information Policy (OIP), carries out the Department's statutory responsibility to encourage compliance with the FOIA. We have also been actively engaged from the very start in a variety of initiatives to inform and educate agency personnel on the new commitment to open government and to encourage compliance with the key directives from the President and the Attorney General.

Just two days after the President issued his FOIA Memorandum, OIP sent initial guidance to agencies informing them of the significance of the President's Memorandum and advising them to begin applying the presumption of disclosure immediately to all decisions involving the FOIA. After the Attorney General issued his FOIA Guidelines in March 2009, OIP held a governmentwide training conference which was filled to capacity with over 500 agency personnel attending. To further assist agencies in implementing the new FOIA Guidelines, OIP issued extensive written guidance which we posted on *FOIA Post,* OIP's electronic newsletter which provides FOIA information and guidance to agencies. Significantly, OIP provided agencies with concrete steps to use and approaches to follow in applying the presumption of openness. OIP described ways to apply the foreseeable harm standard and discussed the factors to consider in making discretionary releases.

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

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

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

In addition to issuing written guidance to agencies, since the issuance of the Attorney General's FOIA Guidelines OIP has conducted numerous training sessions specifically focused on the President's and Attorney General's transparency initiative. OIP regularly provides training to agency personnel on all aspects of the FOIA. Those training programs now all include sessions on the new FOIA Guidelines. OIP has also convened two agency working groups, one on technology and the other on FOIA Best Practices. Building on those discussions, OIP has developed a list of FOIA Best Practices which in turn is used as a basis for further training of agency personnel.

OIP has also reached out to the public and the requester community. OIP hosted its Second Annual Requester Roundtable on December 8 last year. Building on the success of our first roundtable, we invited any interested members of the FOIA requester community to meet with OIP and to share their ideas for improving FOIA administration. In response to interest expressed by agency FOIA professionals in being able to attend the Requester Roundtable, and

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the enthusiastic response by the requester community to the idea of meeting with those FOIA professionals, OIP decided to hold the first-ever FOIA Requester-Agency Town Hall meeting. Scheduled for March 21st, this Town Hall event will bring agency FOIA personnel and frequent FOIA requesters together to exchange ideas, share concerns, and engage in a discussion of common issues.

OIP has engaged in ongoing dialogue with the FOIA requester and open government communities and has found that engagement to be very productive.
For example, in direct response to concerns raised by the requester community concerning difficulties in reaching agency personnel, OIP issued guidance to all agency personnel emphasizing the need for good communication with FOIA requesters and requiring agencies to provide an agency point of contact to all requesters, as well as to take a number of other steps to improve communication with requesters. These simple steps have the potential to go a long way to imbuing a "spirit of cooperation" into the FOIA process, as the President has called for. This encouragement to agencies to increase their interaction with requesters for their mutual benefit has taken root across the government. Many agencies included examples of improved communication with requesters in their Chief FOIA Officer Reports. These training programs and requester outreach activities will be on-going in the months and years ahead.

Last week, the Attorney General approved updated FOIA regulations for the Department of Justice which we hope to publish for notice and comment this week. The revised regulations are simplified and streamlined. They will also serve as a model for all agencies to use in similarly updating their own FOIA regulations.

Each year, all agencies submit to the Department of Justice their Annual FOIA Reports,

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which contain detailed statistics on the number of requests and appeals received and processed, their disposition, and the time taken to respond. The Open Government Directive required that agencies post these Annual FOIA Reports in an "open" format. In order to ensure that those "open" formats were consistent across the government and would allow for ready "mashing" of the data contained in the reports, the Department of Justice developed a tool for all agencies to use to convert their Annual FOIA Report into an XML format. By using the same tool, all agency Annual FOIA Reports are now available in a uniform "open" format. As an additional feature, the Department of Justice designed into the tool built-in math checks and other features that alert the agency to issues regarding the integrity of the data that is entered into the various fields. This feature has greatly enhanced the accuracy of all the Annual FOIA Reports. The Department has received very positive feedback from agencies both on this correction feature and on the ease of using the tool. Through this initiative the Department of Justice utilized technology to assist all federal agencies in a key aspect of FOIA administration.

Just yesterday, the Department launched its newest transparency initiative, a new website called FOIA.gov. Combining the Department's leadership and policy roles in the FOIA, the FOIA.gov website will shine a light on the operation of the FOIA itself. The website has two distinct elements. First, it will serve as a visual report card of agency FOIA compliance. All the detailed statistics contained in agency Annual FOIA Reports will be displayed graphically. The website will make it possible to search and sort the data so that comparisons between agencies and over time can be made. Reports highlighting key measurements, such as the five agencies which processed the most requests or the five agencies with the oldest pending requests, will be routinely posted. It is our hope that FOIA.gov will help create an incentive for agencies to

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improve their FOIA performance. The site will also provide a link to each agency's FOIA website which will allow the public to readily locate records that are already posted by each agency, including frequently requested records.

In addition to allowing easy access to the wealth of FOIA data contained in agency Annual FOIA Reports, the FOIA.gov website will serve a second and equally important function. It will be a place where the public can be educated about how the FOIA works, where to make requests, and what to expect through the FOIA process. Explanatory videos are embedded into the site. There is a section addressing frequently asked questions and a glossary of FOIA terms. A wealth of contact information is given for each agency, including their Chief FOIA Officer and all their FOIA Requester Service Centers and FOIA Public Liaisons. Significant FOIA releases are posted on the site to give the public examples of the types of records made available through the law.

The Department of Justice envisions that this website will be a one-stop shop both for reviewing agency compliance with the FOIA and for learning about how the FOIA process works. We plan to continually add features and updates to the site, and so we welcome comments from both the public and from agencies and have established feedback avenues directly on the site.

Looking ahead, agencies submitted their Annual FOIA Reports in February and have just completed their 2011 Chief FOIA Officer Reports. OIP has begun its reviews of both these reports, and will assess where agencies stand in their ongoing efforts to improve compliance with the FOIA. OIP will continue its outreach on the important goal of improving transparency. This will include additional training seminars and further guidance to agencies, specialized training

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sessions, as well as one-on-one assistance, and continued outreach to requesters. As I've stated previously, the Department is committed to achieving the new era of open government that the President envisions. We have made progress in the past two years toward that goal, but OIP will continue to work diligently to help agencies achieve even greater transparency in the years ahead.

In closing, the Department of Justice looks forward to working together 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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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OSM MEDIA, LLC d/b/a PAJAMAS MEDIA AND PJTV, 100 North Sepulveda Blvd., Ste. 225 El Segundo, CA 90245 Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, 950 Pennsylvania Ave., NW Washington, DC 20530, Defendant.	))))))))))))))))	Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff OSM Media, LLC d/b/a Pajamas Media and PJTV (hereinafter, "Plaintiff") brings this action against Defendant United States Department of Justice ("DOJ") to compel compliance with a request submitted pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, regarding the resumes of non-political attorney hires into the Civil Rights Division of the DOJ since January 21, 2009. As grounds therefore, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

2. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff OSM Media, LLC is a Delaware limited liability company, which is headquartered in and qualified to do business in California. Plaintiff does business under the names Pajamas Media and PJTV. Plaintiff is an Internet-based news organization and a "representative of the news media" within the meaning of 5 U.S.C. § 552(a)(4)(A)(ii) and 28 C.F.R. § 16.11(b)(6).

4. Defendant DOJ is an agency of the United States Government and is headquartered in Washington, DC. Defendant has possession, custody, and control of the records to which Plaintiff seeks access. The Civil Rights Division is a component of Defendant.

STATEMENT OF FACTS

5. The DOJ's hiring practices – particularly in the Civil Rights Division – have been the subject of significant national attention over the last four years and continue to receive substantial press coverage.

6. Because the hiring practices of the Obama Administration's Civil Rights Division deserve the same public scrutiny as those of the Bush Administration's Civil Rights Division, Plaintiff submitted this FOIA request.

7. Plaintiff (through its Washington Bureau Chief, Richard Pollock) submitted a FOIA request to Defendant, which Defendant received on October 13, 2010, and docketed on October 14, 2010. This request, assigned FOIA PA Number 11-00020-F, sought the following information:

> A copy of all resumes of career (i.e., non-political appointee) attorneys hired into the Civil Rights Division between January 21, 2001 and the present. To the extent that career attorneys are hired into the Civil Rights Division between the date of this request and the date that you respond, please consider the request a rolling request and include all responsive resumes up to the date of your response.

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8. In its FOIA submission, Plaintiff specifically requested expedited processing pursuant to 28 C.F.R. § 16.5(d)(1) on the grounds that this issue is one of significant public interest for which there is an urgent need to inform the public of the government's activities. Defendant, however, did not even respond to Plaintiff's request for expedited processing.

9. Plaintiff contacted the Civil Rights Division FOIA office on December 17, 2010, to seek a status update on the FOIA submission. A representative told Plaintiff that the FOIA office could not determine when the requested documents would be released.

10. Defendant has been unable or unwilling to provide a specific timetable for release of the documents.

FOIA STATUTORY FRAMEWORK

11. FOIA requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

12. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), an agency must respond to a party submitting a FOIA request within 20 working days, notifying the party as to whether or not the agency will comply with the request and advising the party of its right to appeal any adverse determination to the head of the agency.

13. In "unusual circumstances," an agency may delay its response to a FOIA request, but it must provide notice of the delay and "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B)(i); see also 28 C.F.R. § 16.5(c).

14. If an agency fails to comply with the time limit provisions set forth in 5 U.S.C. § 552(a)(6), the person submitting the FOIA is deemed to have exhausted his administrative remedies and may immediately bring a FOIA lawsuit in federal court. 5 U.S.C. § 552(a)(6)(C).

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15. Defendant has neither produced any responsive records nor provided Plaintiff any timetable as to when the responsive records will be produced. Defendant has thus failed to comply with the FOIA time requirements for responding to Plaintiff's FOIA request.

PLAINTIFF'S CAUSE OF ACTION

COUNT I – VIOLATION OF FOIA

16. Plaintiff realleges and incorporates by reference paragraphs 1 through 15.

17. Defendant has violated FOIA by failing to produce any and all non-exempt records responsive to Plaintiff's FOIA request within the time limits required by 5 U.S.C. § 552(a)(6)(A), (B).

18. Plaintiff is deemed to have exhausted its administrative remedies by virtue of Defendant's failure to comply with the statutory time limits for completing its processing of Plaintiff's FOIA request.

19. Plaintiff is being irreparably harmed by reason of Defendant's FOIA violation, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to conform its conduct to the requirements of the law.

20. Plaintiff is entitled to injunctive and declaratory relief with respect to the release and disclosure of the requested documents.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

(1) Declare that Defendant violated FOIA by failing to lawfully comply with Plaintiff's FOIA request;

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(2) Order Defendant to process and immediately release all non-exempt records responsive to Plaintiff's FOIA request, and to prepare a *Vaughn* index of any allegedly exempt records responsive to the request by a date certain;

(3) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request;

(4) Award Plaintiff its reasonable attorney fees and litigation costs in this action, pursuant to 5 U.S.C. § 552(a)(4)(E).

(5) Retain jurisdiction over this action to ensure that Plaintiff's FOIA request is timely processed and that Defendant does not wrongfully withhold any responsive records; and

(6) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Dated: January 18, 2011

Scott A. Hodes, DC Bar #430375
P.O. Box 42002
Washington, D.C. 20015
(301) 404-0502

Attorney for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OSM MEDIA, LLC d/b/a PAJAMAS MEDIA AND PJTV,	)	
Plaintiff,	)	Case No.: 1:11-cv-00103
v.	)	Judge Emmet G. Sullivan (EGS)
UNITED STATES DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

ANSWER

Defendant United States Department of Justice answers plaintiff's complaint for declaratory and injunctive relief as follows:

The introductory paragraph of the Complaint contains a characterization of plaintiff's case, to which no response is required. To the extent a response is deemed required, defendant denies the allegations contained in this paragraph.

JURISDICTION AND VENUE

1. Paragraph 1 of the Complaint contains a legal conclusion regarding jurisdiction, to which no response is required. To the extent a response is deemed required, defendant denies on the ground that 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 speak for themselves, and respectfully refers the Court to those statutes for a complete and accurate statement of their contents.

2. Paragraph 2 of the Complaint contains a legal conclusion regarding venue, to which no response is required. To the extent a response is deemed required, defendant denies on the ground that 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) speak for themselves, and

respectfully refers the Court to those statutes for a complete and accurate statement of their contents.

PARTIES

3. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in the first two sentences of this paragraph. The third sentence of this paragraph contains a legal conclusion regarding the interpretation 5 U.S.C. § 552(a)(4)(A)(ii) and 28 C.F.R. § 16.11(b)(6), to which no response is required. To the extent a response is deemed required, defendant denies the allegation contained in this sentence.

4. Admit the first sentence. Defendant admits in the second sentence that it possesses copies of the resumes of career attorneys hired into the Civil Rights Division. Admit the third sentence, except that the Civil Rights Division is a "Division" of the Department of Justice, not a component.

STATEMENT OF FACTS

5. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in this paragraph.

6. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in this paragraph.

7. Admit the first sentence. Admit the second sentence, except that the first quoted sentence of plaintiff's FOIA request sought "[a] copy of all resumes of career (i.e., non-political appointee) attorneys hired by the U.S. Department of Justice's Civil Rights Division between January 21, 2001 and the present."

8. Defendant admits in the first sentence that plaintiff's FOIA request sought expedited processing pursuant to 28 C.F.R. § 16.5(d)(1) "on the grounds that this is an issue of

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urgent and significant public interest given the controversy over the hiring practices of the Department's Civil Rights Division." Defendant admits in the second sentence that it did not directly respond to plaintiff's request for expedited processing, but notes that it sent an acknowledgment letter to plaintiff dated October 14, 2010.

9. Admitted.

10. Denied, except to admit that defendant has not provided a specific timetable for release of the requested documents.

FOIA STATUTORY FRAMEWORK

11. This paragraph contains a legal conclusion regarding the general obligations imposed by the Freedom of Information Act, to which no response is required. To the extent a response is deemed required, defendant denies on the ground that the Freedom of Information Act (5 U.S.C. § 552) speaks for itself and respectfully refers the Court to that statute for a complete and accurate statement of its contents.

12. This paragraph contains a legal conclusion regarding the interpretation of 5 U.S.C. § 552(a)(6)(A)(i), to which no response is required. To the extent a response is deemed required, defendant denies on the ground that 5 U.S.C. § 552(a)(6)(A)(i) speaks for itself and respectfully refers the Court to that statute for a complete and accurate statement of its contents.

13. This paragraph contains a legal conclusion regarding the interpretation of 5 U.S.C. § 552(a)(6)(B)(i) and 28 C.F.R. § 16.5(c), to which no response is required. To the extent a response is deemed required, defendant denies on the ground that U.S.C. § 552(a)(6)(B)(i) and 28 C.F.R. § 16.5(c) speak for themselves and respectfully refers the Court to that statute and that regulation for a complete and accurate statement of their contents.

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14. This paragraph contains legal conclusions regarding the interpretation of 5 U.S.C. § 552(a)(6) and 5 U.S.C. § 552(a)(6)(C), to which no responses are required. To the extent a response is deemed required, defendant denies on the ground that 5 U.S.C. § 552(a)(6) and 5 U.S.C. § 552(a)(6)(C) speak for themselves, and respectfully refers the Court to those statutes for a complete and accurate statement of their contents.

15. Admit the first sentence. The second sentence contains legal conclusions regarding the obligations imposed by FOIA, to which no response is required. To the extent a response is deemed required, defendant denies on the ground that the FOIA speaks for itself and respectfully refers the Court to that statute for a complete and accurate statement of its contents.

PLAINTIFF'S CAUSE OF ACTION

COUNT 1 – VIOLATION OF FOIA

16. Defendant incorporates by reference the responses to paragraphs 1-15 set forth above.

17. This paragraph contains legal conclusions regarding defendant's alleged violation of FOIA and the interpretation of 5 U.S.C. § 552(a)(6)(A), (B), to which no responses are required. To the extent a response is deemed required, denied.

18. This paragraph contains legal conclusions regarding exhaustion of administrative remedies and defendant's alleged failure to comply with FOIA's statutory time limits, to which no responses are required. To the extent a response is deemed required, denied.

19. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in this paragraph. To the extent a response is deemed required, denied.

20. Denied.

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PRAYER FOR RELIEF

The concluding paragraph of the Complaint, including subparts (1) – (6), contains plaintiff's request for relief, to which no response is required. To the extent a response is deemed required, defendant denies that plaintiff is entitled to any relief.

Defendant denies all allegations not expressly admitted or denied.

AFFIRMATIVE DEFENSE

The information plaintiff seeks in its FOIA request is subject, in whole or in part, to exemption under the FOIA.

Accordingly, defendant asserts that plaintiff is not entitled to the relief requested, or to any relief, and respectfully requests that this Court enter an order dismissing the Complaint and granting such other and further relief as this Court deems just and proper.

Dated: February 22, 2011

Respectfully submitted,

TONY WEST
Assistant Attorney General

JOHN R. TYLER
Assistant Director

s/ Ethan P. Davis
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ATTORNEYS FOR DEFENDANT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date and by the methods of service noted below, a true and correct copy of defendant's answer was served on the following:

Served by FedEx Mail:

Nina Yablok
1313 N. Milpitas Blvd.
Milpitas, CA 95035

DATED: February 22, 2011

s/ Ethan P. Davis
ETHAN P. DAVIS
Trial Attorney
U.S. Department of Justice

The Washington Post

PROMISES, PROMISES: Little transparency progress

Advertisement

The Associated Press
Monday, March 14, 2011; 12:48 PM

WASHINGTON -- Two years into its pledge to improve government transparency, the Obama administration took action on fewer requests for federal records from citizens, journalists, companies and others last year even as significantly more people asked for information. The administration disclosed at least some of what people wanted at about the same rate as the previous year.

People requested information 544,360 times last year under the U.S. Freedom of Information Act from the 35 largest agencies, up nearly 41,000 more than the previous year, according to an analysis by The Associated Press of new federal data. But the government responded to nearly 12,400 fewer requests.

The administration refused to release any sought-after materials in more than 1-in-3 information requests, including cases when it couldn't find records, a person refused to pay for copies or the request was determined to be improper under the law. It refused more often to quickly consider information requests about subjects described as urgent or especially newsworthy. And nearly half the agencies that AP examined took longer - weeks more, in some cases - to give out records last year than during the previous year.

The government's responsiveness under the Freedom of Information Act is widely considered a barometer of how transparent federal offices are. The AP's analysis comes a day before a Senate Judiciary Committee hearing examining the Obama administration's progress.

There were some improvements. The administration less frequently invoked the "deliberative process" exemption under the law to withhold records describing decision-making behind the scenes. President Barack Obama had directed agencies to use it less often, but the number of such cases had surged after his first year in office to more than 71,000. It fell last year to 53,360. The exemption was still commonly invoked last year at the Homeland Security Department, which accounted for nearly 80 percent of cases across the whole government.

Overall, the decidedly mixed performance shows the federal government struggling to match the promises Obama made early in his term to improve transparency and disclose more information rapidly. "Transparency promotes accountability and provides information for citizens about what their government is doing," Obama said when he took office."

The White House said it was voluntarily disclosing more information, forestalling a need to formally make requests under the law, and said that agencies released information in nearly 93 percent of cases, excluding instances when it couldn't find records, a person refused to pay for copies or the request was determined to be improper.

"A lot of the statistics need to be taken with a grain of salt, but they may understate our successes," said Steven Croley, a special assistant to the president for justice and regulatory policy.

At an event on Monday celebrating Sunshine Week, when news organizations promote open government and freedom of information, Associate Attorney General Tom Perrelli announced the unveiling of a website, foia.gov, to provide the public with a centralized resource that details how to file requests for government records.

The Obama administration censored 194 pages of internal e-mails about its Open Government Directive that the AP requested more than one year ago. The December 2009 directive requires every agency to take immediate, specific steps to open their operations up to the public. But the White House Office of Management and Budget blacked-out entire pages of some e-mails between federal employees discussing how to apply the new openness rules, and it blacked-out one e-mail discussing how to respond to AP's request for information about the transparency directive.

The OMB invoked the "deliberative process" exemption - the one that Obama said to use more sparingly - at least 192 separate times in turning over the censored e-mails to the AP. Some blacked-out sections involved officials discussing changes the White House wanted and sections of the openness rules that were never made official.

This year, after Republicans won control in the House and with the presidential election looming, the fight over transparency could turn political. The new Republican chairman of the House Oversight and Government Reform Committee, Rep. Darrell Issa, R-Calif., is conducting a broad inquiry into Obama's openness promises. The investigation was at least partly prompted by reports from the AP last year that the Homeland Security Department had sidetracked hundreds of requests for federal records to top political advisers, who wanted information about those requesting the materials.

Organizations that routinely ask for government records are fighting many of the same battles for information waged during the Bush administration. Federal offices lack enough employees and money to respond to requests quickly and thoroughly, said Anne Weismann, chief counsel at Citizens for Responsibility and Ethics in Washington, a watchdog group. With federal spending expected to tighten, the problem will likely get worse.

"They're going to be asked to do more with less," Weismann said.

AP's analysis showed that the odds a government agency would search its filing cabinets and turn over copies of documents, e-mails, videos or other requested materials depended mostly on which agency produced them - and on a person's patience. Willingness to wait - and then wait some more - was a virtue. Agencies refused more routinely last year to quickly consider information requests deemed especially urgent or newsworthy, agreeing to conduct a speedy review about 1-in-5 times they were asked. The State Department granted only 1 out of 98 such reviews; the Homeland Security Department granted 27 out of 1,476. The previous year the government overall granted more than 1-in-4 such speedy reviews.

The parts of the government that deal with sensitive matters like espionage or stock market swindles, including the CIA or Securities and Exchange Commission, entirely rejected information requests more than half the time during fiscal 2010. And they took their time to decide: The SEC averaged 553 days to reply to each request it considered complicated, and the CIA took more than three months.

Less-sensitive agencies, such as the Social Security Administration or Department of Agriculture, turned over at least some records nearly every time someone asked for them, often in just weeks.

Some federal agencies showed marked improvements, but sometimes it came at a cost elsewhere in the government. The Homeland Security Department cut its number of backlogged information requests by 40 percent last year, thanks mostly to work under a $7.6 million federal contract with TDB Communications of Lenexa, Kan., which was approved during the Bush administration. The company accomplished its work partly by forwarding to the State Department tens of thousands of requests for immigration records from Homeland Security's Citizenship and Immigration Services because the State Department makes visa determinations in immigration cases. At one point, as the Homeland Security Department was reducing its backlog, it was sending as many as 3,800 cases each month to the State Department, said Janice DeGarmo, a State Department spokeswoman.

The State Department received and handled three times as many requests in 2010 than the previous year. It ended up with a backlog of more than 20,500 overdue cases, more than twice as many as the previous year.

Also, the Veterans Affairs Department said it received 40,000 fewer information requests last year. Spokeswoman Jo Schuda said the department incorrectly labeled some requests in 2009 as being filed under the Freedom of Information Act but actually were made under the U.S. Privacy Act, a different law.

The 35 agencies that AP examined were: Agency for International Development, CIA, Consumer Product Safety Commission, Council on Environmental Quality, Agriculture Department, Commerce Department, Defense Department, Education Department, Energy Department, Department of Health and Human Services, Department of Homeland Security, Department of Housing and Urban Development, Interior Department, Justice Department, Labor Department, State Department, Transportation Department, Treasury Department, Department of Veterans Affairs, Environmental Protection Agency, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Trade Commission, NASA, National Science Foundation, National Transportation Safety Board, Nuclear Regulatory Commission, Office of Management and Budget, Office of National Drug Control Policy, Office of Personnel Management, Office of Science and Technology Policy, Office of the Director of National Intelligence, Securities and Exchange Commission, Small Business Administration and the Social Security Administration.

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Online:

FOIA.gov:http://www.foia.gov/index.html

Sunshine Week:http://www.sunshineweek.org/

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Study: Dozens of agencies struggling to comply with Obama's order to improve FOIA procedures

By The Associated Press, Sunday, March 13, 2:07 PM

WASHINGTON — Dozens of federal agencies are struggling to meet President Barack Obama's 2-year-old order that requires the government to respond more quickly and thoroughly to request for records under the U.S. Freedom of Information Act, a study finds.

The report by the Washington-based National Security Archive determined that 41 of 90 federal agencies have yet to make concrete changes to their FOIA procedures under Obama's order. That's down from 77 one year ago, but still cause for concern half way through Obama's first term, said Eric Newton of the John S. and James L. Knight Foundation, which financed the study. The archive is a public interest group that uses the law frequently to obtain federal records.

The day after his inauguration in January 2009, Obama reversed a Bush-era policy of defending any legal reason to withhold information and directed agencies to release records whose disclosure wasn't barred by law or wouldn't cause foreseeable harm.

"At this rate, the president's first term in office will be over by the time federal agencies do what he asked them to do on his first day in office," Newton said.

Steven Croley, special assistant to the president for justice and regulatory policy, said the White House has made significant progress toward putting the directive in place. "Many agencies across the government have taken substantial steps to improve their administration of FOIA," he said.

The study was released Sunday to commemorate Sunshine Week, an annual observance by news organizations to promote open government and freedom of information.

The archive submitted requests to 90 federal agencies seeking information about their compliance with Obama's order and with a subsequent March 2010 memorandum from senior White House officials directing agencies to improve their handling of requests from citizens, journalists, companies and others.

The survey showed that 13 agencies — including the departments of Defense, Interior, Agriculture, and Treasury — made major improvements in responsiveness and by posting information on their websites. These agencies also updated their FOIA regulations, manuals and training materials to comply with Obama's directive.

Others showed little or no changes. The U.S. Postal Service said it had "no responsive records" to the archive's request. The departments of Justice, Commerce and Energy, along with the CIA and 13 other

agencies, were still working on the archive's records request 117 business days after it was received. The law requires a response in 20 business days.

The Justice Department has responsibility for ensuring government-wide compliance with the Freedom of Information Act.

Four agencies, including the Merit Systems Protection Board and the Legal Services Corporation, never acknowledged receiving the archive's request despite numerous calls and faxes, the study said.

Croley said the lack of a response from an agency to the archive's FOIA "does not establish they have done nothing."

Online:

National Security Archive: http://tinyurl.com/a8dwh Justice Department: http://www.justice.gov/oip/

White House: http://www.whitehouse.gov/

Sunshine Week: http://www.sunshineweek.org/

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Barely half of agencies meeting Obama's FOIA request goals, study says

By Ed O'Keefe
Monday, March 14, 2011; A17

President Obama's administration has improved in itsresponsiveness to freedom-of-information requests, but it still has a ways to go, according to a new report on the issue.

Of 90 federal agencies equipped to process requests made under the Freedom of Information Act, slightly more than half have taken at least some steps to fulfill Obama's goal to improve government transparency, according to the study by the National Security Archive at George Washington University and the Knight Foundation. The report is set for release Monday.

Researchers submitted FOIA requests to each agency seeking information on any changes made since Obama ordered the government to "adopt a presumption in favor" of FOIA requests on his first full day in office in January 2009.

Though 49 agencies and departments complied with the study's authors, 17 others, including the Transportation Department and the U.S. Postal Service, provided no documents and two withheld information. An additional 17 agencies - including the departments of Commerce, Energy, Justice and State - provided no final response, and four smaller agencies never acknowledged receipt of the requests. The figures have improved significantly from last year, when just 13 of 90 agencies complied.

"At this rate, it'll be the end of his term before the agencies do what Obama asked them to do on the first day," said Thomas S. Blanton, director of the National Security Archive.

The report's publication coincides with the start of Sunshine Week, an annual effort by news organizations and good-government groups to raise awareness about improving access to public information.

As part of the week's events, the Obama administration on Monday plans to launch FOIA.gov, a site meant to inform the general public on how to request government information. The site is one of several established by the Obama White House to give better access to government data and spending information.

Administration officials disputed some of the report's conclusions, noting that when taken as a whole, the government at least partially fulfilled 93 percent of all FOIA requests reviewed in fiscal 2010, a significant increase from the previous year.

Collectively, federal agencies cut their backlogged FOIA requests by about 10 percent in fiscal 2010, according to White House officials.

The study credits agencies with fulfilling more requests for drafts and final copies of internal documents and staff-level reports. Federal FOIA law permits agencies to withhold such "pre-decisional" or "deliberative process" information - the type of data that transparency advocates believe is essential to truly understanding the mechanics of government.

Ten of the 14 Cabinet agencies have cut their use of the "pre-decisional" exemption, according to the White House.

"This is the kind of window that can actually bring some real accountability to the policy process, and that could be the most significant impact of Obama's changes," Blanton said.

House Republicans are also planning to probe the administration's responsiveness to FOIA requests.

Rep. Darrell Issa (R-Calif.), chairman of the House Oversight and Government Reform Committee, asked agencies in January to turn over information on the number of requests received in the past five years. He also plans to investigate the government's public reporting of spending information, another key element of Obama's transparency reforms.

Steven P. Croley, who oversees a team of White House staffers responsible for ethics issues, said several departments made significant improvements in the last year by staffing up, retraining workers or simplifying the review process.

Among others, the Agriculture Department, the Environmental Protection Agency and the Consumer Product Safety Commission are preempting FOIA requests by publishing online government data sets previously withheld from public view.

"It's not a kind of change that you can dictate in one day, there's no switch to throw that's going to change FOIA practice overnight," Croley said in an interview.

"But from a realistic standpoint, have agencies focused on FOIA, have they made it a priority, are they taking more time to figure out where we can disclose information? Yes."