

S. HRG. 113-883

**OPEN GOVERNMENT AND FREEDOM  
OF INFORMATION: REINVIGORATING  
THE FREEDOM OF INFORMATION ACT  
FOR THE DIGITAL AGE**

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**HEARING**  
BEFORE THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

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MARCH 11, 2014

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## **OPEN GOVERNMENT AND FREEDOM OF INFORMATION: REINVIGORATING THE FREEDOM OF INFORMATION ACT FOR THE DIGITAL AGE**

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**TUESDAY, MARCH 11, 2014**

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:20 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Franken, Blumenthal, and Grassley.

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

Chairman LEAHY. Thank you all for being here. I apologize for being a few minutes late. Once or twice a year, the Chief Justice brings in what is called the Judicial Conference with the chief judges of all the circuits, as well as some others, for a meeting, and a number of us come and brief or answer questions. I was there in this capacity, and so was the Attorney General and others. I also had been tied up on the floor earlier and ran a little bit late. But I wanted to have this hearing, and I will stay here as long as I can, and then I think Senator Franken will take over the gavel.

But we are going to talk about the Freedom of Information Act. All of you refer to it as "FOIA." And as we stream what we do here, I will call the whole Freedom of Information Act, "FOIA," from now on. But we also commemorate the annual celebration of openness in our democratic society called "Sunshine Week," which will take place next week. I will be in Vermont talking about it in several places.

For almost a half a century, the Freedom of Information Act has translated our American values of government openness and accountability into practice by guaranteeing the public's right to get information. So I think it is time that we take stock of just where we are, what progress we have made during the last decade as we tried to improve FOIA. We will also examine proposals to reform FOIA to address new technologies that were not even imagined at the time it was written and the challenges that remain when citizens seek information about their Government.

Five years after President Obama issued Presidential directives on FOIA and open government, we have seen some progress. Backlogs of FOIA requests are on the decline, a trend that started dur-

ing his first term. Online tools such as Data.gov, FOIA.gov and the FOIA portal, and the Obama administration's new FOIA IT Working Group have modernized it. It is a step in the right direction, but I think we all agree there is more that remains to be done, and I feel that much of the progress has come too slowly.

A new study by the Center for Effective Government, which graded the responsiveness of the 15 Federal agencies that process the most FOIA requests, found that half of these agencies failed to earn a passing grade. Another impediment to the FOIA process is the growing use of exemptions to withhold information from the public. According to a 2013 Secrecy Report prepared by OpenTheGovernment.org, Federal agencies used FOIA Exemption 5 to withhold information from the public more than 79,000 times in 2012—a 41-percent increase from the previous year.

I might say parenthetically that if you start marking everything classified, nothing is classified. I have been in meetings where among the things that have been brought up and marked classified were the covers of a couple of news magazines. That is getting a little bit carried away.

I am concerned that the growing trend toward relying upon FOIA exemptions to withhold large swaths of Government information is hindering the public's right to know. It becomes too much of a temptation if you screw up in Government to just mark it "top secret." That is why I have long supported adding a public interest balancing test to the FOIA statute so Federal agencies consider the public interest in the disclosure of information before issuing a FOIA exemption.

And this is a bipartisan effort. Seven years ago, Senator Cornyn, a Republican from Texas, and I worked together to establish the Office of Government Information Services, OGIS. We wanted OGIS to mediate FOIA disputes and to make recommendations to Congress and to the President on how to improve the FOIA process. I am encouraged by the good work that OGIS is doing, but I worry the office does not have the sufficient independence, authority, but especially resources to fully carry out its work. The office is critical to keeping our Government open and accountable to the American people. So I will continue to work so they get the tools and the resources necessary.

During both Democratic and Republican administrations, and both Democrats and Republicans as Chair of this Committee, this Committee has had a proud tradition of working in a bipartisan manner to protect the public's right to know. Working together, we have enacted several bills to improve FOIA for all Americans. I value the strong partnerships that I have formed with Ranking Member Grassley and Senator Cornyn on open government matters. So I look forward to that continuing because it really makes no difference whether you have a Democrat or a Republican as President. The American public is served only if it knows what its Government is doing and why. And that is something that should unite—as it has united Senator Grassley and I and others—should unite us and keep us going.

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

Senator Grassley.

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

Senator GRASSLEY. Thank you, Mr. Chairman. I always enjoy this hearing. And from what you just said, let me emphasize that there is not any distance between you and me on this subject, and I hope that that broad-based political support will send a clear signal to everybody in the bureaucracy, not just these two people here, of the importance of the public's information being public.

This hearing provides us an opportunity to focus on how the Government handles the Freedom of Information Act. As I have said before, it has been my experience that every administration, whether Republican or Democrat, just what the Chairman said, has challenges in providing the degree of transparency desired by so many—a right of citizens to know and, more importantly, as I have said, public information ought to be public.

Unfortunately, this administration, as administrations before, continues to fail to provide the transparency in this particular case, maybe a higher standard set by the President himself because of the statements he made of this being the most transparent administration in history. This is troubling, as we all were told that fact on January 21st, 1 day after he was sworn in as President the first term. We need to do better than the status quo.

I expect that we will hear about some of the changes in technology that are taking place to make the FOIA process better. This is important, and improvements are, in fact, needed. But we also must remain focused on improving the way Government thinks about transparency and freedom of information. All of the changes to technology will be futile if there is not a change of attitude.

On this point about change of attitude, at last year's hearing I questioned what the Justice Department was doing to improve the way people think about transparency. I hope to hear today what has been done to change the so-called culture of obfuscation among freedom of information officials. The term "culture of obfuscation," et cetera, is a quote.

The Justice Department and its Office of Information Policy has a unique and special role with regard to FOIA. The Office of Information Policy can have a profound impact on FOIA. It can tackle head-on the governmentwide "culture of obfuscation" problems. I am concerned, though, that rather than lead in a positive way, this office has reacted in a way that is contrary to the President's transparency promise.

I am frustrated with the legal argument that the Justice Department and the Federal Election Commission made in a recent FOIA case. This is *Citizens for Responsibility and Ethics in Washington v. FEC*. The Justice Department made an argument that, in the view of many, undermined FOIA.

Fortunately, the D.C. Circuit Court of Appeals, in a unanimous decision, rejected the administration's argument. The D.C. Circuit said the Government's position would create a "Catch-22" situation, leaving requesters in limbo for months or years. That result is not what Congress or the law envisions. I am glad the court got this one right, but it is a shame that it even had to consider the question.

What message does the Justice Department's argument send to other agencies, meaning the argument in that case? I fear this "do as I say, not as I do" approach emboldens the agencies to craft legal maneuvers that undermine Freedom of Information compliance. That is what the Federal Election Commission did, and the Justice Department was right there to help them in the court.

Given the Justice Department's leadership role with respect to FOIA, that is disappointing, if not downright alarming, considering what the purposes of FOIA is all about. If Justice makes this kind of argument, why should anyone be shocked about the lack of transparency claims against the Government? As a Senator, I have had my own challenges in obtaining information not only from this administration but a lot of administrations since I have been in the Senate. And, again, I only hold this administration to a higher standard because of the standard set by themselves that on January 21, 2009, they were going to be the most transparent in the history of our country. If it is this difficult for a Senator, I can only imagine how much more difficult and frustrating it might be for a private citizen.

I will note that recently the House of Representatives unanimously passed bipartisan FOIA legislation. I think that is a real accomplishment in the politicized world that Washington is today. I understand, Mr. Chairman, that our staffs are reviewing this legislation and hearing from those in the transparency community. Overall, the reception seems to be positive, but there are some questions that have been raised regarding, for example, the technology used in handling requests. We will continue to examine this issue and others, but here is a bill that we should take seriously and examine closely.

There is a lot of room for improvement, and I look forward to asking our witnesses today about some of these concerns I have raised before—or that I have raised today.

Thank you.

Chairman LEAHY. And our staffs have been looking at it, and it is an area where I believe we can find common ground and should move forward with it.

Senator GRASSLEY. Good.

Chairman LEAHY. Melanie Pustay, who is the Director of the Office of Information Policy at the Department of Justice, has statutory responsibility for directing agency compliance with the Freedom of Information Act. Before becoming the office's Director, she served for 8 years as Deputy Director, so a great deal of experience there.

Ms. Pustay, please go ahead.

**STATEMENT OF MELANIE ANN PUSTAY, DIRECTOR, OFFICE OF INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC**

Ms. PUSTAY. Good morning, Chairman Leahy, Ranking Member Grassley, and Members of the Committee. I am pleased to be here today to discuss the Department of Justice's ongoing efforts to assist agencies in improving their administration of the FOIA. Increasing use of technology to improve the public's access to information has been a key part of our work.

Over the past 5 years, we have seen agencies embrace technology in a wide variety of ways. Agencies recognize the benefits of IT and are using ever more sophisticated technology to improve access to information.

One area that we have found technology to be particularly beneficial is the use of tools and applications that assist with the core tasks of processing FOIA requests, such as technology that assists in the search and review of records. Automating those functions has the potential to improve timeliness in responding to requests.

OIP has hosted seminars and given presentations to our FOIA IT Working Group to enhance awareness of the possibilities that these technologies hold. Last year, 68 agencies reported using some type of advanced technology to increase their efficiency.

Now, in addition, agencies are using technology in ways to improve the public's ability to interact with the agency. Making more information available online is yet another way that agencies are increasing transparency.

Given that proactive disclosures can satisfy public demand for information without the need to ever file a FOIA request, OIP has focused on this topic in both our written guidance and in our training for agencies. And agencies have embraced proactive disclosures by posting a wide variety of material that is of high public interest, and they have made their websites more useful to the public.

Finally, FOIA.gov continues to revolutionize the way in which FOIA data is itself made available to the public. The explanatory videos that we have embedded in that site received more than 2.5 million visitors.

So as you can see, FOIA is indeed adapting to the Digital Age, yet there is still more that we can do. In the next 2 years, the administration has committed to five initiatives that are all designed to modernize the FOIA. As part of the administration's second Open Government National Action Plan, we have committed to improving the customer service experience by establishing a consolidated online FOIA portal that will not only allow for the making of requests to all agencies from a single website but will also include additional tools to help improve the customer experience.

Second, to streamline and simplify the request-making process, OIP will be leading an interagency team in developing a common FOIA regulation that is applicable to all agencies but still retains flexibility for agency-specific requirements.

Third, as agencies have been working to improve their FOIA practices these past 5 years, OIP is organizing a series of targeted Best Practices Workshops where agencies can share lessons learned in implementing the Attorney General's FOIA Guidelines.

Fourth, to ensure that employees have a proper understanding of the FOIA, OIP is creating a suite of e-learning FOIA training resources which will target discrete groups of employees, from the newly arrived intern to the senior executive.

And last, OIP will be supporting and participating in a FOIA Advisory Committee that is designed to foster dialogue between agencies and the requester community.

Now, the Department of Justice will also be continuing our work in encouraging and overseeing compliance with the law. Last year, for example, we issued guidance addressing a number of ways that

agencies can improve their communication with requesters. We continue to conduct assessments of agency progress using a wide variety of milestones, including those that target technology use. As agency implementation of the Attorney General FOIA Guidelines has matured, OIP has been continually refining those milestones. We have engaged with the open government community in this effort, and we greatly appreciate the ideas and suggestions we have gotten from them.

This past Fiscal Year marks another year in which the Government received record high numbers of FOIA requests. In response, agencies were able to increase the total number of requests processed. Out of the 99 agencies subject to the FOIA, 73 reported having a backlog of 100 requests or less, with 29 reporting no backlog at all.

But given the importance of reducing significant agency backlogs, OIP required those agencies to provide a plan for reducing their backlog in the year ahead.

So, in closing, the Department of Justice looks forward to working together with the Committee on matters pertaining to government-wide FOIA administration. We have accomplished a lot over these last 5 years, but OIP will continue to work diligently to help agencies achieve even greater transparency in the years ahead. Increasing use of technology will be a key part of those efforts.

Thank you.

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

Chairman LEAHY. Thank you very much.

And before we go to questions, we want to hear from Miriam Nisbet. She is the founding Director of the Office of Government Information Services at the National Archives and Records Administration. Before assuming that, she served as Director of the Information Society Division for the United Nations Educational, Scientific, and Cultural Organization in Paris. So I guess I should say, "Bienvenue."

Ms. NISBET. Merci.

Chairman LEAHY. De rien. Please go ahead.

**STATEMENT OF MIRIAM NISBET, DIRECTOR, OFFICE OF GOVERNMENT INFORMATION SERVICES, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, WASHINGTON, DC**

Ms. NISBET. Bonjour, Mr. Chairman, Ranking Member Grassley, Members of the Committee. Thank you for the opportunity to appear again before you leading up to Sunshine Week.

Since last year's Sunshine Week, we at OGIS have been working hard to carry out our mission to review agencies' policies, procedures, and compliance, and to provide mediation services to resolve FOIA disputes. In fact, the OGIS mediation caseload was up 40 percent in Fiscal Year 2013, which is a testament to the innovative approach of resolving FOIA disputes that Congress created through OGIS.

We have also worked closely with Government colleagues to contribute to five ambitious efforts to modernize FOIA through the administration's second Open Government National Action Plan. All

of these commitments embrace using technology in some way to improve FOIA processes.

For example, the administration committed to launching a consolidated portal to give requesters a single site across Government to file their requests. Ms. Pustay talked about that also.

I would note that the existing and expanded FOIAonline system—in which our parent agency, the National Archives, is a partner and which was the subject of an OGIS recommendation in 2012—will certainly inform that process.

Additionally, NARA will support the new FOIA Modernization Advisory Committee, made up of Government and non-Government FOIA experts who will recommend improvements, starting with meetings this spring—if spring ever comes.

More specifically to the work of OGIS, the FOIA, as you know, directs my office to recommend policy changes to Congress and the President to improve the FOIA process. Last year, we recommended four ways to do that, and our efforts with all four recommendations continue today.

We are making progress on two 2013 recommendations that we intend to carry forward: one is examining FOIA fees, the other reviewing the process for requesting immigration-related records.

A third recommendation also long term involves working with agencies to implement dispute resolution for FOIA disputes.

OGIS has begun working with several agencies to identify ways to prevent and resolve disputes as well as avoid litigation. Our final recommendation last year was to encourage agencies to share our reminder that FOIA is everyone's responsibility, which we were very glad to see some agencies do.

Beyond those and other efforts OGIS is continuing to carry out, there are additional low- or no-cost ways to address technological issues and improve the FOIA process generally. At any given time, agencies across the Government are working to update or purchase new information technology infrastructure. We recommend that when procuring new technology, upgrading existing technology, or even creating a new large agency database, program officers consult with their records managers and FOIA professionals to best determine how the records will be managed, how the agency might conduct FOIA searches, and ideally how the agency might proactively disclose the information or data. This collaboration should extend to contracted information technology services so that when a FOIA request is received, neither agencies nor requesters are burdened with out-of-contract costs.

Additionally, while technology can theoretically make it easier to maintain information, it can sometimes pose a challenge in retrieving information in response to a FOIA request. FOIA professionals must be able to rely upon their more technologically savvy colleagues to help unleash information held in databases or other systems.

There are also low-tech, low-cost, or no-cost ways that can make a difference to improve customer service. For example, I have sent a letter to the President asking the White House to issue a memorandum to general counsels and chief FOIA officers that focuses on exemplary customer service for a better FOIA process, with par-

ticular attention to the importance of appropriate dispute resolution through FOIA public liaisons and through working with OGIS.

Another way we can improve customer satisfaction is by working with agencies to ensure they provide information about the estimated date of completion for FOIA requests. This issue remains a challenge to some agencies, and OGIS will work closely with OIP on that.

I appreciate the opportunity to appear before this Committee, and I thank you for the support you have shown to the Office of Government Information Services.

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

Chairman LEAHY. Well, thank you very much for that.

Let me ask a couple questions. Ms. Pustay, this year marks, as I said, the fifth anniversary of the Attorney General's FOIA Guidelines. I commend the guidelines. As I said before, they restore the presumption of openness. But I worry that they get undermined by the growing use of FOIA exemptions. I referenced this in my opening statement, the recent report by OpenTheGovernment.org. It said that Federal agencies used FOIA Exemption 5 to withhold information more than 79,000 times in 2012, a 41-percent increase.

Why are they relying so extensively on Exemption 5? And those are the numbers for 2012. What happened in 2013? Is your microphone on? Thank you.

Ms. PUSTAY. There are a couple of things I want to point out regarding the usefulness of looking at a statistic such as that.

First of all, the use of exemptions is going to necessarily fluctuate from year to year. We have had years in the past where the number of citations to Exemption 5 went down. Sometimes it goes up. So it does fluctuate.

That is also going to be very much driven by the types of requests that agencies receive. Agencies obviously have no control over what types of records are asked for.

Third, the use of Exemption 5 this past year, over 85 percent of the uses of Exemption 5 are attributed to two agencies, and last year, when we looked at the use of Exemption 5, one of those agencies overwhelmingly had been processing records that were subject to protection under the attorney work product privilege, which does not—

Chairman LEAHY. What were the two agencies?

Ms. PUSTAY. DHS and EEOC. Those are the two agencies that have used Exemption 5 the most. But both of those agencies use Exemption 5 to protect attorney work product and attorney-client information, which is not as susceptible to discretionary release, like the deliberative process privilege.

So these are all reasons why we would—and, last, another important thing to keep in mind is that an agency might be processing a record and releasing everything on a page other than one sentence. But if they use Exemption 5 to protect one sentence, they are going to be citing Exemption 5, and that will count as the use of the exemption. So the number of citations does not tell you how much is being released or how much is being withheld.

And for all those reasons, what we have asked agencies to do in their Chief FOIA Officer Reports is give examples of discretionary

releases so that there is a public accountability for actual increases in releases.

Chairman LEAHY. But the Attorney General's Guidelines say they will not defend an agency's decision to deny a FOIA request unless it would cause a foreseeable harm.

Ms. PUSTAY. Correct.

Chairman LEAHY. But only three of the 15 agencies that process the most FOIA requests have promulgated regulations to adopt this. Is there foot dragging going on here? Or is this just—

Ms. PUSTAY. No; the agencies across the Government have embraced the Attorney General's FOIA Guidelines, as are demonstrated each and every year through the detailed Chief FOIA Officer Reports that we ask every agency to provide. Regulations were not required to implement the Attorney General's FOIA Guidelines, and we have a very robust accountability for their implementation through the Chief FOIA Officer Reports, which detail a wide variety of steps that agencies are taking specifically to advance the presumption of openness, but also to use technology and to improve efficiency. They are all addressed in the Chief FOIA Officer Reports.

Chairman LEAHY. Let me go to Director Nisbet. You mentioned if spring ever comes. I want you to know that in Vermont, we will have 4 or 5 inches of snow on a day, and usually the news will say we are going to have a "dusting" tomorrow, no more than 4 of 5 inches. They did announce that tomorrow it will be a moderate to heavier snow, 18 to 20 inches. And it is conceivable schools could open an hour late.

[Laughter.]

Chairman LEAHY. We could open on time if we had anywhere near as much equipment as they have here in this area to clear snow, but we do not. So we do the best we can.

To be serious—I was serious about that, but to be serious, we are considering a legislative proposal to make OGIS more independent by allowing OGIS to make recommendations on improving the FOIA process and make those recommendations directly to Congress. Do you support that proposal?

Ms. NISBET. Senator Leahy, the administration has not yet taken a position on H.R. 1211, and I am not able to comment. I will say I really always appreciate the attention to OGIS, and I will be interested to see what happens.

Chairman LEAHY. I understand the reason you have to be cautious, but OGIS made nine recommendations to Congress—five in 2012, four in 2013. But it seemed that they were delayed for so long because of either OMB or the Department of Justice looking at it. So I hope that we can reach a point where the recommendations can be made directly to us.

We also had a Government Accountability Office study that found last year that you do not have adequate staffing and resources to perform the dual mission of reviewing agency FOIA compliance and also providing mediation services, which can be very essential to getting something done. So I will ask you this question: Does OGIS have adequate staff and resources to carry out its work?

Ms. NISBET. Mr. Chairman, let me answer that in a couple of ways. A number of commenters, I think even before OGIS opened its doors, noted that with the broad mission that we have, with the dual mission that we have to review and to provide mediation services, either one of those missions would be quite a challenge for the office that we have. We have tried to do as best we can with that. We have been challenged at times, and as I mentioned, our case-load in mediation is up significantly from the year before.

With that having been said, we are looking at ways to take the GAO recommendations into effect, and I am pleased to tell you that our agency has approved hiring three additional staff members for OGIS in large part to work on the review part of our mission, and we are very much looking forward to getting those people on board.

Chairman LEAHY. Well, I am not restrained by OMB or anything else, but I will say I believe you need more staff to carry this out, because I think—again, I do not care whether you have a Republican or Democratic administration. To be able to move quickly and effectively on FOIA requests, knowing that some are here for the sake of doing it, but most are very reasonable, to move quickly and thoroughly on them is extremely important to democracy in this country.

Senator Grassley had to step out, and he suggested we go next to Senator Blumenthal. And I will say, as I have said before, I think we are lucky that Senator Blumenthal is here.

Senator BLUMENTHAL. Thank you, Mr. Chairman. Thank you very much. And I appreciate your having this hearing, which I think is profoundly important, and I recognize your leadership in the area of open government and freedom of information. And I appreciate this panel being here today.

Ms. Pustay, you used the word earlier “robust” to refer to the initiatives going forward. You know, I think it is hard to square the term “robust” with the frustration and sometimes anger that people feel, we hear as their representatives. And I wonder what additional steps or what kinds of recommendations you would make to this Committee, whether it is the legislation that has been proposed or other measures, to make this process work better and convince people that their Government is, in fact, open and complying with the law.

Ms. PUSTAY. Well, respectfully I disagree with the premise in that I think that the agencies are robustly—I do not have a problem using the word that they are robustly implementing the law. This is not to say that there are not further improvements that can be made. But we have seen across the Government record high numbers of incoming FOIA requests, and yet agencies processed more FOIA requests last year than ever before. In the past 5 years, we have agencies releasing records, in full or in part, in over 90 percent of cases. We have many, many examples of agencies putting records up on their websites to help make information available to the public without the need for a FOIA request.

So we have seen a lot of concrete steps that agencies have taken to improve access to information. But we do think that there are further steps that we can take, and one of those—I detailed five of them, but just even to focus a little bit on one of the five that I

think has a lot of potential to help both agencies and requesters is our project to create a uniform or common FOIA regulation.

The idea there would be to streamline and standardize some of the core procedures, procedural parts of administering the FOIA, making them the same across agencies to the extent we can. That I think would have a direct day-to-day impact on the common FOIA requester who would find it much easier to know there is the same time period for filing an appeal, for example, at every single one of the 99 agencies.

Senator BLUMENTHAL. And why does that not exist now, as you put it, standardized and common FOIA regulations—

Ms. PUSTAY. Right. Yes, this—it is an idea—it is a new idea to have a common one. Right now we have 99 agencies with 99 sets of FOIA regulations. So one of our initiatives is to explore the legal feasibility, first and foremost, of doing that, and then working together as an interagency team and also getting comments from the public about the content of those.

Senator BLUMENTHAL. And who is responsible for that project?

Ms. PUSTAY. So my office is leading that project, but we are having input from across the Government, the requester community, certainly my friend Miriam at OGIS. We are all going to be part of a team to do this, to have a thoughtful study and analysis of how best to do it.

Senator BLUMENTHAL. What is your timeline for actually implementing a standardized common regulation?

Ms. PUSTAY. We are going to start the process this spring, so we have been talking a lot about spring in this hearing, so very soon we are going to start the process of actually having meetings and delving into the different mechanics of doing so. But it is a 1- or 2-year project.

Senator BLUMENTHAL. Well, I would accept, with all due respect, the use of the word “robust” if that standard regulation were already in place, similarly with improving the agencies’ internal processes.

Ms. PUSTAY. Right.

Senator BLUMENTHAL. Who is in charge of that project?

Ms. PUSTAY. Well, so that internal—OIP is leading an effort to create opportunities for agencies to share their best practices. Across the Government we have many examples of agencies doing some really terrific things, for example, in technology or taking steps that have really helped them reduce their backlogs. There is a wide variety of issues connected with FOIA administration, and with 99 agencies we have stars that we can identify for every one of those topics.

And so the idea there is to have a group of agencies that have done very well on a particular topic share their experiences, their tips, their strategies for success with everyone else. Then we will create written documentation of those strategies, make those available on line.

The whole idea is to have some synergy and have agencies be able to learn from one another.

Senator BLUMENTHAL. And I very much applaud and welcome those kinds of initiatives. My suggestion is that the sooner that you implement them, because the only real obstacle to implementing

them is the resources that you have and the organizational skills of the people trying to achieve them, the more likely it is you will avoid legislation that will tell you and give you dates about what to do.

Ms. PUSTAY. Right. We have already announced on our website the start of these series of meetings. We have lots of agencies that have already indicated to us that they are really excited and interested to serve on panels. We have got more suggestions for topics than we have got months in the year, so I think this will be a really—I do not want to keep using the word “robust,” but I think this will be a very energetic project. Let me say it that way.

Senator BLUMENTHAL. Well, you questioned the premise of my question, which is that the procedures were not robust. But you did not question the premise, the more important premise that the public is frustrated and unhappy with the pace of responses and the amount of information provided. I think when you mention freedom of information to the ordinary citizen—and, by the way, it is true of State government as well as Federal—there is a common reaction for anybody who has any experience with it that it does not function well.

Ms. PUSTAY. In addition to processing more requests across the Government this past year, the agencies improved processing time. So I guess I do have a response to that characterization. We have been able to reduce the processing time for simple-track FOIA requests.

There is no doubt, though, that there is an incredible interest by the public in getting access to information, and we have over 700,000 requests filed each year. So really we are fortunate, I think, in the United States that the public really embraces the use of the Freedom of Information Act. But to help agencies increase their capacity to deal with that high volume of requests, that is where we think technology really holds a lot of great potential, and particularly the more sophisticated technology tools that help with processing. To the extent manual processes can be changed over into automated processes, the actual time per request can be reduced, that to me has the most potential to increase timeliness across the board.

Senator BLUMENTHAL. And I would second your comment about that we should welcome the public’s interest in what the Government does. At a time when we kind of moan about the cynicism and distrust of Government, obviously some of these requests for information are motivated by that feeling of doubt or questioning what Government is doing. But at the same time, a lot of it is simple curiosity and interest, which we should welcome and support and aid and abet.

Ms. PUSTAY. Right.

Senator BLUMENTHAL. So the better and quicker that we try to provide information, the better democracy works, which is just kind of a less articulate statement than many provide about the reason that we have freedom of information laws.

Thank you, Mr. Chairman.

Chairman LEAHY. Well, thank you, Senator. You have been a strong supporter of the Freedom of Information Act.

And as I said at the beginning, Senator Grassley has joined with us on a number of the pieces of legislation to make FOIA even more effective, and I yield to Senator Grassley.

Senator GRASSLEY. Thank you.

There are not a lot of Members here today, but I hope you will get a view from all of us in a bipartisan way that we are very serious about making this FOIA work and that withholding information is not justified.

Director Pustay, you heard me mention in my opening statement about the CREW case. Last year you could not comment on it because I suppose at that time it was pending. Now that the case has been decided, I would like to ask you some questions about the Office of Information Policy role in that case.

The bottom line—and then I will follow it up with specifics—whether or not you had a seat at the table so that you or your office was able to provide insight or assistance in those handling the case. Were you involved in preparing a brief or, if not going that far, in crafting an argument? Or were you consulted at all?

Ms. PUSTAY. Senator Grassley, because you are still asking me questions connected with litigation, even though it is not ongoing, it is not appropriate for me to go behind the scenes and talk about it. I would refer you to the briefs that we filed in that litigation for the statement, the position that the Government took.

But what I can tell you is that—

Senator GRASSLEY. Before you go on, what is ongoing when the D.C. Circuit has made a decision?

Ms. PUSTAY. No, I did not say—I know it is not ongoing anymore, but it is not appropriate for me to go behind the scenes to talk about litigation procedures or strategies. The position that the Government took is in our briefs that are obviously publicly available.

Senator GRASSLEY. Yes, but since you are such a key player in this whole thing, if they do not seek your advice, we ought to know that. Why wouldn't they seek your advice? If they did not, you can just say no, they did not seek your advice.

Ms. PUSTAY. As I said, it is just not appropriate for me to talk about behind-the-scenes discussions that go on at the Department of Justice in connection with litigation.

Senator GRASSLEY. Well, I am not a lawyer here, but can I ask the lawyers on the staff whether that is an appropriate thing once a decision has been made?

Ms. PUSTAY. The attorney work product privilege extends beyond the conclusion of the litigation. I can tell you that.

Senator GRASSLEY. Okay. Go ahead and tell me whatever you want to tell me. I do not think it will be of much value, but go ahead.

Ms. PUSTAY. What I thought might be helpful to you, Senator Grassley, is to know that we have done a number of steps, taken a number of steps since the Attorney General's FOIA Guidelines were issued to help agencies improve their experience with—to help agencies and requesters interact more productively together. And, in particular, we have issued now over the course of the past several years two guidance articles specifically on the importance of good communication with requesters. And in doing so, we have taken into account and gotten a lot of suggestions from the re-

quester community through requester roundtables and just regular outreach that I have with the open government groups. And I have taken that information and put it into guidance to agencies, all designed to help improve the way agencies interact with requesters. I think that is a very good example of how my office, through our guidance function, is improving the process.

Senator GRASSLEY. I want to ask you another question. Last year I pointed out my concerns regarding increased litigation on FOIA. Specifically, we had this 2012 study finding that there were more court complaints from requesters to get documents under the Freedom of Information Act during President Obama's first term as compared to Bush's second term. It would seem to me that the Government is falling short of achieving unprecedented transparency. This problem highlights questions surrounding use of the foreseeable harm standard. Attorney General Holder has instructed agencies to apply this standard in litigation and agency decisionmaking. Doing so encourages discretionary disclosures wherever possible.

So my question: During this administration has the Justice Department ever applied the foreseeable harm standard and decided not to defend an agency in a Freedom of Information Act lawsuit?

Ms. PUSTAY. The Department of Justice, there have been—yes. The answer to your question is yes. Through the review process that our litigators go through with the agencies when a FOIA lawsuit is filed, there have definitely been situations where information was released as a result of applying the Attorney General's Guidelines, and examples of those are actually contained in published court opinions.

Senator GRASSLEY. Okay. Maybe you can give us—because the next question, I was going to ask you to provide a list of those cases. You might just give us the citations so we can get to them.

Ms. PUSTAY. Certainly. I will be happy to do that.

Senator GRASSLEY. Okay.

[The information referred to appears as a submission for the record.]

Senator GRASSLEY. Then I am going to go to Ms. Nisbet. Your testimony notes that the administration's goal of simplifying the process for requesters and the agency professionals, specifically improving the online process for making and tracking freedom of information requests. I know that the National Archives and other agencies participate in FOIAonline portal, so I would like to hear from you about what we should consider when we examine this matter. So this question: Given that agencies vary in size and operation, how can a single online portal be created that avoids a one-size-fits-all approach? And on this point, has a failure to accommodate the differences between agencies caused any agency to terminate its use of FOIAonline?

Before you answer, I understand that the Treasury Department no longer uses FOIAonline portal, so I think it is helpful that we carefully consider how to establish online systems that are being utilized by multiple agencies of different sizes.

Can you answer that for me?

Ms. NISBET. Yes, Senator Grassley. I hope I can answer all of those questions.

FOIAonline launched October 1, 2012, so it has been operating for about a year and a half. There are currently seven agencies that are partners in it. The National Archives and Records Administration is one, and we would certainly be an example of one of the small agencies. We are quite small compared to some of the others—Department of Commerce, Customs and Border Protection has recently joined, and the Department of the Navy joined just this February, so just barely more than a month ago. And the goal is to have a shared service. It is to accommodate both small agencies and large agencies, and we have not had—we, the partnership of FOIAonline, have not discovered that there has been an issue doing that. In other words, whether a small agency or a large agency, the system seems to be working quite well. We have heard good feedback from requesters, and we think it is going to be a good model for looking at either continuing to expand it, which we hope is going to happen, or to the next version that comes along.

Treasury did belong for about a year. It was, in fact, creating its own system, but it was not up and running at the time that FOIAonline got up and running, and so Treasury joined during such time as it was able to take advantage of that multiagency portal until it was ready to launch its own expanded FOIA request system.

Senator GRASSLEY. I have one more question. I am going to ask you to answer in writing.

Mr. Chairman, I would like to ask Ms. Nisbet to take a message back to the Archivist. I am continuing to look closely at the National Archives Inspector General being kept on administrative leave for over 17 months. That is almost \$200,000 of taxpayers' money that has been wasted while we are waiting to resolve problems there. I think it severely harms the credibility of the National Archives and needs to be resolved. I would appreciate it if you would tell him that.

Ms. NISBET. Yes, sir, I will.

Senator GRASSLEY. Thank you.

[The information referred to appears as a submission for the record.]

Senator GRASSLEY. Thanks to both of you for answering my questions.

Senator FRANKEN [presiding]. Thank you, Senator Grassley.

Director Pustay, thank you for testifying this morning. I am sorry I got here late.

The Center for Effective Government just came out with a report grading the 15 agencies that receive by far the most FOIA requests, over 90 percent of all information requests that the Federal Government receives. None of the 15 agencies received an A and 7 got an F.

I am particularly concerned about the long delays that people must undergo when they wait for records, notably including requests from groups that are seeking information to make sure that Federal contractors are complying with important labor laws. It seems like reform is necessary.

What are some of the biggest problems that agencies face as they work to comply with FOIA? And what can we do to resolve those problems?

Ms. PUSTAY. The primary reasons that agencies give for having backlogs are the increases in the number of requests coming in, and as I have said, for the past 5 years we have had a steadily growing number of requests for information coming into the Government, so people—there are more requests to handle. And although many agencies are able to increase the number of requests they process to meet that incoming demand, the second thing that has been happening is that the requests are more complex than they were before. And I think in some ways, as agencies post more information online, what comes in as a request then tends to be a more complicated matter.

So putting those two things together, in my opinion the best way or one of the best ways we would have to really actually tackle that is the topic of this very hearing—technology. I am very hopeful that the more advanced, sophisticated technology tools that can actually help agencies search for records and duplicate records and sort records, all the things that many times are done manually, if they can be automated to increase timeliness, that in turn will allow the agencies to get back to the requesters in a faster way. So that to me is the best approach that we have to that issue.

Senator FRANKEN. Well, how long will that take to implement?

Ms. PUSTAY. As I said in my opening statement, last year 68 agencies reported using advanced technology tools. So it has been—when you look back just a few years in FOIA administration, when we were using much more basic technology, there have been real leaps and bounds forward. And agencies obviously really embrace and appreciate the use of these more sophisticated technology tools. They are also always looking for efficiencies.

One of the focuses of the Attorney General's FOIA Guidelines is to ask agencies every year to report on what are they doing to increase their efficiencies. Every agency is going to have different reasons for delays or different reasons where—different choke points in their process. And looking every year at efficiencies and finding ways to make your process more efficient and more smooth is another key aspect of what we have been doing under the Attorney General guidelines. And those are improvements that have been being made so far for 5 years under the guidelines and that we will continue to encourage going forward.

Senator FRANKEN. Well, if half the agencies are getting an F and, as you said, most of the agencies seem to be using this advanced technology, I think there is something systemically wrong here.

When you came to testify before the Committee last year, we talked about specific agencies and specifically the Department of Justice working to update their FOIA regulations to be consistent with the Open Government Act, which was passed 6 years ago now and the Attorney General's March 2009 memo setting out the administration's policy on FOIA.

At the time you said the Department was still working on its own regulations, which it hoped would serve as a model for other agencies. This model for other agencies, why is the Department still not done with it? And what is the status of these regulations?

Ms. PUSTAY. I can report that the regulations are now undergoing a regulatory review process that is—

Senator FRANKEN. The regulations are undergoing a regulatory review process. Okay.

Ms. PUSTAY. Yes, yes. It is required by Executive Order 12866, to really give you the details of it. So there is a specific process. We are at the tail end of that process, and it is now in this inter-agency review stage. So we really are optimistic that they will be ready soon.

I do want to, though, re-emphasize to you—I know we talked about this before—the Attorney General’s Guidelines did not require implementing regulations. We have been working steadily and very aggressively since they were issued in 2009 to implement those guidelines, not just at DOJ but across the Government. No regulatory changes were needed. We have required agencies to report on their progress in implementing the guidelines through their Chief FOIA Officer Reports. So we have a very full record of not just what DOJ has been doing for the past 5 years under the guidelines but what all agencies have been doing to increase transparency.

Senator FRANKEN. Okay. Well, hopefully the next report you will be getting better grades, but thank you both for your testimony. You are excused, and I would like to invite the witnesses on our second panel to come forward.

[Pause.]

Senator FRANKEN. Well, first of all, welcome and thank you for taking time from your busy schedules to be with us today.

Our first witness is Amy Bennett, the assistant director at OpenTheGovernment.org. OpenTheGovernment.org is a coalition of 80-plus organizations seeking to make the Federal Government more open and accountable.

Our next witness is Dr. David Cuillier, director and associate professor of the University of Arizona School of Journalism. Dr. Cuillier is also the president of the Society of Professional Journalists, the largest organization of journalists in the United States.

Our final witness is Daniel J. Metcalfe. He is the adjunct professor and executive director of the Collaboration on Government Secrecy at the Washington College of Law at American University. And he is the former Director of the Department of Justice Office of Information and Privacy.

I would like to thank you all for joining us. I would like to give you each about 5 minutes to make your opening statements. Your complete written testimonies will be included in the record. Ms. Bennett, please go ahead.

**STATEMENT OF AMY BENNETT, ASSISTANT DIRECTOR,  
OPENTHEGOVERNMENT.ORG, WASHINGTON, DC**

Ms. BENNETT. Thank you, Chairman Leahy, Ranking Member Grassley, and Members of the Committee, for the opportunity to speak today about reinvigorating the Freedom of Information Act—

Senator FRANKEN. I think your mic might not be on.

Ms. BENNETT. There we go. So thank you for the opportunity to speak about reinvigorating the Freedom of Information Act and for your unwavering commitment to protecting and strengthening the public’s right to know. My name is Amy Bennett, and I am the as-

sistant director of OpenTheGovernment.org, a coalition of more than 80 organizations dedicated to openness and accountability.

Currently the FOIA is anything but an efficient tool and effective tool that the public can use to get timely access to Government records. Members of the public must contend with delays, mind-boggling technical barriers, and a tradition of bureaucratic resistance to disclosure because agency officials believe information in agency records belongs to the agency, not the people.

There is no doubt that technology has been extremely useful in speeding FOIA processing while also making it easier for the public to use and re-use Government information.

Technology is not the entire answer, however, and we hope that the Committee will approve amendments to the FOIA addressing two of the issues discussed below and in my written testimony.

Foremost among these, the open government community would like to see Congress put tighter boundaries around the Government's overuse of FOIA's Exemption 5 or, as many requesters like to refer to it, the "We don't want to give it to you" exemption. Exemption 5 is intended to protect the Government's deliberative process, among other things, and was intended to have—as are all FOIA Exemptions—narrow application. Over time, Federal agencies have expanded the scope of Exemption 5 to the point that it covers practically anything that is not a final version of a document. In one recent egregious example, the Central Intelligence Agency denied a request from the National Security Archive for a copy of the CIA's internal history of the 1961 Bay of Pigs disaster. The request was denied despite the fact that the draft is connected to no policy decision by the CIA and it is related to events that occurred more than 50 years ago.

Exemption 5 has also recently been invoked to flatly deny the public access to opinions by the Office of Legal Counsel. In recent years, we have seen the Government rely on these opinions to authorize a number of programs that go well beyond the plain reading of the law.

Secret interpretations of the law prevent the public from having fully informed debates about Government's policies and erode the public's trust in the executive branch and in its decisions.

In terms of needed reforms to Exemption 5, we can draw two lessons from these examples. One, Exemption 5 needs a public interest balancing test. If the Government were not convinced that the requested documents would advance the public interest, a requester would still have the opportunity to ask a court to independently weigh the Government's needs in invoking the privilege against the needs of the requester. Two, there needs to be a time limit. Currently, a President's records are only protected from release for 12 years after he leaves office. We should not accord more secrecy to agency business than we accord the President of the United States.

The next critical issue relates to the Office of Government Information Services. The open government community strongly supports OGIS, and we appreciate this Committee's leadership in creating the office. You will not be surprised, however, when I tell you OGIS continues to struggle to meet its dual roles as FOIA mediator

and as the office charged with reviewing agency FOIA compliance in recommending changes to Congress and the President.

The first limitation faced by OGIS should be abundantly clear to this Committee thanks to Senator Grassley's sharp questioning during last year's FOIA oversight hearing. It should not take a threat by a Senator to drive down to the Office of Management and Budget to make sure that OGIS' recommendations are delivered in a timely fashion. OGIS needs direct reporting authority so it can give you and the President opinions and recommendations based on the problems that they see.

The second limitation is the age-old problem of resources. Right now the office consists of a staff of seven. That is seven people to help each agency FOIA office and the hundreds of thousands of FOIA requesters. They need new resources to help promote and support the office's work. We believe that Congress should approve at least two new positions—a Director of Enforcement and a Director of Operations—to further strengthen OGIS' ability to carry out its mission.

The final limitation currently faced by OGIS that I will discuss today is its lack of authority to compel agencies to participate in the mediation process. Currently, OGIS and a requester that seeks OGIS' assistance must rely on the good will of an agency involved in a dispute. For OGIS to serve all requesters who seek mediation service, Congress should require agencies to cooperate with OGIS and to provide information if requested.

OpenTheGovernment.org and our partners are eager to work with you to draft a strong bill that makes FOIA work better for the public. In addition to the other issues discussed in my written testimony, I am submitting a much longer list of possible reforms that the open government community would like to see enacted.

We also think there are several good ideas in the recently passed House bill, and included with my testimony is a letter signed by more than 25 organizations endorsing that bill and calling attention to particularly good provisions.

Thank you for the opportunity to speak about this critical issue, and I look forward to answering any of your questions.

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

Senator FRANKEN. Thank you, Ms. Bennett.

Dr. Cuillier.

**STATEMENT OF DAVID CUILLIER, PH.D., DIRECTOR AND ASSOCIATE PROFESSOR, THE UNIVERSITY OF ARIZONA SCHOOL OF JOURNALISM, AND PRESIDENT, SOCIETY FOR PROFESSIONAL JOURNALISTS, ON BEHALF OF THE SUNSHINE IN GOVERNMENT INITIATIVE, TUCSON, ARIZONA**

Professor CUILLIER. Thank you, Senator Franken.

I want to thank you for the opportunity to testify today on behalf of the Society of Professional Journalists and the Sunshine in Government Initiative. As you know, we are passionate about access to Government information. FOIA helps journalists reveal corruption, expose problems in society, empower citizens. Recently, journalists have used FOIA to expose dangers of crime aboard cruise ships. They have used FOIA to discover conflicts of interest among Fed-

eral Reserve Bank presidents. They have used FOIA to show how drug companies influence what appears on warning labels. FOIA makes a difference. It saves lives.

But I am here today to say that FOIA is terribly, terribly broken, and it needs more than just reinvigoration. It really needs resuscitation. You all have worked hard to improve FOIA—the 2007 Open Government Act, creation of OGIs—and for that we thank you. All great. But on the ground today, people's real access to information is actually more and more restricted than ever. For example, this year the U.S. dropped 13 spots on the world ranking of press freedom, down to 46th place behind such countries as Romania, El Salvador, and Botswana. When you compare FOIA laws around the world, the statutes among the 90 or so countries that have them, the U.S. now ranks—and get this—44th. We are nearly in the second half in FOIA statute strength in the world. We have a weaker FOIA law than Uganda, Kyrgyzstan, Mexico, and Russia.

Well, this trend is supported by other recent research. The Associated Press found that use of exemptions have increased 22 percent from 2011 to 2012. A study out of Penn State showed that agencies have used privacy exemptions to deny records more often under the Obama administration than the Bush administration. In surveys and anecdotally, journalists report increased delays, excessive fees, and agencies frankly gaming the system. Journalists are angry, they are livid, and I have never seen them as angry as they are now.

You may recall, for example, that chemical contamination of drinking water a few months ago in West Virginia affecting 30,000 residents. There was a reporter down there, Ken Ward, Jr. He has been stonewalled by the EPA and CDC. He requested records regarding health risks to pregnant women, but last week the CDC denied his petition for expedited review. They told him there was no urgent need to inform the public about the matter.

Another reporter told me last week about a data request he initiated a couple years ago with Immigration and Customs Enforcement. After resistance and delays, Immigration referred the matter to OGIS for mediation. But then, after more delay, they decided not to go through mediation. Then they said too much time had passed and the reporter could not appeal anymore, so case closed. Now the reporter has to submit another request and start all over. It is that kind of behavior that we see that is causing a lot of problems. Agencies are getting more sophisticated in denying, delaying, and derailing requests, using FOIA as a tool of secrecy not of openness. So we can reverse this trend, but it is going to take significant action, such as:

Number one, we probably should codify the presumption of openness. Let us enshrine into law that records should be freely available to the public unless disclosure would cause a specific, foreseeable, and identifiable harm.

Number two, definitely, as we have heard here, strengthen OGIS. It needs more staff, it needs more independence, it needs more authority. OGIS should have a Chief FOIA Officers Council to recommend changes. OGIS should have enforcement powers. Some States have created enforcement mechanisms. Even Mexico has. So why not the U.S. Government? Really.

Number three, streamline the process. It is good to hear work is underway in a single online portal for receiving and tracking requests. Great. Harness the Internet, save money, time, frustration. I think we can all agree to that.

But more important, number four, far more important than technology, gizmos, doodads, and gee-gaws is reigning in the statutory exemptions. That is primarily the most important thing we can do, because exemptions are being used today to end-run FOIA, crippling the law. And over the years, we appreciate pushback on exemptions, most recently with the farm bill. But we need to narrow the application, particularly with b(3). We need sunsets. We need a public interest balancing test, like Ms. Bennett said. And we need to require exemptions go through the Judiciary Committee for review.

Of course, there are many other ways we can make beneficial changes to FOIA, and I know my colleagues next to me will provide more ideas. But I think the final thought I would like to leave you with is this: We are undergoing a climate change in this Nation with our transparency, and unless we take action now, I think we can forecast a future shrouded by cloudiness, darkness, and secrecy.

I thank you for the opportunity to testify, and I look forward to answering your questions. Thank you.

[The prepared statement of Prof. Cuillier appears as a submission for the record.]

Senator FRANKEN. Thank you, Doctor.  
Professor Metcalfe.

**STATEMENT OF DANIEL J. METCALFE, ADJUNCT PROFESSOR OF LAW, AND EXECUTIVE DIRECTOR, COLLABORATION ON GOVERNMENT SECRECY, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, WASHINGTON, DC**

Professor METCALFE. Good morning, Mr. Chairman and Members of the Committee. As someone who has worked with the Freedom of Information Act now for more than 35 years, I am pleased to be here this morning to provide an academic perspective on the Act and its governmentwide administration.

My own views today are rooted in my work at American University's Washington College of Law in recent years, where I teach courses in Government information law and direct the Collaboration on Government Secrecy, or CGS.

In addition to maintaining an extensive website as an academic resource for all who are interested in Government secrecy and transparency (as two sides of the same coin), CGS has conducted an extensive series of day-long programs on the subject, with particularly heavy focus on the FOIA and, most recently, on the Obama administration's implementation of it. Next week, we will hold our 24th such academic program—our annual celebration of Freedom of Information Day—and I am pleased to note that this Committee's Chairman has twice participated in them.

This academic perspective is also informed by decades of experience in leading the component of the Department of Justice, then the Office of Information and Privacy, now called the Office of Information Policy, that discharges the Attorney General's responsi-

bility to guide all agencies of the executive branch on the complexities of the FOIA's administration.

I know firsthand of the challenges involved in encouraging proper compliance with the Act, including new policy conformity by all agencies. Simply put, I have "been there, done that," through several Presidential administrations, time and again.

So it is through that lens that I view the many ways in which the openness-in-government community has been disappointed, greatly disappointed, by the surprising inadequacies of the Obama administration's implementation of new FOIA policy—especially the key standard of "foreseeable harm"—during what has now been these past 5 years. This began with the Holder FOIA Memorandum itself. Contrary to all expectations, and despite the precedent established by Attorney General Janet Reno, the Holder FOIA Memorandum did not by its terms apply its new "foreseeable harm" standard to all pending litigation cases—where it could have had an immediate, highly consequential impact. Rather, it contained a series of lawyerly hedges that appear to have effectively insulated pending cases from it.

As one of the speakers at a CGS FOIA Community Conference put it, the FOIA requester community is still waiting to see a list of any litigation cases in which the "foreseeable harm" standard has been applied to yield greater disclosure. And after all these years now, notwithstanding what you heard this morning, there is a strong suspicion that there are few or perhaps even no such cases.

Thus, the best possible opportunity to press for full adoption and use of this standard throughout the executive branch, in a concrete, exemplary fashion, has been lost.

Perhaps I should note parenthetically here that the bipartisan FOIA amendment bill passed by the House 2 weeks ago, H.R. 1211, that was mentioned by Senator Grassley, contains a provision that would codify the "foreseeable harm" standard as a matter of law.

Neither did the Holder FOIA Memorandum or its initial implementation guidance take the expected step of directing agencies to reduce their backlogs of pending FOIA cases. That is something that I address at great length in my written statement, and I will just in the interest of time skip over that now.

But that should be a matter of concern for more than one reason: The awkward fact that the Department of Justice's own FOIA backlog has been allowed to worsen over the past 3 years is bad enough for its own FOIA requesters. But when the lead Government agency for the FOIA fails so badly to reduce its own backlog, it makes it much harder for it to press other agencies to dutifully comply. And this "do as I say, not as I do" problem is exacerbated by the fact that the Department's high-visibility leadership offices saw their own numbers of pending FOIA requests increase, rather than decrease, over the same period, by an aggregate figure of 3.95 percent. This makes it impossible to lead by example.

Turning to the FOIA's exemptions, I will mention that the one that continues to cry out for immediate attention is Exemption 2. That is because of the Supreme Court decision that was issued 3 years ago that basically eviscerated Exemption 2, leaving a lot of

sensitive information within the Government without an exemption that applies.

I think it is fair to say that there is no reasonable question that remedial legislation is needed. And as Senator Grassley suggested in a question 2 years ago, it is irresponsible for the executive branch not to have proposed an amendment of Exemption 2 since that time.

In sum, there certainly is much reason to look askance at the implementation of new FOIA policy over the past 5 years, to put it mildly. And this relatively brief recitation here today does not even take the time to consider in depth other large deficiencies, such as the glaring fact that most Federal agencies (especially, and again inexplicably, the Department of Justice) have not updated their vital FOIA regulations for many, many years now, even though required to do so, put aside the Holder Memorandum in 2009, by the 2007 FOIA Amendments.

Nor does it include the fact that as found in an academic study conducted by CGS, less than half of the Exemption 3 statutes used by agencies actually qualify under that exemption.

In conclusion, I surely appreciate the Committee's efforts today as in the past to, in the words of today's hearing title, "reinvigorate the FOIA for the Digital Age." But I daresay that what now appears to be needed—much to nearly everyone's great disappointment and surprise—is sustained attention of a serious, remedial nature.

Thank you for the opportunity to testify today, and I look forward to answering your questions.

[The prepared statement of Prof. Metcalfe appears as a submission for the record.]

Senator FRANKEN. Thank you, to all of you. Thank you, Professor Metcalfe.

I will start with Ms. Bennett. You have heard the Government's testimony today. Do you agree with their assessment of agency compliance with FOIA?

Ms. BENNETT. I would certainly disagree that there have been robust efforts to implement the FOIA and that things are going particularly well. My organization believes that the Department of Justice, when they issue their annual report cards, generally act more as the cheerleader for how agencies are doing. And I think that to make agencies really pay attention to processing FOIA the way that they should be and to begin to really make a difference for requesters, we need to start calling agencies out on what they are doing wrong. So we hope that the Department of Justice takes a more fulsome look at not just where things are going well but where things are going poorly.

Senator FRANKEN. Well, let me ask you that. Where are things going poorly? And what are your priority areas for reform?

Ms. BENNETT. Sure. I think certainly the use of Exemption 5, as I talked about in my testimony, is a problem that we have seen over and over again. I know that the Department of Justice said that you cannot really use that statistic because it depends on what has been requested. But they certainly use that statistic when it is in their favor.

So we think that it is telling, and it is important, especially if you are looking at it over time, comparing year to year. So putting some tighter boundaries around how that exemption is used is definitely one of our number one priorities.

Senator FRANKEN. Okay. Thank you.

Dr. Cuillier, we know that FOIA has for over 40 years been instrumental to the press and to its role in our democracy. By the same token, we know that the FOIA system remains far from perfect. In your opinion, what are the most pressing problems that representatives of the news media face in navigating the FOIA system?

Professor CUILLIER. Exemptions, hands down. It is agencies figuring out how to avoid giving out information they do not want out. And usually when journalists are requesting information, it is to find something that perhaps an agency does not want the public to know. So they will figure out any way to game the system, and that is huge frustrations in addition to delays and delays and delays, which is essentially denial to a journalist. And that is what is happening today. It is not even just FOIA. We are talking about a big trend in all forms of information control, excessive PIO controls at the Federal agencies, State and local government. It is everywhere. And this is a trend that has been going on for 40 years. The research supports it, the body of evidence. There may be folks who say otherwise, but it is just not supported overall, big term.

I sound like a climate change scientist from the 1980s, but I am telling you, something is amiss. And unless we do push back against it, it is going to be pretty bad here.

Senator FRANKEN. Professor Metcalfe, in your testimony you talked about the exemptions. Do you agree with the other two witnesses?

Professor METCALFE. I certainly do agree that there are serious problems. If you wanted to have a list just to focus, in priority fashion, I would suggest six things in total:

One, that there needs to be focus on the implementation of the foreseeable harm standard, which, by the way, is a very specific, concrete thing. That is how we implemented it in the Clinton administration, not with some more amorphous term such as "presumption of openness," which does not mean that much to a FOIA analyst in the trenches.

Second, backlog reduction, which I discussed in great detail in my written testimony. The Department of Justice's backlog has increased. The Open Government Directive in December 2009 mandated all agencies with a significant backlog to reduce their backlog by 10 percent per year since then. That has not happened governmentwide. There has been an increase. It has not happened within the Department of Justice in particular. There has been an increase. It has not happened in the three top leadership offices of the Department: AG, Deputy, and Associate's office. There has been an increase.

Third, Exemption 2. I do not think there is any reasonable dispute that remedial legislation is needed there, and as I say in my written testimony, it is utterly unfathomable to me why that has not happened. I am not casting aspersions on the work of the Committee because the tradition, certainly the one that I followed for

more than 25 years in leading that office, was that the executive branch, Justice, and OMB took the initiative in proposing legislation. But it has not happened. No one knows why.

Fourth, regulations. As I mentioned earlier, regulations may not be legally required to implement the Holder Memorandum, but when we issued the one that I wrote for Janet Reno in October 1993, we codified, so to speak, that standard in our regulations, and other agencies did as well. That is good policy; it is good practice to do so. It is inexplicable why that has not happened.

Fifth, Exemption 3. As I indicated in my written testimony, there is a strong potential for one or the other committee on the Hill, this Committee or the counterpart committee on the House, to look at the academic groundwork we have done at my secrecy center because we have found that barely half of the more than 300 Exemption 3 statutes reported as used by Federal agencies actually qualify as Exemption 3 statutes when you look at them carefully.

And, sixth, something you have already discussed, which is OGIS, and I know that you are very focused on that as well.

Senator FRANKEN. Well, thank you all, and I apologize but I have to go to a vote. So we are going to have to close the hearing. I want to thank all of you. I want to thank the Chairman and the Ranking Member and, again, each of you.

We will hold the record open for 1 week for submission of questions for the witnesses and other materials.

This hearing is adjourned. Thank you.

[Whereupon, at 11:43 a.m., the Committee was adjourned.]

[Additional material submitted for the record follows.]



## APPENDIX

### ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

#### Witness List

Hearing before the  
Senate Committee on the Judiciary

On

"Open Government and Freedom of Information: Reinvigorating the Freedom of Information  
Act for the Digital Age"

Tuesday, March 11, 2014  
Dirksen Senate Office Building, Room 226  
10:15 a.m.

#### Panel I

Melanie Pustay  
Director, Office of Information Policy  
United States Department of Justice  
Washington, DC

Miriam Nisbet  
Director, Office of Government Information Services  
National Archives and Records Administration  
Washington, DC

#### Panel II

Amy Bennett  
Assistant Director  
OpenTheGovernment.org  
Washington, DC

Dr. David Cuillier  
Director, Associate Professor  
The University of Arizona School of Journalism  
President, Society for Professional Journalists  
On behalf of The Sunshine in Government Initiative  
Tucson, AZ

Daniel J. Metcalfe  
Adjunct Professor of Law  
Executive Director, Collaboration on Government Secrecy  
American University Washington College of Law  
Washington, DC



## **Department of Justice**

**STATEMENT OF**

**MELANIE ANN PUSTAY, DIRECTOR, OFFICE OF INFORMATION POLICY**

**BEFORE THE**

**COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE**

**AT A HEARING ENTITLED**

**"Open Government and Freedom of Information: Reinvigorating the Freedom of  
Information Act for the Digital Age"**

**PRESENTED MARCH 11, 2014**

**Melanie Ann Pustay, Director, Office of Information Policy, U.S. Department of Justice**

**Committee on the Judiciary, United States Senate**

**"Open Government and Freedom of Information: Reinvigorating the Freedom of Information Act for the Digital Age"**

**March 11, 2014**

Good morning, Chairman Leahy, Ranking Member Grassley, and Members of the Committee. I am pleased to be here today, the week before Sunshine Week, to discuss the Department of Justice's ongoing efforts to assist agencies in improving their administration of the FOIA and to ensure that President Obama's Memorandum on the FOIA and Attorney General Holder's FOIA Guidelines are fully implemented. As the lead agency responsible for encouraging agency compliance with the FOIA, the Department of Justice is strongly committed to the President's and Attorney General's vision of open government. The Office of Information Policy (OIP) carries out the Department's responsibility to encourage agency compliance with the FOIA. Increasing use of technology to improve the public's access to information has been a key part of our work.

As you know, this Sunshine Week we will celebrate the fifth anniversary of the Attorney General's FOIA Guidelines. Issued during Sunshine Week on March 19, 2009, those 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 to improve timeliness and to work to reduce backlogs. Those Guidelines also directed agencies to promptly and proactively make information available to the public. Finally, both the President and the Attorney General emphasized the importance of agencies using "modern technology to inform citizens about what is known and done by their Government."

Over the past five years, we have seen agencies embrace technology in a wide variety of ways, all designed to improve access to information. Looking ahead, we have launched a series of initiatives that are designed to modernize the FOIA even further. Through the efforts to date and those to come I believe that agencies are in the process of transforming the way in which the FOIA is administered and information is made available to the public.

I have been working in FOIA long enough that I can remember the days when agencies overwhelmingly searched by hand, for records that consisted solely of paper, and that were stored in filing cabinets or boxes. When FOIA requests were received, FOIA Offices searched for and reviewed records manually and made proposed redactions using highlighters or tape. FOIA Offices had supply cabinets filled with "El Marko" magic markers and the invention and use of "post it notes" was a real step forward. As I'll describe, times have certainly changed since then.

As part of the Attorney General's FOIA Guidelines, agency Chief FOIA Officers were directed by the Attorney General to review their administration of the FOIA each year and to report to the Department of Justice on the steps taken to improve transparency. OIP was given responsibility for

providing direction to agencies on the content of their reports and from the start, we asked agencies to address the topic of technology use in the administration of the FOIA. Each year we have modified the reporting requirements, building on the responses of previous years. As a result, agencies' Chief FOIA Officer Reports are a valuable resource for tracking and documenting agency use of technology over the past five years. These Reports also provide a detailed description of each agency's efforts to apply the presumption of openness, to increase efficiencies, to proactively disclose information, and to improve timeliness in responding to requests. I highly recommend that the Committee review these Reports, which are available at <http://www.justice.gov/oip/reports-fy2013.html>, to see the broad array of activities that agencies have undertaken to improve their FOIA administration.

On the topic of technology, for the first Chief FOIA Officer Reports submitted in 2010, OIP asked agencies to answer a series of eight questions relating to their use of technology. While we knew anecdotally that agencies had been acquiring automated FOIA tracking systems and moving to greater use of technology in administering the FOIA, this was the first time that an agency-wide survey on technology use had been undertaken. The results overwhelmingly showed that agencies were harnessing technology to assist them in the core elements of FOIA processing. Virtually all agencies reported that they received and tracked requests electronically, and used technology to process records. This survey demonstrated that the old days of using El Markos and tape were coming to an end. Agencies recognized the benefits of IT and were using it to help manage their FOIA workloads. In the years since then, just as technology has rapidly changed other aspects of how the public and agencies work and communicate, in the FOIA context, technology is being used in ever more sophisticated ways to improve disclosure of information.

As agencies were expanding and adapting technology for FOIA purposes and working to implement the Attorney General's FOIA Guidelines, OIP believed that it was important to provide agencies with a forum where they could share their ideas and learn from the successes of one another. In the spring of 2010, after review of those first Chief FOIA Officer Reports, OIP convened two FOIA Working Groups, one focused on FOIA Best Practices and the second working group focused specifically on the critical area of technology. As an outgrowth of those meetings, OIP issued guidance and suggested best practices for agencies, many of which addressed increased use of technology.

OIP has continued to hold meetings of its FOIA IT Working Group, which have focused on a number of important areas where the government's FOIA administration could benefit from greater use of technology, including improving agency websites, using metadata to tag posted documents so that they are easier to locate, and using social media to make information available to the public. The Working Group will be meeting once again next week, during Sunshine Week, to review all the different topics we have covered over the past four years, and to discuss the important role of technology in FOIA. As we did last year, during Sunshine Week, we will open this meeting to interested members of the open government community, who can share their ideas and experiences with the participants.

One area in which we have found technology to be particularly beneficial is the use of tools and applications that assist with the core tasks of processing FOIA requests, such as technology that assists in the search and review of documents, shared platforms that allow for simultaneous review and comment on documents, and electronic capabilities that automatically identify duplicative material. Automating many of the internal processes for handling FOIA requests can bring great benefits in efficiency. For example, conducting an adequate search for responsive records often involves the review of both paper and electronic records originating with multiple employees throughout the agency. In turn, these searches can locate hundreds, if not thousands, of pages of material that need to be reviewed for both responsiveness and duplication before a FOIA disclosure analysis can be conducted. With the widespread use of email and the common practice of employees forwarding the same email to multiple other people,

with each employee then building still further on that email, long chains of overlapping and duplicative email are frequently created. The benefits of using technology to de-duplicate and sort and thread all those emails automatically, rather than doing so manually, are readily apparent. Employing electronic systems that can consolidate and perform any of the necessary administrative tasks associated with FOIA processing allows agency FOIA staff to focus their efforts on substantive review of the responsive material. This, in turn, has great potential to improve timeliness in responding to requests.

Significant time savings can be achieved by automating many of the administrative tasks associated with FOIA processing. Advanced technologies allow for more precise and targeted searches to be easily performed across a wide spectrum of documents in a short period of time. More sophisticated document platforms allow for enhanced capabilities in the review and processing of records, automatically creating indices and facilitating review of the material. In all of these ways, the internal processes associated with locating and processing material in response to requests can be greatly improved by using advanced technology.

OIP has hosted seminars and given presentations at our FOIA IT Working Group and other forums with the aim of enhancing awareness of the possibilities these technologies hold for increased efficiencies across the government. In the past two years, other components within the Department and other agencies have all begun using various document-management software tools for FOIA purposes. In their 2013 Chief FOIA Officer Reports a total of 68 agencies reported using some type of advanced technology to increase the efficiency of their FOIA administration. A number of agencies have implemented the use of advanced digital tools to automate the most time-consuming parts of the FOIA process, including acquiring tools to de-duplicate records. Agencies have also reported improving their records management systems to improve document retrieval in the first instance. Others are using document-sharing platforms to facilitate collaboration between and among different offices.

For example, last Fall the Department of Agriculture implemented the use of a new technology platform that allows its FOIA professionals to quickly list and catalog documents and sources; identify duplicate and near-duplicate documents and emails; search, categorize, and rank documents for ease of review; and view and group documents by the record holder. Just this past year, the Department of Homeland Security acquired de-duplication capabilities that allow FOIA staff at a number of its components to upload e-mail correspondence files and to de-duplicate them. At the Department of Defense, several components reported the implementation of advanced tools to improve searches, document sharing, and the de-duplication of records. Similarly, the Nuclear Regulatory Commission has also procured an advanced document review module to assist with the processing of voluminous records.

In addition to directly using technology to assist with internal aspects of processing FOIA requests, agencies have taken a number of steps to use technology in ways that improve the public's ability to interact with the agency and to find information. Online portals can be used by the public to make requests to more than 100 FOIA offices, of which 23 provide tracking information to the requester. For example, EPA has built a shared online portal that is currently being used by seven other agencies and which provides tracking information along with other features. The State Department created an online portal that guides requesters through a series of questions to help them better target their requests. At DOJ, we created the FOIA.gov website that, among other things, provides FOIA contact information for all agencies, eliminating the need for the public to navigate multiple websites to obtain that information. FOIA.gov also includes links to agency FOIA email accounts and online FOIA request portals, allowing the public to start making requests right from FOIA.gov.

Looking ahead, as part of this Administration's commitments under our Second Open Government National Action Plan, we have committed to improving the customer service experience even further by establishing a consolidated online FOIA portal that will not only allow for the making of

requests to all agencies from a single website, but will also include additional tools to help improve the customer experience. Such tools could, for example, help guide the requester to the right agency and help in the formulation of the request so that it could be answered more efficiently. We look forward to working with an interdisciplinary team that will seek input from both agencies and the public, will review current practices and explore new, innovative ideas, all with the aim of determining the best way to implement this consolidated FOIA service.

Both the President and Attorney General have emphasized the need for agencies to make information available to the public proactively. Making more information available online is yet another way that FOIA is adapting to the digital age. Given that proactive disclosures can satisfy public demand for information without the need to ever file a FOIA request, OIP has focused on this topic in both our written guidance and in our training for agencies. We also have included this as one of the key areas that agencies must address in their Chief FOIA Officer Reports each year.

In the five years since issuance of the Attorney General's FOIA Guidelines, agencies have embraced proactive disclosures by posting a wide variety of material that is of high public interest. As reported in the 2014 Chief FOIA Officer Reports, for example, the Department of Homeland Security reports that it has proactively posted over 63,000 pages since October 2010, including daily schedules of senior leaders and procurement records. The Department of the Air Force posts aircraft accident reports. The Department of Education posts Federal Student Aid data, while the Department of the Interior's Bureau of Safety and Environmental Enforcement is posting certain oil and gas production data. The Federal Deposit Insurance Corporation posted documents considered at Board of Directors' meetings and the SEC posted investment and money market information. In an example of how agencies are targeting proactive disclosures to those members of the public who typically frequent their website, the National Park Service posted information on the shooting of a grizzly bear at Grand Teton National Park. At the Department of Justice, the FBI continues to post information of interest in its online *Vault*, posting records this past year on subjects as diverse as Neil Armstrong and Spiro Agnew.

Beyond proactively posting new information online, agencies also continue to take steps to make the information on their websites more useful to the public. For example, the Department of the Interior's Bureau of Ocean Energy Management posted an interactive map displaying and describing its renewable energy-related activities in the United States. The FBI's *Vault* has a robust search capability and users are able to submit feedback and suggestions on how to make the site easier to navigate. At the Department of Agriculture, the Food and Safety Inspection Service uses an interactive resource called "Ask Karen" to provide information to consumers about preventing foodborne illness, safe food handling and storage, and safe preparation of meat, poultry and egg products. In another effort, Amtrak teamed up with Google to create an interactive train locator map, which allows the public to check on the status of its trains by showing where they are in route, the speed at which they are traveling, and estimated times of arrival. Finally, the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) has enhanced its website's performance and usability by continuously obtaining public feedback and analyzing various web metrics. Based on visitor feedback, NHTSA has enhanced SaferCar.gov by adding a new car seat sizing chart and functionality that compares 5-Star Safety Ratings by specific vehicles and classes.

Finally, FOIA.gov continues to revolutionize the way in which FOIA data is made available to the public. The website was initially undertaken by the Department of Justice in response to a strong interest by open-government groups to have a "dashboard" that illustrates statistics collected from agencies' Annual FOIA Reports, such as the numbers of FOIA requests received and processed each year, and the time taken to do so. The Department created FOIA.gov to serve as that dashboard.

In order to display all the detailed agency statistics in an open, interactive format, we created an Annual FOIA Report Tool for all agencies to use that converts their FOIA data into a NIEM-XML format which is then uploaded into FOIA.gov. We once again took advantage of the capabilities of technology by including within that tool built-in math checks and other features that assist agencies in ensuring the accuracy of their reports. This past year, we revised the tool even further so that it now produces not just the machine-readable version of the data, but also a human-readable Annual FOIA Report. This technological improvement to the tool enhances the quality of the human-readable reports by ensuring that they are compiled from the same set of data that is used for the machine-readable version.

Once the data is loaded onto FOIA.gov, it is displayed graphically, so it can be readily and easily reviewed by the public. FOIA.gov allows users to search and sort the data in any way they want, so that comparisons can be made among agencies and over time. This year we will be adding the comprehensive data from agencies' Fiscal Year 2013 Annual FOIA Reports to the website, so our body of data continues to grow.

This is not all FOIA.gov provides. From the start, the Department of Justice realized that FOIA.gov could be much more than a dashboard and so we created additional features to make the website more robust. To help educate the public about the FOIA, we included useful information on FOIA.gov about how the FOIA works, where to make requests, and what to expect through the FOIA process. We also included a glossary of FOIA terms and listed each agency's FOIA Requester Service Centers and FOIA Public Liaisons, as well as their Chief FOIA Officers. We created explanatory videos that guide the public through a series of questions about the FOIA. Since the launch of FOIA.gov, those videos have themselves received more than 2.5 million visitors.

To make it easier for the public to locate material that agencies have been proactively disclosing, the Department expanded the scope of services offered by FOIA.gov by adding a search feature, which allows users to enter search terms on any topic of interest. FOIA.gov then searches for material on that topic across all federal government websites. The "Find" feature captures not just those records posted in agency FOIA Libraries, but also records that are posted anywhere on an agency's website. Further, in the year ahead we will be building on our guidance issued last year at this time on the use of metadata tagging for FOIA. With increased use of metadata tags for posted material, the search capability of FOIA.gov will be enhanced even further by allowing for more targeted searches. In this way FOIA.gov will continue to provide the public with an easy way to locate information that has already been made available by agencies. With our continued focus on encouraging agencies to post documents proactively, enhancing the public's ability to locate that posted information is critical.

As you can see, the FOIA has indeed been adapting to the digital age. Yet there is still more that we can do to improve and advance the administration of the FOIA. In the next two years we have committed to five initiatives that are designed to modernize the FOIA as part of the Second Open Government National Action Plan. As mentioned, the first of these initiatives is the creation of a consolidated online FOIA service that will allow the public to make a request to any Federal agency from a single website and will include additional tools to improve the customer experience. Second, given that many steps in the FOIA process are generally shared across Federal agencies, and to streamline and simplify the request-making process for the public, an interagency team lead by OIP is reviewing the feasibility and potential content of a core FOIA regulation that could be both applicable to all agencies and retain flexibility for agency-specific requirements. Third, as agencies have been working to improve their FOIA practices these past five years, OIP is organizing a series of targeted Best Practices Workshops where agencies will systematically share lessons learned in implementing the Attorney

General's FOIA Guidelines, including increasing proactive disclosures, using technology and reducing backlogs and improving timeliness, with the goal of scaling those successes across the government. Fourth, to ensure that all employees, not just FOIA professionals, have a proper understanding of the FOIA, OIP is creating a suite of e-learning FOIA training resources which we will make available to all agencies, which target discrete groups of employees, from the newly arrived intern to the senior executive, to ensure that all employees know their obligations and responsibilities under the law. Lastly, OIP will be supporting and participating in a FOIA Modernization Advisory Committee that is being established at the National Archives and Records Administration to foster dialogue between agencies and the requester community and to develop consensus recommendations for improving FOIA administration.

In addition to all our work on these initiatives, the Department of Justice will also be continuing its work in encouraging and overseeing agency compliance with the law. We have been actively engaged in a variety of initiatives to inform and educate agency personnel on the requirements of the FOIA, as well the policy directives from the President and the Attorney General. Over the past five years, OIP has provided training to thousands of agency personnel, including training by video conferencing to reach employees outside the Washington area.

We also continue to reach out to the public and the requester community. In 2009, OIP teamed with the Office of Government Information Services to begin holding "requester roundtable" meetings with interested members of the FOIA requester community to engage in a dialogue and share ideas for improving FOIA administration. OIP has also, on multiple occasions, issued policy guidance to all agencies specifically in response to feedback from the requester community. Last year, for example, based on input from requesters, we issued revised guidance addressing the importance of good communication with FOIA requesters. One of the key points addressed in the guidance was the need for agencies to use technology to communicate with requesters when it is feasible to do so. We advised agencies to use electronic communication as the default and to alert the public to any limitations on the use of technology in communicating with the public.

In addition to our work encouraging agency compliance with the FOIA statute and with the Attorney General's FOIA Guidelines, OIP has undertaken several initiatives to increase agency accountability. Last year, for the first time, OIP instituted a new quarterly reporting requirement for all agencies that allowed for a more real-time assessment of the flow of FOIA requests handled by the government throughout the year. During the course of each fiscal year, agencies are now required to publicly report on the numbers of requests received, processed, and in an agency's backlog for that quarter, as well as the status of the agency's ten oldest pending requests. We, in turn, post that information on FOIA.gov. The Department has continued to focus on the importance of agencies closing their oldest pending requests and this additional reporting requirement was yet another way to bring attention to that issue.

In 2013, for the third straight year, OIP conducted a formal assessment of agencies' FOIA administration by scoring all 99 agencies that are subject to the FOIA on a series of milestones tied to each of the five key areas addressed in the Attorney General's FOIA Guidelines. Because each agency inevitably faces different challenges in meeting the demands of its FOIA operations, OIP uses a wide range of milestones to more completely capture every agency's efforts. We post on the Department's website the assessment each year, along with a summary of agency activity and guidance for further improvement. As agency implementation of the Attorney General's FOIA Guidelines has matured, OIP has been continually refining the milestones that are assessed. We have also engaged with the open-government community to identify new milestones to be included in the assessment. This collaboration

has been very productive and we greatly appreciate the ideas and suggestions we have gotten.

As you know, Sunshine Week is the time when agencies complete their Chief FOIA Officer Reports. Based on our initial review of those reports for 2014 and our review of agency Annual FOIA Reports for Fiscal Year 2013, it is clear that agencies have persevered through a difficult year of limited resources and tough fiscal times to meet the ever-increasing demands of their FOIA administration and to continue to improve public access to information. This past fiscal year marks yet another year in which the government received record high numbers of incoming requests. During Fiscal Year 2013, agencies received 704,394 requests, which rose from the previous high of 651,254 requests received in Fiscal Year 2012. Notably, since Fiscal Year 2009, the number of FOIA requests received by the government has increased each year. In Fiscal Year 2013, the government received 26 % more requests than the 557,825 received in Fiscal Year 2009. As described above, in accordance with the President's and Attorney General's FOIA directives, we have encouraged agencies to make proactive disclosures and to anticipate the public's need for information in advance of any FOIA requests. Agencies have responded to these directives by posting a wide variety of material. While we had hoped that this increased focus on proactive disclosures would reduce the number of incoming requests, to date that has not been the case. Of course, it is likely that the increase would be even higher in the absence of the many proactive disclosures that were made. It is also likely that our increased focus on the important role that transparency plays in our democracy has itself made more members of the public interested in seeking access to records under the FOIA.

In response to the increased numbers of incoming requests, agencies were able to increase the total number of requests processed this past fiscal year, processing 678,391 requests. As to backlogs of pending requests, out of the 99 agencies subject to the FOIA, 73 agencies reported having a backlog of fewer than 100 requests. Of those, 29 agencies reported no backlog at the end of the fiscal year. Further, 55 agencies reduced their backlog or continued to maintain no backlog of FOIA requests. Of the 40 agencies that had an increase in their backlog, 25 had a backlog of 100 requests or fewer. Given the importance of reducing significant agency backlogs, for the first time this year, OIP directed any agency that had a backlog of more than 1000 pending requests, and had not reduced that backlog by the end of the fiscal year, to include in its 2014 Chief FOIA Officer Report a plan for achieving backlog reduction in the year ahead.

Even in the face of these challenging times agencies did find ways to improve their administration of the FOIA this past year. As highlighted earlier, the 2014 Chief FOIA Officer Reports contain many, varied examples of proactive disclosures made by agencies and their increasing use of technology to find efficiencies in their administration of the law. Agencies also made improvements to their websites to make them more useful and are increasingly using social media to disseminate information to even wider segments of the public. Agencies have also continued to maintain a high release rate. Indeed, during Fiscal Year 2013, the government released records in full or in part in response to 91.4% of requests where records were processed for disclosure, marking the fifth straight year in which the government's release rate was above 90%.

Like the majority of agencies, the Department of Justice was also faced with the challenge of finding ways to do more with less. This past fiscal year the Department received a record high number of over 70,000 incoming requests. In an effort to meet this high demand, and despite an over 5% reduction in FOIA staffing, the Department processed over 68,000 requests, including its ten oldest requests from the prior fiscal year, while continuing to release records in full or in part in response to over 93% of requests that were processed for disclosure. We also continued to make proactive disclosures of information and to improve the capabilities of our website. For example, OIP revamped the webpage that contains our summaries of FOIA court decisions to make them more easily searchable, posted material in an open format, and converted our *Department of Justice Guide to the FOIA* to a

“living” document that can be updated on a rolling basis.

In closing, the Department of Justice looks forward to working together with the Committee on matters pertaining to the government-wide administration of the FOIA. We are fully committed to achieving the new era of open government that the President and Attorney General envision. We have accomplished a great deal over these past five years, but OIP will continue to work diligently to help agencies achieve even greater transparency in the years ahead. Increasing our use of technology will be a key part of those efforts. Employing advanced digital tools to help internal processes, increasing proactive disclosures, expanding search capabilities of websites and improving their functions, and creating a consolidated online FOIA service that helps improve the customer experience are all exciting initiatives we will be undertaking in the year ahead.

I would be pleased to address any question that you or any other Member of the Committee might have on this important subject.



## OFFICE of GOVERNMENT INFORMATION SERVICES

## TESTIMONY OF MIRIAM NISBET

**DIRECTOR OF  
THE OFFICE OF GOVERNMENT INFORMATION SERVICES  
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY**

ON

*"Open Government and Freedom of Information: Reinvigorating  
the Freedom of Information Act for the Digital Age"*

MARCH 11, 2014

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Good morning, Mr. Chairman, Ranking Member Grassley, and members of the Committee. I am Miriam Nisbet, Director of the Office of Government Information Services (OGIS) at the National Archives and Records Administration (NARA). Thank you for the opportunity to appear again before you leading up to Sunshine Week, to discuss "Open Government and Freedom of Information: Reinvigorating the Freedom of Information Act for the Digital Age."

FOIA has been a part of American democracy for more than 40 years. Even before 1996, when Congress passed the Electronic Freedom of Information Act Amendments, or e-FOIA, both government and non-government organizations worked to bring FOIA into the digital age and we continue today to identify ways to integrate technology into FOIA efforts. Since last year's Sunshine Week, we at OGIS have worked closely with government colleagues to contribute to five ambitious administrative efforts to modernize FOIA through the Administration's second Open Government National Action Plan. All of these commitments embrace using technology in some way to improve FOIA processes.

For example, the Administration committed to launching a consolidated portal to give requesters a single site across government where they can file their requests and which will include additional tools to improve the customer experience. The existing and expanded *FOLAonline* system — in which NARA is a partner and which was the subject of an OGIS Recommendation in 2012 — will certainly inform this process. We look forward to assisting in Administration efforts to implement a service that will both simplify this practice for requesters and streamline the process for agency FOIA professionals.

## IMPROVING FOIA — ONGOING EFFORTS

More specifically to the work of OGIS, the FOIA, as you know, directs my Office to recommend policy changes to Congress and the President to improve FOIA administration. Last year, we recommended four ways to improve FOIA administration, and our efforts with all four recommendations continue today. In addition to carrying over those recommendations, OGIS is closely involved in implementing the National Action Plan FOIA commitments, each of which has the potential to significantly improve FOIA processes, and OGIS is also implementing recommendations made by the Government Accountability Office (GAO), which released a report and recommendations in 2013 after conducting an audit of OGIS's work.

### Continued OGIS Recommendations

OGIS is making progress on two 2013 recommendations that were intended to carry forward: the recommendation to examine FOIA fees and the recommendation to review the process for requesting immigration-related records. OGIS began examining these issues by reviewing our own cases over the past four years and identifying common themes. OGIS is continuing both projects in FY 2014 by working with stakeholders from both inside and outside government. For example, in 2013, OGIS began communicating with agency officials who receive FOIA requests for immigration records (primarily but not exclusively the Department of Homeland Security), as well as with some of the requester organizations and representatives who regularly file those requests. Examining both fees issues and immigration records processing are complex matters that require long-term, continuing attention and discussion as we assist the various stakeholders to identify issues and potential solutions.

The third 2013 recommendation involved working with agencies to implement dispute resolution for FOIA conflicts. OGIS identified several agencies including OGIS's parent agency, NARA, to examine targeted ways to prevent and resolve disputes as well as avoid litigation. OGIS began meeting with each of those agencies to determine the types of FOIA disputes that result in litigation for the agencies and to explore ways to incorporate dispute resolution into their FOIA processes with the goal of avoiding such litigation. OGIS continues this project in FY 2014. OGIS also worked with the Administrative Conference of the United States (ACUS) to promote research into dispute resolution strategies that might be most effective in reducing FOIA litigation, and we anticipate the resulting ACUS report to be very helpful.

The remaining 2013 recommendation involved reiterating the importance of FOIA, led by Archivist of the United States David Ferriero's message that FOIA is everyone's responsibility. We continue to encourage agencies to issue similar messages and were delighted to see that Energy Secretary Ernest J. Moniz last summer sent a memorandum to the heads of all Department of Energy offices calling on the agency's senior leaders to continue to support the President's commitment to Open Government and transparency.

#### National Action Plan Efforts

OGIS is working closely with the Department of Justice (DOJ) and the Administration to implement all five FOIA commitments that are part of the second Open Government National Action Plan. Specifically, NARA will support the new FOIA Modernization Advisory Committee, made up of government and non-government FOIA experts who will develop consensus recommendations for improving FOIA administration and proactive disclosures. The new advisory committee is expected to meet up to four times a year, starting this spring.

OGIS will contribute to other National Action Plan commitments being led by DOJ, including standardizing common FOIA practices across agencies either through a shared core regulation or a model regulation that agencies could use, and a series of workshops to improve internal agency FOIA processes. OGIS is also a part of the online FOIA service task force, which will assist in reviewing current practices, seeking public input and developing the best way to implement the consolidated FOIA service mentioned above. OGIS looks forward to assisting and supporting those and other FOIA commitments.

#### Audit Recommendations

In 2013, GAO released a report after carefully reviewing OGIS's work in carrying out the mission set forth in the FOIA statute. GAO made two recommendations for OGIS to improve our efforts, which OGIS appreciated and continues to implement. First, GAO recommended that OGIS adopt a time frame and methodology for reviewing agencies' FOIA policies, procedures and compliance. We will have that methodology by April 1. I want to emphasize that OGIS has been carrying out our review mission in a number of ways, including observing agencies' policies, procedures and compliance through the specific mediation cases that come to us, by reviewing proposed agency FOIA regulations, by reviewing government and non-government reports on FOIA activity and compliance, and by using all of that to inform OGIS's recommendations to improve FOIA. However, we have not been able to do this as fully as we would have liked. In that regard, I am pleased to tell you that NARA leadership has approved the hiring of three additional staff members at OGIS, specifically to work on OGIS's review mission.

Second, GAO recommended that OGIS adopt measures and goals for our mediation services. We have previously shared with this Committee OGIS's struggles to quantify our mediation efforts — a dilemma that is shared by mediators and ombuds offices, both inside and outside the government, around the globe. Despite that, we believe we can refine how we measure our processes and customer service and we are working on that now.

#### **IMPROVING FOIA — NEW SUGGESTIONS**

Beyond the ongoing recommendations and efforts OGIS continues to carry out, there are additional low- or no-cost ways to address technological issues and improve the FOIA process generally.

#### IT Professionals and FOIA

At any given time, agencies across the government are working to update or purchase new information technology infrastructure. We suggest that when procuring new technology, upgrading existing technology, or even creating a new database, agency program officers consult with their records managers and FOIA professionals to best determine how the records will be managed, how the agency might efficiently and effectively search for records in response to FOIA requests for the information contained in those records, and, ideally, how the agency might proactively disclose the information or data. This collaboration should extend to contracted Information Technology services so that when a FOIA request is received, neither agencies nor requesters are burdened with out-of-contract costs.

We intend to pursue this idea through the National Action Plan initiative led by DOJ to identify ways to improve internal agency FOIA processes. OGIS will work with the Chief Information Officers Council, the principal interagency forum for improving Federal agency practices for IT management, to explore available options that will help agencies embed FOIA into Federal IT policy. I note that one of the Council's objectives is to work with the Archivist of the United States to assess how the Federal Records Act can be addressed effectively by Federal IT initiatives and activities. Given the close link between records management and FOIA, we think folding FOIA into this Council objective makes a lot of sense from an efficiency standpoint. OGIS plans to also include the Federal Records Council in this planning and analysis process.

Additionally, while technology can theoretically make it easier to maintain information, it can sometimes pose a challenge to the process of extracting that information in response to a FOIA request. Undoubtedly, FOIA is *everyone's* responsibility, and FOIA professionals must be able to rely on their more technologically savvy colleagues to help unleash information held in databases or other systems. In this regard, we believe that implementation of the 2012 Managing Government Records Directive, led by NARA and the Office of Management and Budget, and the 2013 Open Data Policy will positively impact the work of FOIA professionals in agencies small and large.

#### Customer Service and FOIA

As we have mentioned in previous testimony, OGIS has observed through our casework — we have handled more than 2000 cases to date and seen a 40% increase in our caseload — that communicating with FOIA requesters goes a long way towards preventing and resolving disputes. Both OGIS and DOJ's Office of Information Policy regularly remind agencies of the importance of good communications between FOIA professionals and requesters. And of course, good customer service was one of the goals of the OPEN Government Act of 2007 and it is a goal in NARA's new Strategic Plan. This is an area where dispute resolution skills can be particularly effective.

For example, the right to request the estimated date that an agency expects to respond to the customer's FOIA request was extended to requesters in the OPEN Government Act of 2007, at 5 U.S.C. § 552(a)(7)(B); the 2007 amendments also provided that agency FOIA Public Liaisons are to aid requesters when the agency cannot process a request within the statutory time limits, to limit

the scope of the request and to agree on an alternative time frame, 5 U.S.C. § 552(a)(6)(B)(ii). Yet, a recurring issue in OGIS cases involves requesters who are having difficulty obtaining an estimated date that an agency expects to respond to the customer's FOIA request. We well appreciate that agencies have many demands placed on them, but we are seeing that providing information about the estimated date of completion is proving to be challenging for some agencies. OGIS is working with OIP on this issue and we believe that further developments in this area would go a long way to improving customer satisfaction.

This Administration agrees that customer service should be a priority. The President issued an Executive Order, E.O. 13571, in April 2011 directly committing the Administration to improve customer service. We are recommending that Executive Branch guidance be issued to agencies that focuses on ways agencies can provide exemplary customer service to FOIA requesters, with particular attention to the importance of appropriate dispute resolution through the FOIA Public Liaisons and through working with OGIS.

#### **OGIS UPDATE**

Finally, I would like to update you on OGIS's additional activities in the last year, which are outlined in our annual report and which include:

- working with agencies when the Office observes — through our mediation services — policies or procedures that OGIS believes are not consistent with FOIA law or policy or that may be different from practices occurring at other agencies.
- providing Alternative Dispute Resolution (ADR) skills training to agency FOIA professionals with the goal of giving the professionals ADR tools to incorporate into their FOIA work. In FY 2013, we held three trainings — two interagency and one agency-specific — and so far in FY 2014, we've held one ADR skills training session.
- offering best practices to agencies and requesters, publicized through our blog, The FOIA Ombudsman, which is updated weekly.
- reviewing agency FOIA materials, from agency websites to template letters.

Finally, OGIS continues to request that agencies update their System of Records Notices (SORNs) to include routine-use language allowing OGIS and the agency to discuss and share information about an individual's FOIA request. This administrative step would be helpful because the Privacy Act of 1974 prohibits disclosure of Privacy Act protected files (in general, records, such as FOIA request records, from which information is retrieved by an individual's name or some other personal identifier) to another person outside of the agency or to another agency, without the consent of the record subject.

When an appropriate routine use is not available, it is our practice to seek the individual's consent. However, attempting to obtain consent can be an obstacle when an agency, rather than an individual requester, is seeking OGIS assistance. The situation places agencies in the position of obtaining a requester's consent for the sole purpose of seeking OGIS' assistance in resolving a dispute (and the

agency may be contacting OGIS precisely because it is having a hard time communicating with the requester).

I appreciate the opportunity to appear before this Committee and thank you for the support that you have shown to the Office of Government Information Services.

**Statement  
Of  
Amy Bennett  
Assistant Director  
OpenTheGovernment.org**

Before the United States Committee on the Judiciary  
On:  
Open Government and Freedom of Information:  
Reinvigorating the Freedom of Information Act for the Digital Age

Thank you, Chairman Leahy, Ranking Member Grassley, and Members of the Committee, for the opportunity to speak today about reinvigorating the Freedom of Information Act and for your unwavering commitment to protecting and strengthening the public's right to know. My name is Amy Bennett and I am the Assistant Director of OpenTheGovernment.org, a coalition of more than eighty organizations dedicated to openness and accountability.

As we all know too well, currently the FOIA is anything but an effective and efficient tool that the public can use to get timely access to government records. Members of the public must contend with delays, mind-boggling technical barriers, and a tradition of bureaucratic resistance to disclosure of information because some agency officials believe it belongs to the agency, not the people.

We certainly can make changes to the process that will make the system work better, and I want to thank this Committee for its long history of bipartisan support for improving the FOIA, and for shining a bright light on some of these issues over the past few years by advancing Chairman Leahy and Senator Cornyn's bill, FASTER FOIA. We agree a comprehensive review of agency backlogs in processing FOIA requests is long overdue, and we hope to see Congress require that the soon-to-be-established Federal Advisory Committee on FOIA Modernization or some other body complete this important study.

Later in this testimony, I will address some of the changes that the open government community believes will make the most positive difference for requesters. I am also appending a much more comprehensive list of reforms that the open government community would like to see the Committee act on.

There is no doubt that technology is a part of the solution: technology has proven to be extremely useful in speeding FOIA processing while also making it easier for the public to use and re-use government information. In recent years, technical innovations like FOIAonline, the central portal currently used by several agencies to accept and fulfill requests, have made it simpler for the public to track and manage requests, and receive usable documents. We are optimistic about the Administration's recent commitments to expand the use of a single portal for FOIA requests and to create a Federal Advisory Committee on FOIA Modernization, and hope to see fruits of these commitments soon.

Technology is not the entire answer, however, and I want to use my time before you today to speak about the need for Congress to weigh-in in favor of requesters on some of the natural tensions embedded in the law. These are tensions that the Judiciary Committee is uniquely suited to address, and we hope that the Committee will approve amendments to the FOIA addressing the issues raised below.

Foremost among these, the open government community would like to see Congress put tighter boundaries around the government's over-use of FOIA's Exemption 5, or as many FOIA requesters refer to it, the "We don't want to give it to you" exemption. Exemption 5 is intended to protect the government's deliberative process, among other things, and was intended to have – as are all FOIA Exemptions –narrow application. Over time, federal agencies have expanded the scope of material they consider subject to Exemption 5 to the point that it covers practically anything that is not a final version of a document. In one particularly egregious example of the government's over-use of Exemption 5, the Central Intelligence Agency (CIA) denied a request from our coalition partner the National Security Archive for the last secret volume of the CIA's internal history of the 1961 Bay of Pigs disaster. The request was denied despite the fact that the draft is connected to no policy decision by CIA and related to events that occurred more than 50 years ago.<sup>1</sup> Exemption 5 has also recently been invoked to deny the public access to copies of opinions by the Office of Legal Counsel related to the legality of controversial programs like the use of drones to kill American citizens abroad<sup>2</sup> and the Federal Bureau of Investigation's ability to access American's telephone records beyond what the letter of the public law allows.<sup>3</sup> While we understand the need to allow the President's advisors the freedom to give the President off-the-record advice, we cannot sanction the government's use of secret interpretations of the law to instruct the operations of executive agencies. Moreover, such practices erode the public's trust in the executive branch and its decisions.

For organizations like mine that care about accountability and reporters like those represented by Mr. Cuillier, pre-decisional documents are critical to understanding how a policy has changed and who is influencing the government's decisions. In terms of needed reforms to Exemption 5, we can draw two lessons from the above examples. One, Exemption 5 needs a public interest balancing test. If the government were not convinced that the requested documents would advance the public interest, a requester would still have the opportunity to ask a Court to independently weigh the government needs in invoking the privilege against the needs of the requester. Two, there needs to be a time limit. Currently, a President's records are only protected from release for twelve years from the end of that presidency. Surely, we should not accord more secrecy to agency business than we accord the President of the United States.

The next critical issue relates to the Office of Government Information Services (OGIS) at the National Archives and Records Administration (NARA). As you know, the open government community strongly supported the creation of the office, and we very much appreciate this Committee's leadership in creating the office and giving it early crucial support. OGIS is doing great things, and OGIS staff has a strong working relationship with members of my community. You likely will not be surprised, however, when I tell you OGIS continues to struggle to meet its dual roles as FOIA mediator and as the office charged with reviewing agency compliance with the FOIA and recommending changes to Congress and the President.

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<sup>1</sup> <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB450/>

<sup>2</sup> <http://pogoblog.typepad.com/pogo/2011/11/foia-friday-justice-dept-denies-foia-request-for-awlaki-assassination-memo.html>

<sup>3</sup> <https://www.eff.org/press/archives/2011/05/19>

The first limitation faced by OGIS should be abundantly clear to this Committee thanks to Senator Grassley's sharp questioning during last year's FOIA oversight hearing: OGIS does not have the freedom to report directly to Congress or the President. It should not take a threat by a Senator to drive down to the Office of Management and Budget (OMB) to ensure that OGIS's recommendations are delivered in a timely fashion. Giving OGIS direct reporting authority would allow the office to provide information more freely to you and the President as to problems OGIS consistently sees during its mediation and review efforts, and advise on how these issues should be addressed.

The second limitation is the age-old problem of resources. Right now the office consists of a staff of seven – seven people to deal with more than 99 different agency FOIA offices and to help the hundreds of thousands of members of the public who file FOIA requests. Thankfully, we understand OGIS soon will be adding three new staff who will be responsible for helping set and execute OGIS' review of agency compliance with FOIA. This will help OGIS maintain its position as a neutral arbiter in its casework. However, OGIS needs several more bodies, as well as new resources to help promote and support the office's work. My community believes that at least two new positions should be approved to include a Director of Enforcement and a Director of Operations. This would strengthen OGIS' ability to implement its dual roles. We also urge Congress to designate at least one of the newly-created positions at OGIS as exempt from federal hiring rules to ensure qualified experts from outside the government can be fully considered.

The third and final limitation currently faced by OGIS that I will discuss today is its lack of authority to compel agencies to participate in the mediation process. Currently, OGIS and a requester that seeks OGIS's assistance must rely on the good will of an agency involved in a dispute. The most recent report on OGIS by the Government Accountability Office (GAO) documents OGIS's inability to provide mediation services to a requester because the agency declined to cooperate with OGIS.<sup>4</sup> For OGIS to serve all requesters who seek mediation services, Congress should require agencies to cooperate with OGIS and to provide information if requested.

Another long-standing issue facing FOIA advocates that needs your attention is the frequent appearance of new statutes that allow agencies to withhold information relying on Exemption 3 of the FOIA. According to data compiled by the Sunshine in Government Initiative and made available by ProPublica, a list of watermelon growers and handlers that submit information about the size of their business in order to participate in the National Watermelon Promotion Board, and information concerning the specific location of significant caves are just some of the 100-odd types of information that have been withheld from FOIA requesters using provisions of laws that are otherwise unrelated to the public's right to know.<sup>5</sup> These provisions are often introduced as only a few lines of text in a massive spending or authorization bill and, because they do not amend the FOIA, Committees with expertise like this one are not given the opportunity to weigh in on the need for or potential scope of the provision.

Recently Congress took the common-sense approach of including a public interest balancing test in a provision that excluded information about the Department of Defense's critical infrastructure. This balancing test will ensure the public's ability to access documents like water quality reports that are critical to human health and safety. Congress should amend Exemption 3 to say that no information may be withheld under this section

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<sup>4</sup> <http://www.gao.gov/products/GAO-13-650>

<sup>5</sup> <http://projects.propublica.org/foia-exemptions/>

unless the prospective harm to the interest of the government clearly outweighs the value of disclosure to the public. In addition, Congress can help eliminate unnecessary withholding statutes by requiring each such statute include a sunset. This sunset should give agencies sufficient time to make sure information that truly needs ongoing protection can continue to be withheld.

A fourth reform is both rhetorically important and a common-sense solution to make FOIA a more efficient public access tool: requiring agencies to make all records they process for release publicly available. While FOIA is called a public access tool, a lot of the documents that go through the FOIA process are never made publicly available. The only person who ever sees the documents is the person who filed the request. With a few exceptions, released documents are not required to be publicly available until they have been requested, or are expected to be requested, three times. In practice, this requirement is essentially meaningless as few agencies have a reliable method for tracking how many times a record has been released. Furthermore, we know a single agency sometimes reviews the same document multiple times and makes different withholding decisions each time.<sup>6</sup> Having an agency process a document multiple times wastes our scarce government resources. Simply by mandating that a release to one is a release to all, Congress can make sure that the general public has the ability to benefit from the release of documents through FOIA and can eliminate all of this unpredictability and wasteful duplication of efforts.

Of course, we also recognize that FOIA requesters should be rewarded in some way for their initiative in requesting information, and the picture is complicated by the fact some FOIA requesters must pay fees to have their requests processed. It is particularly important for journalists and other organizations to be able to have some time when they have exclusive access to the information. The process for releasing all reviewed documents recently adopted by the Department of State respects the need for exclusivity by posting its records quarterly, meaning recipients have up to three months before the document is publicly available. FOIAonline also gives the agency the option to make all of the released records public on a large central repository. People interested in seeing what has been released on a particular issue can search the repository; requesters are sent a direct link to the released documents.

The last reform I want to discuss is another common-sense solution to bringing more certainty into the FOIA process, and making a strong statement in favor of the public's right to know: codifying a strong presumption of openness. As you know, recent Administrations have taken different approaches in how they instruct agencies about when to withhold information from the public. Under President Bush, agencies were encouraged to use any exemption that allowed them to withhold information, with a promise the Department of Justice would defend those withholdings. President Obama's memo on FOIA, on the other hand, directs agencies to apply FOIA with a presumption that the information should be released. Congress has been far more consistent in its view of FOIA by recognizing, through the findings of the OPEN Government Act,<sup>7</sup> the FOIA's presumption of openness.

Writing the presumption of openness into the law would encourage agencies to faithfully and consistently be more open. Congress should also stress that information that can be released without causing harm should be released. This can be accomplished by specifying that an agency may withhold information only if it reasonably

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<sup>6</sup> <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB420/>

<sup>7</sup> <http://www.gpo.gov/fdsys/pkg/PLAW-110publ175/html/PLAW-110publ175.htm>

foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law, and requiring the agency to identify specifically and document that harm.

OpenTheGovernment.org and our Partners are eager to work with you to craft a strong bill that makes FOIA work better for the public. As I referenced earlier, I have appended a longer list of possible reforms that the open government community would like to see enacted to this testimony. Additionally, we think there are several good ideas to improve FOIA in the bill recently passed by the House. Attached to this testimony is a letter signed by more than twenty-five organizations, including OpenTheGovernment.org, endorsing the bill and calling attention to particularly good provisions.

Thank you for the opportunity to speak about this critical issue, and I look forward to answering any of your questions.

**Attachment A: List of Reforms Supported by the Open Government Community***Improving Implementation of past FOIA reforms*

- **Require online posting of all released records.** Agencies use a lot of resources reviewing the same record for release under the FOIA multiple times before it is posted publicly. The **E-FOIA Amendments of 1996** required agencies to post “frequently requested” records, which the Department of Justice defines as “three or more” requests for the same or essentially similar record. However, many agencies do not have a reliable system to track how many times a document has been released and overall there is haphazard compliance with OMB’s interpretation of “frequently requested.” We recommend the Committee amend the text to require agencies to post any document that has been released under the FOIA.
- **Close the fee loophole.** Despite the clear intent of Congress in the **2007 OPEN Government Act**, agencies have been exploiting a loophole in the law to charge requesters fees after the agency has missed its statutory deadline to respond. We recommend the Committee amend the language to clarify that if an agency claims there are “unusual or exceptional circumstances” preventing it from meeting the 20-day deadline, the agency cannot charge fees if it fails to respond within the 10-day extension.
- **Improve FOIA tracking.** Agency efforts to meet the **OPEN Government Act’s** requirement to provide requesters with a way to track FOIA requests have been uneven. Agencies should be required to have an online tracking system that enables users to immediately locate where the request is in the process, who is responsible for processing the requests (once assigned), how to contact the reviewer, and a realistic estimate of a release date.
- **Make FOIA everyone’s job.** Despite Congress expressing an interest in including FOIA performance in federal employee job reviews in the **OPEN Government Act**, the Administration has yet to take any positive steps in that direction. We recommend the Committee include language that would create an incentive for program officers and other agency personnel to understand their obligations under FOIA, and cooperate with FOIA offices.
- **Codify a strong presumption of openness.** Through the findings of the **OPEN Government Act**, Congress recognized the FOIA’s presumption of openness. Codifying the presumption in the law would encourage agencies to faithfully and consistently apply the presumption. We strongly recommend that the Committee codify the current Administration’s presumption of openness into the law, and specify an agency may withhold information only if it reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law.
- **Strengthen OGIS.** Congress created the Office of Government Information Services (OGIS) in the **OPEN Government Act** to mediate FOIA disputes and make recommendations for improving the government’s FOIA process. As was apparent during the Judiciary Committee’s 2012 oversight hearing, OGIS lacks sufficient independence, authority, and resources to fully complete its dual mission. In order to strengthen OGIS and make sure it can carry out its statutory purpose, we recommend:
  - **Increase independence.** OGIS has the statutory responsibility to make recommendations for improving FOIA processing to the Congress and the President. During the Judiciary Committee’s 2012 oversight hearing, the Committee raised the lengthy delay in the Office of Management and Budget’s (OMB) review of OGIS’ recommendations. In order to make sure OGIS is able to provide timely recommendations, we recommend the Committee give OGIS the ability to report directly to the Congress and the President.

- **Require cooperation.** According to a recent report on OGIS by the Government Accountability Office (GAO), OGIS was not able to provide mediation services to a requester because the agency declined to cooperate with OGIS.<sup>8</sup> In order to make sure OGIS is able to serve all requesters who seek mediation services, we recommend the Committee require agencies to cooperate with OGIS and to provide information if requested.
- **Increase resources.** A report by the National Archives and Records Administration (NARA) Inspector General (IG) on OGIS stated that additional resources could significantly improve OGIS's ability to address and meet its dual mission of providing mediation services and recommendations.<sup>9</sup> In particular, the report identifies OGIS' need for additional staff so that OGIS staff working with agencies who request OGIS assistance can be segregated from OGIS staff reviewing agencies' FOIA policies, procedures, and compliance with FOIA. We recommend that the Committee increase OGIS' resources by adding additional required staff, and that Congress require the creation of specific positions, including a Director of Enforcement and a Director of Operations. Congress should also designate some of the newly-created position at OGIS as exempt from federal hiring rules to ensure that qualified experts from outside the government can be considered.
- **Newly-proposed b(3) provisions must cite the FOIA.** Not all proposed b(3) provisions are complying with **OPEN FOIA Act of 2009**'s requirement that all new b(3) provisions to cite the FOIA. We recommend the Committee include language in its bill directing agencies to give no effect to newly-passed b(3) provisions that do not cite FOIA.
- **Clarify the definition of a financial institution in Exemption 8.** In a recent court decision, a judge warned that language included in **S. 3717** (passed and signed into law in 2010) to narrow the overly-broad b(3) exemption for the SEC included in the Dodd-Frank Act is being used by the SEC to inappropriately withhold information.<sup>10</sup> We recommend repealing 15 U.S.C. § 78x(e), which defines any entity regulated, supervised, or examined by the SEC as a "financial institution" for the purpose of Ex. 8 and has proved far too broad in scope. If that proves too difficult, we might consider narrowly defining which specific entities should be entitled to *per se* recognition as "financial institutions."
- **Update of FOIA regulations.** As the Judiciary Committee highlighted in its 2013 hearing, a recent audit by the National Security Archive revealed a majority of agencies do not have updated regulations that reflect the latest changes to law and Administration policy. Agencies should be required to review and update all FOIA regulations so that they conform with the updated presumption of openness, and all other requirements of the law. Agencies should be required to update their regulations within 180 days of an amendment to the FOIA. Agencies also should be required to consult with OGIS on proposed updates and gather public input through the regular notice and comment process.

***Reforms to make processing more efficient:***

- **Require all agencies to perform a declassification review.** The Departments of Defense, Justice and Homeland Security currently review records for declassification prior to asserting Exemption b(1). This practice helps ensure

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<sup>8</sup> <http://www.gao.gov/products/GAO-13-650>

<sup>9</sup> <http://www.archives.gov/oia/pdf/2012/audit-report-12-14.pdf>

<sup>10</sup> This section was amended by P.L.111-257 to replace an earlier, broader exemption, with the intent to ensure that hedge funds would be treated as financial institutions, but the SEC has since relied upon it to shield information relating to the Financial Industry Regulatory Authority. See *Public Investors Arbitration Bar Ass'n v. SEC*, No. 11-2285, 2013 WL 987769, at \*9, Slip Op. at \*17 (D.D.C. Mar. 14, 2013) ("This amendment, passed by Congress in 2010, was intended to improve transparency" at the SEC but "appears to have done just the opposite" (internal quotation marks omitted)).

the agency does not deny the public access to records that are marked classified, even if the information does not meet the standards for classification laid out in Executive Order 13526 governing classified national security information. This should be the practice at all agencies that hold classified information.

- **Simplify fees.** We recommend amending the statute to include within the definition of “educational institution” any organization recognized by the Internal Revenue Service as a 501(c)3 organization. This will ensure the fee categories are applied as Congress intended.
- **Reduce the number of b(3) provisions.** Exemption b(3) provisions make it easy to deny access to information the public needs. We need a better understanding of what provisions are in existing laws and a better way to identify newly-proposed provisions to guard against b(3) provisions that hurt public health and safety or other interests.

In order to create a definitive inventory of b(3) provisions already in statutes and a systematic way to know when new b(3) provisions are added, we recommend the Government Accountability Office (GAO) perform an audit of all existing b(3) statutes, and their use by agencies. The GAO’s results should be available to the public and should form the basis of a newly required online log of existing and proposed b(3) statutes to be maintained by the Department of Justice (DOJ) on FOIA.gov or a similar website.
- **Create a Chief FOIA Officers Council.** We strongly recommend the creation of a Chief FOIA Officers Council to monitor agency implementation of the law and recommend changes in agency policy and practices. This body will be a permanent structure that will ensure Chief FOIA Officers are engaged in their agencies’ FOIA operations. OGIS and the Office of Information Policy should co-chair the Council; this will afford OGIS a direct line of communication to the agency Chief FOIA officers, which it currently lacks.
- **Mandate a centralized FOIA portal.** FOIAonline is a promising effort to centralize the FOIA process for requesters and streamline processing for the government. However, it, or any other centralized portal, will only be successful if participation is mandated. The Committee should require agencies to participate. If an agency is using proprietary software, the switch to the centralized portal would happen at contract expiration. A small amount of funding will be contributed from each participating agency, allowing for significant upgrades to the functionality of the platform.
- **Reduce the FOIA burden by identifying and proactively disclosing whole record categories.** The Environmental Protection Agency (EPA) noted that it was receiving a substantial number of FOIA requests for environmental hazard information related to specific properties being considered for real estate transactions. The agency created an online tool (via MyPropertyInfo) to give the public direct access to such records. As a result, the agency charted a 27% reduction in “no records” responses. The practice of identifying categories of records that are commonly requested and making those records proactively available should be both more common and systematic. We recommend that the Committee require that within 180 days agencies that receive more than 1,000 requests per year analyze a random sample of their FOIA logs to determine what two categories of records are most often requested by non-commercial requesters and what one category of records is most requested by commercial requesters. The identified categories and supporting analysis must be submitted to OGIS for review and approval. Once approved, each agency should be required to begin proactively posting the three categories of information online within two years. Additionally, agencies should submit three additional categories to OGIS for approval two years after enactment of the bill, and make the approved categories available within two years. Five years after enactment of this bill, OGIS should be required to report to Congress on the progress agencies are making.

***Transformative changes to improve the FOIA***

- **Narrow the application of Exemption b(5).** Agencies use exemption b(5) to withhold a broad swath of material that is crucial to understanding what the government has done and why. We recommend the statute be revised to require agencies to consider the public interest in disclosure and balance that interest against the agency interest in withholding. We further recommend that the application of the exemption be limited to 12 years after the record was created to ensure the reach of b(5) under the FOIA is no greater than the protection afforded presidential records under the Presidential Records Act.
- **Public interest balancing test for all b(3) provisions.** Based on the precedent Chairman Leahy set in recent b(3) provisions, the incorporation of a public interest balancing test. In addition, b(3) provisions should have a sunset to ensure unnecessary ones are not continued. The sunset should give agencies sufficient time to make sure information that truly needs protection is withheld.
- **Create an Advisory Committee on Open Government that is required to conduct the study included in FASTER FOIA.** A standing Advisory Committee on Open Government would create an infrastructure to help make sure that open government work continues in spite of the Executive Branch's loss of enthusiasm or even disdain for transparency. We recommend that the Committee add a new title to the bill that directs the General Services Administration or the National Archives and Records Administration to establish an Advisory Committee on Open Government charged with advising the government on how to improve FOIA and government transparency. The advisory committee should include representatives certain members of the public,<sup>11</sup> the Department of Justice, OGIS, and the Advisory Committee should be composed of no more than 50 percent government members. We also support the bill by Senators Leahy and Cornyn to establish an advisory panel to examine agency backlogs in processing FOIA requests and provide recommendations to Congress for legislative and administrative action to enhance agency responses to such requests. The new Advisory Committee on Open Government should be required to conduct the study mandated by FASTER FOIA.
- **Direct fees to support OGIS and encourage agency compliance.** In addition to being a major sticking point for agencies and requesters, the collection of fees is not currently correlated with any efforts to process requests, or reduce the systemic backlogs that prevent the public from getting timely access to government records through the FOIA. The Senate version of the OPEN Government Act (S. 1090), included a provision that would have allowed an eligible agency that met the 20 day statutory deadline to keep half of the fees charged for processing the request. We recommend that the Committee include similar language, and that the proposal be expanded so that a percentage of the fees associated with any request that was not processed by the statutory deadline be directed to OGIS.

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<sup>11</sup> At least one representative of the media, frequent public interest FOIA requester, frequent commercial FOIA requester, public interest representative with expertise in FOIA, public interest representative with expertise in information technology, and three public interest representatives with expertise in government openness and transparency.

**Attachment B: Letter Endorsing HR 1211**

Members of Congress  
U.S. House of Representatives  
Washington, DC 20515

February 24, 2014

Dear Representative,

We, the undersigned organizations, are pleased to support H.R. 1211, the FOIA Oversight and Implementation Act of 2014, a bill to amend the Freedom of Information Act (FOIA) to promote greater government transparency and accountability. The bipartisan bill is cosponsored by House Oversight and Government Reform Chairman Darrell Issa (R-Calif.), Ranking Member Elijah Cummings (D-Md.), and Representative Mike Quigley (D-Ill.). We urge you to vote in favor of this open government legislation.

The FOIA has yet to become an effective and efficient tool for the public to access government information, and the experience of the past few years makes clear the need for reform to ensure the law is implemented as Congress intended. Particular reforms included in H.R. 1211 that we support include advancing the online portal for FOIA requests, establishing an open government advisory committee, requiring all agencies to update their FOIA regulations, and providing the Office of Government Information Services with the ability to submit reports and testimony directly to Congress and the President. The bill also encourages more proactive disclosures, and puts into statute the current administrative policy of a “presumption of openness” with which agencies should review FOIA requests.

This bill has also been a catalyst for administrative reform. We welcome the Obama Administration’s commitments to similar significant reforms to FOIA in the U.S. National Action Plan for the Open Government Partnership. Similar to H.R. 1211, the President has pledged to create a central, online FOIA portal, establish an advisory committee for modernizing FOIA, and improve agency FOIA practices to reduce backlog. We also appreciate the President’s promise to harmonize the current confusing patchwork of FOIA regulations. While we are working to support the fulfillment of these commitments, we believe that these efforts will be strengthened when supported in statute. We will work with Congress and the Administration to ensure that any final FOIA reform legislation will do just that.

While the House bill reflects several of our recommendations to improve FOIA for the American people, there is still more that must be done. We look forward to working with the Senate Judiciary Committee to advance legislation with additional reforms, including provisions to curb the overuse and abuse of certain exemptions—particularly Exemption 3 and Exemption 5. At a minimum, the application of Exemption 5 should be narrowed to promote greater transparency and be subject to the same time limits as the President’s records, and a public interest balancing test should be used when applying Exemption 3. Additionally, we hope that the Senate Judiciary Committee will put in place a much stronger requirement that agencies make all records that have been reviewed for release available to the public.

We urge you to vote for H.R. 1211 and then join us in supporting House and Senate FOIA champions to produce a final bill with robust Freedom of Information Act reforms.

Sincerely,

American Association of Law Libraries	Mine Safety and Health News
American Library Association	Security Counselors
American Society of News Editors	OpenTheGovernment.org
Association of Alternative Newsmedia	Project On Government Oversight (POGO)
Association of Research Libraries	Public Citizen
Center for Effective Government	Public Employees for Environmental Responsibility (PEER)
Center for Media and Democracy	Sage Information Services
Delaware Coalition for Open Government	Society of American Archivists
Delaware League of Women Voters	Society of Professional Journalists
Government Accountability Project – GAP	Sunlight Foundation
iSolon.org	Tully Center for Free Speech at Syracuse University
James Madison Project	Vermont Press Association
Liberty Coalition	

Testimony of

Dr. David Cuillier  
Director, Associate Professor  
The University of Arizona School of Journalism  
President, Society of Professional Journalists

On behalf of

The Sunshine in Government Initiative

On

“Open Government and Freedom of Information: Reinvigorating the Freedom of  
Information Act for the Digital Age”

Before the

United States Senate Judiciary Committee

March 11, 2014

Chairman Leahy, Ranking Member Grassley and Members of the Committee on the Judiciary,

I want to thank you for the opportunity to testify today on behalf of the Sunshine in Government Initiative (SGI) and as president of the Society of Professional Journalists (SPJ), founded in 1909 as the most broad-based journalism organization in the nation, currently representing 8,000 members.

SGI consists of SPJ and eight other media associations: American Society of News Editors, The Associated Press, Association of Alternative Newsmedia, National Newspaper Association, Newspaper Association of America, Online News Association, Radio Television Digital News Association, and the Reporters Committee for Freedom of the Press.

I also thank those of you, particularly Senators Leahy and Cornyn, for your continued work to improve the people's access to their government. The 2007 OPEN Government Act was a good step toward fixing longstanding procedural issues with FOIA. The Office of Government Information Services (OGIS) has made inroads into making our government more accessible to journalists and other citizens. Many agencies demonstrate good intentions for carrying out their duties, and in many instances FOIA officers are well-trained and helpful, often looking for solutions to fulfilling requests.

But I'm afraid that today I must say FOIA is in desperate need of significant fixes. It is a broken shell of what it once was, and what it was intended to be. I have never seen journalists so frustrated, cynical, and angry when it comes to accessing federal records. And for good reason. Today I will lay out some of the research that demonstrates the increased secrecy in this nation and problems with FOIA. I don't think I am exaggerating when I say we are approaching a crisis when it comes to access to information. I cannot emphasize enough the urgency of the situation. I also will provide some suggestions for how we can turn this around. It is possible to find

common solutions that serve requesters and agencies, and most importantly, help citizens build stronger government and stronger communities.

#### **Broken System: Trend Toward More Secrecy**

From a global perspective, the United States, once a beacon of transparency, is quickly falling behind. This year the country dropped 13 spots in the 2014 ranking of press freedom by Reporters Without Borders, down to 46<sup>th</sup> place.<sup>1</sup> That is below Romania, El Salvador, and Botswana. The ranking methodology takes into account the strength and implementation of public records laws, as well as important factors outside the focus of this hearing, such as the lack of a federal shield law that has led to the jailing of journalists and the seizure of their phone records without notice, the efforts of the U.S. government to muzzle whistleblowers, and the excessive controls exerted by federal public information officers.

Similarly, international ratings of FOIA laws also indicate that we are falling behind. Access Info Europe and the Centre for Law and Democracy have rated the United States at 44<sup>th</sup> in FOIA strength, behind Uganda, Mexico, Kyrgyzstan, and Russia.<sup>2</sup>

It is no wonder the United States is falling behind in freedom of information. I see it nearly daily. Journalists and other requesters are having more and more difficulty getting information from the federal government. This downward trend directly hurts the public. When it works well, FOIA saves lives and improves society.<sup>3</sup> For instance, recently journalists have used

<sup>1</sup> Reporters Without Borders for Freedom of Information, "World Press Freedom Index 2014," <http://rsf.org/index2014/en-index2014.php#>

<sup>2</sup> Access Info Europe (September 28, 2013). "Global Right to Information Rating," <http://www.rti-rating.org/files/docs/Report.13.09.Overview%20of%20RTI%20Rating.pdf>; Also, for a comparison showing how countries should not use the U.S. as a model for FOIA, see Stephen Lamble (June 2003). "FOI as a United States' foreign policy tool: a carrot and stick approach," *Freedom of Information Review*, 105, 38-43.

<sup>3</sup> For a description of the breadth of societal good that came from journalists using FOIA, see Jennifer LaFleur (2003). "The Lost Stories," *Reporters Committee for Freedom of the Press*, <http://www.rcfp.org/lost-stories>; Ian Marquand (2001). "Open Doors," *Society of Professional Journalists*, <http://www.spj.org/opendoors5.asp>; and "FOI in Action," a list of public-interest stories reliant on public records, posted at the Sunshine Week website, <http://sunshineweek.rcfp.org/foi-in-action/>.

FOIA to show how drug companies influence the FDA's decision about what should appear on warning labels, dangers of crime aboard cruise ships, and security concerns at laboratories run by the Centers for Disease Control and Prevention.

Despite pledges by our government for greater transparency, and despite some preliminary indicators early in Obama's term that showed some movement toward transparency,<sup>4</sup> recent research indicates government agencies have delivered just the opposite. For example, an Associated Press analysis of FOIA request data showed that in 2012, agencies' use of exemptions to deny requests increased 22 percent over the previous year.<sup>5</sup> A study by researchers from Penn State examined the percentage of FOIA requests denied under privacy Exemptions 6 and 7(C), comparing the last three years of the George Bush administration to the first three years of the Obama administration. The researchers found that under the Obama administration, the percentage of denials among most agencies actually increased.<sup>6</sup> Yesterday, the Center for Effective Government released an analysis of 15 federal agencies' processing of requests, rules for access, and online ease for users. None of the agencies earned exemplary scores and only eight earned passing grades.<sup>7</sup> The evidence is clear: FOIA is broken.

I can tell you, as well, that journalists are frustrated and downright angry about what they have experienced over the past several years. Surveys by myself and others indicate that

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<sup>4</sup> See, for example, OMB Watch (March 16, 2011). *Assessment of Selected Data from the Annual Agency Freedom of Information Act Reports*; OpenTheGovernment.org (June 10, 2013). "Secrecy Check: FOIA by the Numbers," <http://www.openthegovernment.org/node/4013>; and The National Security Archive (March 14, 2011). "Glass Half Full," <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB338/index.htm>

<sup>5</sup> Jack Gillum & Ted Bridis (March 11, 2013). "FOIA Requests Being Denied More Due to Security Reasons Than Any Time Since Obama Took Office." *The Associated Press*.

<sup>6</sup> Martin E. Halstuk, Benjamin W. Cramer, & Michael D. Todd, (in press). "Tipping the Scales: How the U.S. Supreme Court Eviscerated Freedom of Information in Favor of Privacy," in Charles N. Davis and David Cuillier (eds.) *Transparency 2.0: Digital Data and Privacy in a Wired World*, Peter Lang Publishing.

<sup>7</sup> Center for Effective Government (March 2014). "Making the Grade: Access to Information Scorecard 2014 Shows Key Agencies Still Struggling to Effectively Implement the Freedom of Information Act."

journalists perceive that it is getting more difficult to get information from the federal government.<sup>8</sup>

The bottom line, Mr. Chairman, is this: Agencies are getting more sophisticated in denying, delaying, and derailing requests, using FOIA as a tool of secrecy, not openness.

For example, you might recall the chemical contamination of the Elk River drinking water supply in Charleston, W.V., in January. Ken Ward Jr., a reporter at the *Charleston Gazette*, has been trying to inform the 300,000 residents about the risks to their health. However, Ward and other journalists have faced excessive stonewalling and evasion from the Environmental Protection Agency and Centers for Disease Control and Prevention.<sup>9</sup> Ward remains frustrated. Just last week the CDC denied his petition for expedited review of a FOIA request regarding the chemicals' effects on pregnant women. The agency told Ward that there was no "urgent need" to inform the public about the issue.

I also continue to hear complaints from journalists about the difficulty of the FOIA process – delays, excessive fees, and gaming of the system by agencies. For example, a reporter requested data from Immigration and Customs Enforcement a few years ago, and after delay the agency referred the matter to OGIS for mediation. After more time, ICE declined to participate in the mediation, and then said the appeal window had run out, closing the request. The reporter now has to submit another request and start over, extending his search even longer. This sort of behavior is commonplace and unconscionable.

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<sup>8</sup> See Carolyn Carlson, David Cuillier, & Lindsey Tulkoff (March 12, 2012). "Mediated Access: Journalists' Perceptions of Federal Public Information Officer Media Control," <http://spj.org/pdf/reporters-survey-on-federal-PAOs.pdf>; David Cuillier (May 18-20, 2011). "Pressed for Time: U.S. Journalists' Use of Public Records During Economic Crisis," presented to the Global Conference on Transparency Research, Newark, N.J.; Anne Diffenderffer & Karen Retzer (April 2011). "Reporters' Rights and Access Survey," *Chicago Headline Club*, found that 41 percent of Chicago journalists said their experience with FOIA is worse than with state/local records, 37 percent said it is the same, and 22 percent said better. Also, The Associated Press was due to release this week survey results of its members indicating that they perceive access to public records is becoming more difficult.

<sup>9</sup> "SEJ, SPJ Say Agency Media Obstacles Hurt Public Confidence in Water, Safety," (January 20, 2014) <http://www.sej.org/sej-spj-say-agency-media-obstacles-hurt-public-confidence-water-safety>

It is becoming more difficult in this country to access information about our government.

Despite the good ideas Congress has baked into the law, FOIA still needs to be fixed.

#### **Commonsense Solutions to Reinvigorate FOIA in a Digital Age**

We as a nation, and you as the Senate Judiciary Committee, have many opportunities to address these challenges and reverse this trend toward more secrecy. Specifically:

1. **Codify the presumption of openness.** Many of us already see the presumption of openness throughout the text of the FOIA, but Justice Department policy guidance over the years has oscillated between a presumption of openness and a presumption that information should be withheld whenever legally defensible. Mr. Chairman, we appreciate your longstanding support for this change to the statute. Now would be a great time to enshrine into law the current stated policy presuming that records should be disclosed absent a specific, foreseeable, identifiable harm.
2. **Strengthen OGIS.** The Office of Government Information Services should be able to issue recommendations and speak its mind without prior approval from the White House, the head of NARA or input from any other agency. We need to create a Chief FOIA Officers Council to recommend changes to FOIA. OGIS could use more resources. And most important, OGIS needs enforcement power, similar to what some states, such as Texas, provide.<sup>10</sup> If Mexico has figured out how to create an independent records agency with enforcement powers,<sup>11</sup> I think we can, as well.

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<sup>10</sup> For an excellent explanation of enforcement provisions in state and federal open meeting and open record laws, see Daxton R. "Chip" Stewart (2010). "Let the Sunshine In, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws," *Communication Law & Policy*, 15, 265-310.

<sup>11</sup> For an examination of how Mexico's FOIA processes are strong on paper but have had difficulty in implementation, see Zachary Bookman & Juan-Pablo Guerrero Amparan (2009). "Two Steps Forward, One Step Back: Assessing the Implementation of Mexico's Freedom of Information Act," *Mexican Law Review*, 1(2), <http://info8.juridicas.unam.mx/pdf/mlawrn/cont/2/arc/arc1.pdf>.

3. **Streamline the process online.** Invest in a single online portal for receiving and tracking requests. The system should allow people to make requests to any agency online, and allow requesters and agencies to monitor progress, just as we can with packages – or even pizza delivery – ordered online. This will provide more transparency about the FOIA process itself. Already, some organizations have produced interesting online tools to help requesters, such as the Reporters Committee for Freedom of the Press iFOIA tool (<https://www.ifoia.org/#/>), but more action is needed by the federal government. Requesters should not have to be faxing their requests to agencies. The Internet is a powerful tool – let's harness it to save money, time, and frustration – on everyone's part.
4. **Reign in statutory exemptions.** Statutory exemptions are used to end-run FOIA's balanced framework, making them one of the most frustrating parts of the process for journalists, in addition to excessive delays. Mr. Chairman, once again we appreciate your efforts over the years to find and push back against proposals to write new statutory exemptions to FOIA into the law, most recently with the farm bill. But we should be inoculating the FOIA against overbroad attacks by restraining the abuse of Exemption b(3). Congress should include sunsets when writing new statutory exemptions to FOIA so agencies periodically re-examine their need for secrecy. Congress should also require a public interest balancing test in applying exemptions, introduce review mechanisms so agencies must assess their need for new legal protections, and require that exemption proposals in Senate legislation go through the Judiciary Committee for review.  
This Senate committee has the opportunity to make significant improvements to FOIA that can make a real difference for enlightening the public and reinvigorating the spirit of

transparency that this country once enjoyed. I cannot stress enough the urgency and need for significant reform.

While journalists are extremely frustrated and see first-hand how FOIA's flaws are preventing important information from being released, I want to emphasize that this is not a press issue. Journalists are merely proxies for the public. This is about our citizenry and the very nature of what we aspire to be as a nation. If we do not act now then I fear the trend toward secrecy will continue, and this country will look very different in 20 years.

Thank you for your dedication to reinvigorating FOIA and the opportunity to testify today. I look forward to answering your questions.

**Testimony of Daniel J. Metcalfe  
Adjunct Professor of Law and Executive Director, Collaboration on Government Secrecy  
American University Washington College of Law  
Before the Senate Judiciary Committee  
March 11, 2014**

Good morning, Mr. Chairman and Members of the Committee. As someone who has worked with the Freedom of Information Act (“FOIA”) for more than thirty-five years now, I am pleased to be here to provide an academic perspective on the Act and its governmentwide administration.

My own views today are rooted in my work at American University’s Washington College of Law in recent years, where I teach courses in government information law and direct the Collaboration on Government Secrecy (“CGS”). CGS came into existence in 2007 as the first academic center at any law school in the world to focus on this subject area; three more have been established since then. In addition to maintaining an extensive Web site as an academic resource for all who are interested in government secrecy and transparency (as two sides of the same coin), we have conducted a series of day-long programs on the subject, with particularly heavy focus on the FOIA and, most recently, on the Obama Administration’s implementation of it.<sup>1</sup> Next week, in fact, we will hold our twenty-fourth such academic program -- our annual celebration of Freedom of Information Day during “Sunshine Week” -- and I am pleased to be able to note that this Committee’s Chairman has twice participated in them.<sup>2</sup>

This academic perspective is also informed by decades of experience in leading the component of the Department of Justice that discharges the Attorney General’s responsibility to guide all agencies of the Executive Branch on the complexities of the FOIA’s administration. I

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<sup>1</sup> The most recent such program, entitled “Transparency in the Obama Administration -- A Fourth-Year Assessment,” is part of a series of FOIA Community Conferences that were conducted by CGS on January 20 of each year in 2010, 2011, 2012, and 2013, following an initial forward-looking such program that was held on January 29, 2009. CGS’s Web site contains a compilation of all of its programs to date (including one held in January 2008 on initial implementation of the 2007 FOIA Amendments), which is available at this link: <http://www.wcl.american.edu/lawandgov/cgs/programs.cfm>.

<sup>2</sup> CGS’s Web site is found at <http://www.wcl.american.edu/lawandgov/cgs/>. It is a non-partisan educational project devoted to openness in government, freedom of information, government transparency, and the study of “government secrecy” in the United States and internationally. Its mission is to, among other things, foster both academic and public understanding of these subjects by serving as a center of expertise, scholarly research, and information resources; promote the accurate delineation and development of legal and policy issues arising in this subject area; conduct educational programs and related activities for interested members of the academic and openness-in-government communities; and become the premier clearinghouse for this area of law both in the United States and worldwide. It engages in no lobbying activity but rather provides expertise at congressional request.

know first-hand of both the difficulties that FOIA requests can pose to federal agencies and the challenges involved in encouraging proper compliance with the Act, including new policy conformity, by all agencies notwithstanding those difficulties. Simply put, I have “been there, done that,” through several presidential administrations, time and again.

#### **Obama/Holder FOIA Policy Implementation**

So it is through that lens that I view the many ways in which the openness-in-government community has been disappointed by the surprising inadequacies of the Obama Administration’s implementation of new FOIA policy -- especially the key standard of “foreseeable harm” -- during what has now been these past five years.<sup>3</sup> This began with the Holder FOIA Memorandum itself, quickly issued as it was, in March 2009. Contrary to all expectations, and despite the precedent established by Attorney General Janet Reno not so many years before, the Holder FOIA Memorandum did not by its terms apply its new “foreseeable harm” standard to all pending litigation cases -- where it could have had an immediate, highly consequential impact.<sup>4</sup> Rather, it contained a series of lawyerly hedges that appear to have effectively insulated pending cases from it.<sup>5</sup> As one of the speakers at a CGS FOIA Community Conference pointedly observed, the FOIA-requester community is still waiting to see a list of

<sup>3</sup> Actually, the specific policy standard employed by Attorney General Eric Holder is not “new,” in that he in fact adopted the same “foreseeable harm” standard that was established by the Reno FOIA Memorandum in October 1993 and was used during the Clinton Administration. This standard is designed to govern both litigation and agency decisionmaking at the administrative level, and it works hand in hand with a strong policy emphasis on the making of discretionary disclosures under the Act wherever possible. In short, it calls upon agencies to look beyond the fact that requested information does technically fall within the contours of a FOIA exemption.

<sup>4</sup> As an example, when the “foreseeable harm” standard was applied to all pending litigation cases under the Reno FOIA Memorandum, the Justice Department applied it even to a litigation case that had recently concluded, one in which the courts already had upheld nondisclosure for a Justice Department report investigating the Nazi past of former U.N. Secretary-General Kurt Waldheim. See *FOIA Update*, Vol. XV, No. 2, at 1 (noting that the new policy “triggered a decision to disclose the report entirely as a matter of administrative discretion . . . [even] though there was a substantial legal basis for withholding, affirmed by the court of appeals”), available at [http://www.justice.gov/oip/foia\\_updates/Vol\\_XV\\_2/page1.htm](http://www.justice.gov/oip/foia_updates/Vol_XV_2/page1.htm).

<sup>5</sup> Specifically, the Holder FOIA Memorandum states as follows: “With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.” One of the speakers at a CGS Obama Administration transparency-assessment program, herself a former Justice Department FOIA litigator, described this as “a major loophole” (actually, a group of several loopholes), which continues to the present day. See also Metcalfe, D., “Sunshine Not So Bright: FOIA Implementation Lags Behind,” 34 Admin. & Reg. L. News 5, 6-7 (Summer 2009), available at <http://www.wcl.american.edu/faculty/metcalfe/sunshinenotsobright.pdf>.

any litigation cases in which the “foreseeable harm” standard has been applied to yield greater disclosure -- and after all these years now there is a strong suspicion that there are few or perhaps even “no such cases.”<sup>6</sup> Thus, the best possible opportunity to press for full adoption and use of this standard throughout the Executive Branch<sup>7</sup> -- in a concrete, exemplary fashion -- has been lost.<sup>8</sup>

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<sup>6</sup> This speaker, a veteran FOIA litigator, elaborated as follows: “We have asked the Justice Department on several occasions to consider publishing a list of cases in which a decision has been made based on the Holder guidance that the Department is not going to defend a FOIA lawsuit and they consistently refuse to make that information public -- and I believe it is because there are no such cases.” CGS produces Webcasts of all of its programs, and this comment can be found at the 48th minute of the part of the program Webcast that is available directly at this link: <http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=84bf0e08-c5fc-4d67-8ce4-82d841c7e53e>.

<sup>7</sup> It should be noted in this regard that the bipartisan FOIA amendment bill passed by the House of Representatives two weeks ago, H.R. 1211, contains a provision that would codify the “foreseeable harm” standard as a matter of law. Specifically, Section 2(b) of that bill would place this existing policy standard directly into the “exemptions” part of the Act, 5 U.S.C. § 552(b), such that agencies would be required to adhere to it by statutory command. See also House Report 113-155 (July 16, 2013), at 7 (stating that under H.R. 1211 “agencies may only withhold information if the disclosure of such records could cause foreseeable harm [sic].”) Putting aside the technicalities of this particular provision, such a legislative step could fairly be seen as ensuring the effective continuation of Attorney General Janet Reno’s discretionary disclosure FOIA policy throughout the current as well as future presidential administrations.

<sup>8</sup> Also perplexing, to say the least, was the Holder FOIA Memorandum’s primary emphasis, as a purported “important implication” of its openness policy, on the making of “partial disclosures” of records that cannot be disclosed in full -- as if agencies were not already doing so to begin with. In fact, all federal agencies have been following this practice, without question, since the mid-1970s, as matter of clear statutory command, not policy. Yet the Justice Department still states as if with significance that Attorney General Holder directed agencies to “consider making partial disclosures.” See, e.g., OIP Chief FOIA Officer Reports Guidance (undated), *available at* <http://www.justice.gov/oip/cfo-report.pdf>. It would be far better to place concentrated emphasis on implementation of the renewed “foreseeable harm” standard than on a decades-old statutory requirement, as if the latter were something new.

Similar to this is the fact that the Justice Department persistently fails to bring the “foreseeable harm” standard into sharp focus by inexplicably speaking of the Holder FOIA policy as establishing “a presumption of openness” instead -- thereby using that amorphous term as if it were a better means of guiding and influencing agencies. See, e.g., FOIA Post, “Kickoff [sic] Sunshine Week 2014 with the Department of Justice” (Feb. 27, 2014) (stating merely that “[t]he Attorney General directed agencies to administer the FOIA with a presumption of openness”), *available at* <http://blogs.justice.gov/oip/archives/1368>. I can tell the Committee from my own experience with writing and implementing FOIA policy guidance that this term is a poor vehicle for effecting change. Just imagine walking into an agency FOIA office, with

Neither did the Holder FOIA Memorandum or its initial implementation guidance take the expected step of directing agencies to reduce their backlogs of pending FOIA requests. Whereas the Reno FOIA Memorandum and its implementing guidance had immediately confronted that difficult subject, their 2009 counterparts contained hardly a word about it, much less a direction to reduce any backlog; that did not come until what is known as the broader “Open Government Directive” was issued by the Office of Management and Budget in December 2009. But in an oft-overlooked part of that governmentwide directive, it indeed was mandated that all federal agencies “with a significant pending [FOIA] backlog . . . shall take steps to reduce any such backlog by ten percent each year” in the coming years. Memorandum for the Heads of Executive Departments and Agencies (Dec. 8, 2009), at 3, ¶ 1(i), available at <http://www.whitehouse.gov/sites/default/files/microsites/ogi-directive.pdf>.

Yet from the aggregate governmentwide statistics made available by the Justice Department for the years since then,<sup>9</sup> it appears that the governmentwide backlog of pending FOIA requests did not at all decrease in the years following the Open Government Directive, let alone decrease by ten percent each year as mandated. Rather, it actually *increased* from Fiscal Year 2010 to Fiscal Year 2012 (the most recent year for which such aggregate figures are available).<sup>10</sup> And at the same time, remarkably, the Justice Department’s own backlog of pending requests also increased, from 7786 to 10,298.<sup>11</sup>

This should be a matter of concern today for more than one reason. The awkward fact that the Justice Department’s FOIA backlog has been allowed to worsen over the past three years is bad enough for its own FOIA requesters. But when the “lead” government agency for the governmentwide administration of the FOIA fails so badly to reduce its own backlog as mandated, it makes it much harder for it to press other departments and agencies to dutifully

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FOIA analysts making excisions or not on the documents that are placed in front of them; is their decisionmaking going to be affected more by the articulation of a vague phrase or by the concrete requirement that they pause and consider whether the information they are about to withhold can be foreseen to pose actual harm? During the Clinton Administration, I can tell you, that answer was clear.

<sup>9</sup> See “Summary of Annual FOIA Reports for Fiscal Year 2012” (June 3, 2013), available at <http://www.justice.gov/oip/docs/fy2012-annual-report-summary.pdf>.

<sup>10</sup> See *id.* at 8 (reporting aggregate number of “backlogged requests” for the end of Fiscal Year 2012 as 71,790, as compared to 69,526 for the end of Fiscal Year 2010). These figures cover the fiscal years that fully post-date the Open Government Directive’s backlog-reduction mandate. In other words, they do not even count the nine-plus months of the initial partial fiscal year (Dec. 8, 2009 to September 30, 2010) of the requirement. They amount to a 3.25% *increase* over the course of Fiscal Years 2011-2012, rather than the 19% aggregate decrease that the Open Government Directive required. And apparently they are reached even within the parameters of the Justice Department’s self-serving redefinition of the word “backlogged” to exclude large numbers of newly received FOIA requests as of 2008.

<sup>11</sup> These figures are taken from the Department’s annual reports of its FOIA activities, for which figures recently became available for Fiscal Year 2013.

comply with that mandate. And this “do as I say, not as I do” problem is exacerbated by the fact that the Department’s high-visibility leadership offices saw their own numbers of pending FOIA requests increase, rather than decrease, over the same period by an aggregate figure of 3.95%.<sup>12</sup> This makes it impossible to lead by example.<sup>13</sup>

#### **Exemption 2**

Turning to the FOIA’s exemptions, as I respectfully suggest this Committee must, the one that continues to cry out for immediate attention is of course Exemption 2. This is because until 2011 federal agencies had for nearly three decades been using the so-called “High 2” aspect of this exemption to withhold sensitive information the disclosure of which could reasonably be expected to enable someone to circumvent the law -- especially in a post-9/11 context. Almost exactly three years ago, however, the Supreme Court firmly ruled that that longstanding interpretation of Exemption 2 was incorrect; as of that moment, “High 2” simply ceased to exist. See *Milner v. Dep’t of the Navy*, 562 U.S. 3 (2011).<sup>14</sup> This meant that the large amounts of information that agencies have regularly withheld under Exemption 2 alone were no longer properly withheld on that basis, and it has placed agencies in an critical quandary over how to

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<sup>12</sup> According to the Department’s most recent annual FOIA report, the numbers of FOIA requests that remained pending as of the end of that reporting year (Fiscal Year 2013) increased to 342 (187 in the Office of the Attorney General, 130 in the Office of the Deputy Attorney General, and 25 in the Office of the Associate Attorney General), as compared to a total of 329 at the end of Fiscal Year 2010. Thus, in summary, the backlog-reduction mandate of the Open Government Directive has been met with backlog increases, rather than decreases (1) within the Executive Branch as a whole, (2) within the Justice Department as a whole, and (3) even within the Justice Department’s own leadership offices in particular.

<sup>13</sup> In this vein, the Committee should be aware of a very recent White House issuance entitled “Memorandum for the Heads of Executive Departments & Agencies Re: 2014 Open Government Plans” (Feb. 24, 2014), which speaks to the FOIA backlog- reduction problem and is available at [http://www.whitehouse.gov/sites/default/files/microsites/ostp/open\\_gov\\_plan\\_guidance\\_memo\\_final.pdf](http://www.whitehouse.gov/sites/default/files/microsites/ostp/open_gov_plan_guidance_memo_final.pdf). In it, the White House reiterates the December 2009 Open Government Directive’s requirement that agencies were to have reduced (and continue to reduce) their backlogs “by at least 10 percent each year” (*id.* at 4) since 2009 -- but it does so without any regard whatsoever for whether that requirement actually has been met during the past four years. Bluntly put, the Obama Administration’s evident capacity for FOIA-related self-assessment, apart from hortatory self-congratulation, has been abysmal.

<sup>14</sup> It should be noted that with this, Exemption 2 is now almost entirely a “dead letter,” at least as a matter of policy under the Holder FOIA Memorandum. This is because the exemption’s other major aspect, known as “Low 2,” uniquely is not based on any expected harm from disclosure but rather shields an agency from the mere burden of responding to requests for low-level administrative information of no real significance. As such, any “Low 2” information readily fails the “foreseeable harm” policy standard and could not properly be withheld in accordance with it. (The residual core of Exemption 2, involving actual personnel rules and practices, has long been a minor, practically negligible, chord.)

handle sensitive such information both at the administrative level and (in some instances) in pending FOIA litigation.

Justice Kagan, in her opinion for the Court in *Milner*, observed with some understatement that the Court's decision "may force considerable adjustments," and she suggested FOIA Exemptions 1, 3, and 7(F) as "tools at hand" for that. 562 U.S. at \_\_\_\_\_. Justice Alito, writing separately, took pains to suggest likewise as to Exemption 7(F) "[i]n particular."<sup>15</sup> *Id.* at \_\_\_\_\_. (Alito, J. concurring). No doubt some part of the *Milner* "adjustment" involves at least two of these three FOIA exemptions, but there also should be no doubt that federal agencies now maintain highly sensitive records -- computer system vulnerability assessments, for example -- with respect to which remedial legislation is vitally necessary.<sup>16</sup> Put simply, it is utterly unfathomable why and how the "*Milner* Exemption 2" problem still remains unaddressed.<sup>17</sup>

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<sup>15</sup> To be sure, some portion of the highly sensitive information previously withheld by agencies on an "anti-circumvention" basis may well qualify for protection under Exemption 7(F) in lieu of it. The compilation of cases in the "Post-9/11" FOIA Litigation section of CGS's Web site indicates that. See <http://www.wcl.american.edu/lawandgov/cgs/post911foia.cfm#ex7f> (citing, e.g., *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313 (D. Utah 2003)). It also is foreseeable that some small portion will qualify under Exemption 7(E) of the Act as well. See *id.*; but see also *Elec. Privacy Info. Ctr. v. Dep't of Homeland Security*, No. 13-260 (JEB), slip op. at 15 (D.D.C. Nov. 12, 2013) (rejecting such claimed Exemption 7(E) and Exemption 7(F) applicability by pointedly repeating the Supreme Court's observation that "the Government may of course seek relief from Congress," quoting *Milner*, 131 S. Ct. at 1271), available at <https://epic.org/foia/EPICvDHS-SOP303-Opinion.pdf>. As for the viability of Exemption 1 toward that end, such an approach, to any degree, would run directly contrary to the current policy imperatives favoring less national security classification rather than more.

<sup>16</sup> And with due respect to Justice Kagan's suggestion that Congress might possibly address this through Exemption 3, it appears that nothing less than a wholesale rewrite of Exemption 2, carefully contoured to protect security-sensitive information with a firm harm standard, is now warranted. Given the inexplicable passage of time without action by the Justice Department or the Office of Management and Budget on this critical gap, CGS today suggests that something along the lines of the language appearing in the article cited in footnote 17 below might possibly be used by this Committee to "jump start" this legislative process, though by so doing CGS does not lobby for revision of Exemption 2 in any particular form. See also note 2 *supra*.

I should also note that such a remedial legislative process would of course involve taking the rare step of "opening up the FOIA's exemptions," something that has not been done since the mid-1980s and which historically is viewed with anxiety on both sides of the FOIA divide. In such an event, for instance, Congress conceivably could be pressed to legislatively overrule some or all aspects of the Supreme Court's landmark *Reporters Committee* decision with respect to Exemptions 6 and 7(C). See, e.g., *O'Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999) (describing efforts to overrule *Reporters Committee* indirectly through 1996 FOIA Amendments).

<sup>17</sup> It is not as if this problem has escaped this Committee's notice. Indeed, as far back as two years ago this week, the Justice Department characterized what was already a one-year-old

### Exemption 3

Speaking of Exemption 3, I think the Committee also should carefully consider the proliferation and use of other statutes to withhold information under the FOIA, which has been a matter of growing concern in recent years. I know that it struggles almost daily, as does its House counterpart, to identify for full attention any proposed new “Exemption 3 statute.” To be sure, this process was made easier by the 2009 amendment of Exemption 3 on that point, which I know derived directly from the Chairman’s longstanding concerns about Exemption 3 statute proliferation. But beyond that, there is the matter of the numerous *existing* statutes that are used -- or in many instances evidently misused -- by agencies to withhold information from FOIA requesters on a daily basis. Not long ago, CGS conducted an academic study of this by first compiling all of the different statutes that are relied upon by agencies for Exemption 3 withholding, more than 300 in total, and then analyzing each one for technical compliance with Exemption 3’s substantive standards. Amazingly, we found that less than half of them, just slightly more than 150, do properly qualify for use under Exemption 3 -- which means that by their own admissions (in their annual FOIA reports) agencies are employing roughly twice as many statutes in this way as they ought to and are improperly withholding untold amounts of information from FOIA requesters in so doing.

I suggest that the time has come for this Committee to seriously consider taking the next logical step. The Committee could take this academic groundwork and readily build upon it, simply by asking each agency that reports using a questionable statute under Exemption 3 to look into why and how it is doing so.<sup>18</sup> Perhaps some agencies would try to take issue with CGS’s substantive evaluation of one or more of the statutes that they use (and that would be only fair), but I guarantee that if the Committee were to take such a step it would at a minimum result in dozens of agencies realizing that many dozens of the statutes they now regularly use are not truly Exemption 3 statutes at all. (See the Exemption 3 section of CGS’s Web site, which can be reached at this link: <http://www.wcl.american.edu/lawandgov/cgs/about.cfm#exemption3>.)

In sum, there certainly is much reason to look askance at the implementation of new FOIA policy over the course of the past five years, to put it mildly, all rosy characterizations of it notwithstanding. And this relatively brief recitation here today does not even take the

problem as having by then become “critical” to this Committee, which then prompted this Committee’s Ranking Member to logically ask: “[I]sn’t it irresponsible to ignore the problem?” See Metcalfe, D., “Amending the FOIA: Is it Time for a Real Exemption 10?,” 37 Admin. & Reg. L. News 16, 18 & n.4 (Summer 2012) (quoting hearing colloquy), available at <http://www.wcl.american.edu/faculty/metcalfe/ABA.article.2012.pdf>

<sup>18</sup> On the Committee’s part, this would require no more than taking an agency’s annual FOIA report, comparing its required list of Exemption 3 statutes used that year against the CGS-vetted list (found at [http://www.wcl.american.edu/lawandgov/cgs/existing\\_exemption\\_3\\_statutes.cfm](http://www.wcl.american.edu/lawandgov/cgs/existing_exemption_3_statutes.cfm)), and then inquiring about any statute found on the former but not the latter. For the agency’s part, such a congressional inquiry would necessarily consume resources that otherwise would be available to handle pending FOIA requests more quickly, but should not be overly burdensome in that regard.

Committee's time to consider in depth other large deficiencies, such as the fact that most federal agencies (especially, and again inexplicably, the Department of Justice) have not updated their vital FOIA regulations for many, many years now, even where required under the 2007 FOIA Amendments.<sup>19</sup> I surely appreciate the Committee's efforts to, in the words of today's hearing title, "reinvigorate the FOIA for the digital age," but I daresay that what now appears to be needed -- much to nearly everyone's great disappointment and surprise -- is sustained attention of a serious remedial nature.

Thank you for the opportunity to testify today, and I look forward to answering your questions.

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<sup>19</sup> This glaring problem was well described and documented in a study that was conducted by the National Security Archive in early 2013 and released during "Sunshine Week" last year. See "Freedom of Information Regulations: Still Outdated, Still Undermining Openness" (Mar. 13, 2013), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB417/>. Once again, I can say from experience that this is a problem of federal agencies naturally waiting to follow the Justice Department's lead -- which certainly never was a problem in the past. Suffice to add that, for reasons quite hard to understand, the Justice Department still has not updated its own FOIA regulations, with what should be a model for all other agencies, in more than a decade. See "Sunshine Not So Bright," *supra* note 5, at 5-6; see also Metcalfe, D., "The Cycle Continues: Congress Amends the FOIA in 2007," 33 Admin. & Reg. L. News 11 (Spring 2008), available at [http://www.wcl.american.edu/lawandgov/cgs/documents/aba\\_arln\\_sp2008\\_cycle\\_continues.pdf](http://www.wcl.american.edu/lawandgov/cgs/documents/aba_arln_sp2008_cycle_continues.pdf).

**Statement of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
Hearing On  
“Open Government and Freedom of Information:  
Reinvigorating the Freedom of Information Act for the Digital Age”  
March 11, 2014**

Today, the Committee holds an important hearing on the Freedom of Information Act (FOIA), one of the Nation's most important open government laws. We also commemorate the annual celebration of openness in our democratic society known as “Sunshine Week,” which will take place next week.

For almost a half century, the Freedom of Information Act has translated our American values of government openness and accountability into practice by guaranteeing the public's right to access information. This hearing is an opportunity to take stock of the progress we have made during the last decade on improving the FOIA process. We will also examine proposals to reform FOIA to address new technologies and the challenges that remain when citizens seek information from their government.

Five years after President Obama issued presidential directives on FOIA and open government, we have seen some progress. Backlogs of FOIA requests are on the decline, a trend that started during the first term of the Obama administration. Online tools such as Data.gov, FOIA.gov and the FOIA portal and the Obama administration's new “FOIA IT Working Group” have modernized the way that citizens can obtain government information. We are moving in the right direction, but stubborn impediments to the FOIA process remain in place and progress has come much too slow.

A new study by the Center for Effective Government - which graded the responsiveness of the 15 Federal agencies that process the most FOIA requests - found that almost half of these agencies failed to earn a passing grade. Another impediment to the FOIA process is the growing use of exemptions to withhold information from the public. According to a 2013 Secrecy Report prepared by OpenTheGovernment.org, Federal agencies used FOIA Exemption 5 to withhold information from the public more than 79,000 times in 2012 — a 41 percent increase from the previous year.

I am concerned that the growing trend towards relying upon FOIA exemptions to withhold large swaths of government information is hindering the public's right to know. That is why I have long supported adding a public interest balancing test to the FOIA statute, so that Federal agencies consider the public interest in the disclosure of government information before invoking a FOIA exemption.

Seven years ago, Senator Cornyn and I worked together to establish the Office of Government Information Services (OGIS) to help mediate FOIA disputes and to make recommendations to Congress and to the President on how to improve the FOIA process. I am encouraged by the good work that OGIS is doing, but I worry this office does not have the sufficient independence, authority and resources to fully carry-out its work. The work of this office is critical to keeping

our government open and accountable to the American people. That is why I will continue to work to ensure that OGIS has the tools and resources that it needs to fulfill its important mission.

During both Democratic and Republican administrations, this Committee has had a proud tradition of working in a bipartisan manner to protect the public's right to know. Working together, we have enacted several bills to improve FOIA for all Americans. I value the strong partnerships that I have formed with Senator Cornyn and Ranking Member Grassley on open government matters. I hope that this bipartisan spirit will guide our work today. I look forward to a good discussion.

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**Senator Cornyn – Questions for Ms. Melanie Pustay, Director of the Office of  
Information Policy, Department of Justice**

On April 15, 2009, a month after Attorney General Eric Holder's FOIA memorandum was publicly released, Gregory Craig, Counsel to the President, sent a memorandum to the executive departments and agencies of the federal government ordering all executive departments and agencies to consult with White House Counsel "on all document requests that may involve White House equities" before releasing them in response to a FOIA request. While past administrations have required consultation on "White-House-originated" documents in FOIA requests, this administration has gone much further.

**Question 1:** As Director of the Office of Information Policy, presumably you are aware of this memorandum. Please clarify how the phrase "White House equities" has come to be defined and applied in the Department of Justice and other agencies. Also, explain what types of records are being submitted to the White House for "consultation" under this memorandum.

**Question 2:** Has the White House ever required that FOIA documents involving "White House equities" be redacted or withheld? If so, under which FOIA exemption were such documents redacted or withheld? Please list all examples of which you are aware.

**Question 3:** Has the Department of Justice provided any guidance, formal or informal, within the Department of Justice or to other agencies, on the meaning or scope of the April 15, 2009 memorandum? If so, please provide the Committee with copies of those documents. If such documents do exist and you are unwilling to release them to the Committee, please provide an explanation of why they are being withheld.

**Question 4:** The April 15, 2009 memorandum also requires that agencies consult with White House Counsel on Congressional committee requests. What public policy justification is there for the White House ordering less information to be shared with Congress?

**"Open Government and Freedom of Information:  
Reinvigorating the Freedom of Information Act for the Digital Age"**  
Questions for the Record submitted by,  
Ranking Member Charles E. Grassley

Questions for Mr. Metcalfe

1. In your written testimony you discussed Attorney General Holder's memorandum setting forth the "foreseeable harm" standard for withholding information. Based on your experience can you discuss:
  - a. The Department of Justice's implementation, or lack thereof, of the foreseeable harm standard in avoiding litigation?
  - b. How did you encourage application of the foreseeable harm standard during your time as head of OIP and what lessons can be learned from that?
2. I'm concerned with this "do as I say, not as I do" behavior coming from the Department of Justice, with respect to FOIA. I fear it sends the wrong message to other agencies when the Department charged with encouraging and monitoring FOIA compliance behaves in this manner.
  - a. In your experience, what effect does the Department of Justice's action have on other agencies when it comes to FOIA compliance?
  - b. What does Congress need to do, if anything, to address this problem and ensure that actions match rhetoric?
3. As your testimony pointed out, it's been three years since the Supreme Court's decision in *Milner v. Department of the Navy*. You note that many agencies are in a quandary over how to handle sensitive information that in the past would have been withheld under Exemption 2. We've been told, from Director Pustay, that this is a critical issue for Congress to address. In your view, has the government simply decided that the *Milner* decision is not a problem that requires action? Do you also believe that failure to address this decision threatens or impacts national security?

**"Open Government and Freedom of Information:  
Reinvigorating the Freedom of Information Act for the Digital Age"**  
Questions for the Record submitted by,  
Ranking Member Charles E. Grassley

Questions for Director Nisbet

1. Given the continued rise in FOIA litigation, one neglected resource appears to be the mediation process OGIS provides. I understand that OGIS and requesters must rely on the willingness of an agency involved in a dispute to participate in mediation. What challenges does OGIS face with other agencies in this regard? Additionally, what do you think would be helpful in encouraging greater agency cooperation with OGIS in greater mediation participation?

**"Open Government and Freedom of Information:  
Reinvigorating the Freedom of Information Act for the Digital Age"**  
Questions for the Record submitted by,  
Ranking Member Charles E. Grassley

Questions for Director Pustay

1. As discussed at the hearing, I look forward to receiving from you information regarding cases where the Department of Justice has applied the "foreseeable harm" standard and not defended an agency's use of an exemption. That said, can you also describe or provide information whether, to your knowledge, agencies, including the Department of Justice, are applying the "foreseeable harm" standard when making initial determinations whether to apply an exemption to a FOIA request.
2. In your testimony, you mentioned the need for standardizing FOIA regulations. As you'll recall, at last year's hearing I was concerned in general about the pace at which agencies were updating their FOIA regulations.
  - a. Has the Department of Justice updated its FOIA regulations since last year's hearing? If not, why and do you intend to update the Department's FOIA regulations?
  - b. Is your office working with other agencies and their FOIA officials to ensure that current law and the Attorney General's FOIA guidelines are followed so as to remove any doubt or uncertainty when responding to a FOIA request? On this point, please explain how your office handles this task and whether your office lacks any resources or authority to assist other agencies in this regard.
3. Regarding your answer to Chairman Leahy's question about the growth in use of Exemption 5, you stated in part that one cause was due to the Department of Homeland Security and the Equal Employment Opportunity Commission's increased Exemption 5 reliance in order to "protect attorney work product and attorney-client information, which is not subject to discretionary release, like deliberative process." It's my understanding that these are, historically, areas of FOIA exemptions where discretionary disclosure is appropriate. In fact, the FOIA Guidance issued by your office, available at <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>, states that when applying the "foreseeable harm" standard to encourage discretionary release:

There is no doubt that records protected by Exemption 5 hold the greatest promise for increased discretionary release under the Attorney General's Guidelines. Such releases will be fully consistent with the purpose of the FOIA to make available to the public records which reflect the operations and activities of the government. Records covered by the deliberative process privilege in particular have significant release potential. In addition to the age of the record and the sensitivity of its content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that

should be analyzed in determining whether a discretionary release is appropriate. Documents protected by other Exemption 5 privileges can also be subject to discretionary disclosures.

- a. Please clarify whether agencies are failing to follow OIP Guidance that encourages discretionary release of information that while otherwise covered by a valid Exemption can still be released if it is determined doing so would not cause any “foreseeable harm.”
  - b. Do you stand by your answer to Chairman Leahy that “attorney work product and attorney-client information” are not subject to discretionary release? If so, how does that align with the guidance your office has issued?
4. It has been three years since the Supreme Court’s decision in *Milner v. Department of the Navy*. I have asked you before whether the Department of Justice planned to submit a legislative fix to address the Court’s decision and you said we would receive a proposal. I have yet to see any language from the Department that addresses the *Milner* decision. Why? Does the Department no longer believe a fix is necessary? If so, please explain why.

**Written Questions for the Record of Chairman Leahy  
for Miriam Nisbet  
Director, Office of Government Information Services  
National Archives and Records Administration  
March 18, 2014**

1. Several Federal agencies have been participating in an online FOIA portal that allows the public to submit, track and review FOIA requests online. Congress is considering legislation to expand the FOIA portal government-wide. Do you support this proposal?
2. Congress is also considering a proposal to require that all records released under FOIA be posted online. Do you support this proposal?
3. During the March 11, 2014 hearing, you testified that the administration's goal is to implement a shared FOIA portal government-wide. What specific steps is the Office of Government Information Services taking to encourage Federal agencies to participate in the FOIA portal?
4. A March 2014 study by the Center for Effective Government found that a majority of the Federal agencies that it graded on FOIA performance did not provide important online services, such as the tracking of FOIA requests via their websites.
  - a. Why are Federal agencies lagging behind in utilizing the Internet and other technologies to facilitate the FOIA process?
  - b. Do you have any recommendations on how Congress can help federal agencies facilitate the FOIA process in the digital age?
5. I am concerned that OGIS does not always receive the level of cooperation needed from Federal agencies in order to conduct its FOIA compliance work.
  - a. Are there any areas where OGIS needs greater cooperation from Federal agencies?
  - b. How can Congress help ensure that OGIS gets the cooperation that it needs?

**Written Questions for the Record of Chairman Leahy  
for Melanie Pustay  
Director, Office of Information Policy  
United States Department of Justice  
March 18, 2014**

1. Several Federal agencies have been participating in an online FOIA portal that allows the public to submit, track and review FOIA requests online. Congress is considering legislation to expand the FOIA portal government-wide. Do you support this proposal?
2. Congress is also considering a proposal to require that all records released under FOIA be posted online. Do you support this proposal? Please explain.
3. A March 2014 study by the Center for Effective Government found that a majority of the Federal agencies that it graded on FOIA performance did not provide important online services, such as the tracking of FOIA requests via their websites.
  - a. What is the Department of Justice doing to help Federal agencies utilize the Internet and other technologies to facilitate the FOIA process?
  - b. Do you have any recommendations on how Congress can help Federal agencies facilitate the FOIA process in the digital age?
4. The Mountain Press, a local Tennessee newspaper, recently reported that it took the Office of Special Counsel 230 days to respond to its FOIA request seeking a single record -- only to deny the request.
  - a. Do you agree that it should not take our Government almost a year to respond to a simple FOIA request?
  - b. What is the Department of Justice doing to ensure that Federal agencies respond to FOIA requests in a timely manner?

5. I have worked to improve proposed legislative exemptions to FOIA by including a requirement that Federal agencies weigh the public's interest in obtaining information before using the exemption to withhold the information from the public. What are your views on codifying a so-called "public interest balancing test" in the FOIA statute?
6. During the March 11, 2014 hearing, you testified that the Office of Information Policy is leading an interagency team to develop a common FOIA regulation that will apply to all Federal agencies.
  - a. When will this new regulation be complete?
  - b. When do you expect Federal agencies will be ready to implement the new FOIA regulation government-wide?

**"Open Government and Freedom of Information:  
Reinvigorating the Freedom of Information Act for the Digital Age"**  
**Questions for the Record Submitted by  
Ranking Member Charles E. Grassley**

**Questions for Mr. Metcalfe**

1. In your written testimony you discussed Attorney General Holder's memorandum setting forth the "foreseeable harm" standard for withholding information. Based on your experience can you discuss:
  - a. The Department of Justice's implementation, or lack thereof, of the foreseeable harm standard in avoiding litigation?

**ANSWER:** I certainly can discuss that, but first there is the fact that the implementation of the foreseeable harm standard only begins with using it to minimize litigation; more comprehensively, it is a matter of applying it to the breadth of FOIA decisionmaking at the administrative level. As for cases in litigation, my written testimony (at 2-3 & nn.5-6) documents the basis for concluding that the Department of Justice's implementation of the foreseeable harm standard has been woefully deficient from the start. And it is quite telling that in the face of this acute criticism the Department of Justice just chose simply to ignore it publicly. Indeed, the Department issued two "Successes in FOIA Administration" blog communications in the wake of the Committee's March 11 hearing, on March 20 (<http://blogs.justice.gov/oip/archives/1390>) and then on April 4 (<http://blogs.justice.gov/oip/archives/1396>), but amazingly neither one of them even mentions the foreseeable harm standard, let alone provides any current guidance on its implementation. Unfortunately, this is entirely characteristic of what has been the Department's approach to the issuance of FOIA guidance in recent years. Anyone taking a hard look at the page of its FOIA Web site (entitled "OIP Guidance") that contains its guidance issuances since 2007 (<http://www.justice.gov/oip/oip-guidance.html>) will find scant guidance on substantive policy issues and enormous amounts of procedural guidance on the preparation of various agency FOIA reports instead. With this, the key concept of the foreseeable harm standard -- which is the very thing that can make a big difference "down in the trenches" of FOIA decisionmaking at the administrative level -- is terribly ill-served.

Indeed, as for implementation of the foreseeable harm standard at the administrative level, the only guidance that the Department has issued was issued nearly five years ago (<http://www.justice.gov/oip/foiapost/2009foiapost8.htm>) and has not been updated since. Nor has it been reinforced with specific reference to the standard and its practical applications. What is more, the venerable "Justice Department Guide to the FOIA," which contains a section devoted to discretionary disclosure under that standard (<http://www.justice.gov/oip/foia-guide.html>), has not seen that section updated since August of 2009. That alone speaks volumes about the emphasis that the Department has placed on the foreseeable harm standard, which is to say absolutely no emphasis at all. This is nothing less than a gross deficiency of FOIA policy implementation by any reasonable standard and it is even further exacerbated by the fact that OIP foolishly persists (even as recently as in the post-hearing March 20 blog cited above) in using the amorphous phrase "presumption of openness" instead.

- b. How did you encourage application of the foreseeable harm standard during your time as head of OIP and what lessons can be learned from that?

**ANSWER:** We did so in many ways. First, we announced the establishment of that new standard ([http://www.justice.gov/oip/foia\\_updates/Vol\\_XIV\\_3/page1.htm](http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page1.htm)) together with an immediate example of its use ([http://www.justice.gov/oip/foia\\_updates/Vol\\_XIV\\_3/page12.htm](http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page12.htm)) in an area that all agencies could readily recognize as a particularly “heavy-duty” one, Exemption 7(D). Then, as detailed in my written testimony (at 2 n.4) we applied it with a vengeance (so to speak) in the most extreme litigation case imaginable -- on in which the Justice Department’s invocation of an exemption had already been upheld in court, at the appellate level (see case description at [http://www.justice.gov/oip/foia\\_updates/Vol\\_XV\\_2/page1.htm](http://www.justice.gov/oip/foia_updates/Vol_XV_2/page1.htm)). Then we issued guidance specifically entitled “Applying the ‘Foreseeable Harm’ Standard Under Exemption 5” ([http://www.justice.gov/oip/foia\\_updates/Vol\\_XV\\_2/page3.htm](http://www.justice.gov/oip/foia_updates/Vol_XV_2/page3.htm)), added a new subsection on the foreseeable harm standard to the “Justice Department Guide to the FOIA,” elaborated further in a separate “Guide” section devoted to discretionary disclosure, and followed this up during the remainder of the Clinton Administration with explicit reference to “foreseeable harm” as the touchstone of FOIA decisionmaking at every turn. And even though the standard adopted by Attorney General Holder is the exact same standard used by federal agencies for all that time only eight years previously, one will look in vain for even the slightest useful acknowledgement of that or even the barest trace of all of this existing policy implementation guidance anywhere in what the Department has said or done in this Administration.

- 2. I’m concerned with this “do as I say, not as I do” behavior coming from the Department of Justice, with respect to FOIA. I fear it sends the wrong message to other agencies when the Department charged with encouraging and monitoring FOIA compliance behaves in this manner.
  - a. In your experience, what effect does the Department of Justice’s action have on other agencies when it comes to FOIA compliance?

**ANSWER:** In my experience -- providing FOIA policy guidance and implementation leadership throughout the executive branch for more than 25 years -- the Department of Justice’s actions can and should have an enormous effect on proper agency compliance with the FOIA. Indeed, that was precisely the objective of everything that we did of a governmentwide nature at the Office of Information and Privacy (OIP). The statutory basis for the Justice Department’s governmentwide policy jurisdiction under the FOIA is subsection (e) of the Act, which (in contrast to the more explicit comparable authority given to the Office of Management and Budget for Privacy Act guidance under subsection (v) of that Act) calls upon the Department to report its “efforts . . . to encourage agency compliance with” the FOIA. 5 U.S.C. § 552(e)(5), as amended. From the mid-1970s through early 2007 (the time period of which I can speak from first-hand experience), the Justice Department took great pains to develop and disseminate an enormous amount of guidance -- *substantive* policy guidance – as the touchstone of all agency FOIA decisionmaking. And when it came time to implement Congress’s intent in amending the Act -- in 1974, 1986, 1996, and 2002 -- the Department through OIP told agencies what they needed to know to achieve faithful implementation throughout the executive branch. This established a

firm pattern in which all agencies simply looked to OIP for the full range of implementation steps required -- and I can say without fear of contradiction that they were not once disappointed. Put most simply, what FOIA requesters experienced at federal agencies across the executive branch was the product of OIP's strong, high-quality efforts -- on substantive as well as procedural issues -- more than anything else. This contrasts greatly with what has been the case in recent years. (See Answer to Question 1.a. immediately above.)

- b. What does Congress need to do, if anything, to address this problem and ensure that actions match rhetoric?

**ANSWER:** In my judgment, Congress can do several things to address the current problem. First, it can resolve to hold regular FOIA oversight hearings, in each body, at which sufficient time and sustained attention can be devoted to a close examination of: (a) what the Justice Department has not done and should now be doing in order to provide solid, substantive guidance to the 99 other federal agencies on FOIA administration; (b) exactly what the Justice Department has not done and should now be doing to implement both current policy standards and the provisions of all amendments of the Act, as a model for other agencies; and (c) the best and worst practices of other federal agencies in their current FOIA activities. In other words, each federal agency -- especially the Department of Justice -- should know that it will be accountable to congressional oversight in both bodies of Congress each year (if not even more frequently, as the need arises), without any doubt. (And there now would be a particular advantage in doing so at this point in that OGIS is very well positioned to advise Committee staff toward that end.)

Second, as it has done in the past (though not recently), Congress should employ Government Accountability Office reviews as an accompaniment to its oversight hearings, either immediately beforehand or immediate afterward, or both. During the closing months of the Clinton Administration in 2000, the House subcommittee with jurisdiction over FOIA matters held a potent oversight hearing that led to a series of highly useful GAO studies over the course of the next several years. OIP closely collaborated with GAO in these FOIA-administration reviews, even to the point of using the issuance of successive GAO reports as the basis for government-wide FOIA Officers Conferences held by OIP to emphasize "lessons learned" toward improved governmentwide administration of the Act. This began with the subject of further "E-FOIA implementation" (<http://www.justice.gov/archive/oip/foiapost/2001foiapost2.htm>), which was addressed pointedly and comprehensively by OIP (in very close coordination with GAO) in March 2001 (<http://www.justice.gov/archive/oip/foiapost/2001foiapost3.htm>). After the success of this first GAO/OIP collaboration, Congress promptly commissioned a follow-up GAO study (<http://www.justice.gov/archive/oip/foiapost/2002foiapost9.htm>) that led to a follow-up FOIA Officers Conference (<http://www.justice.gov/archive/oip/foiapost/2002foiapost21.htm>) that in turn served to "roll out" (and strongly reinforce) the results of GAO's supplemental study in 2002 (<http://www.justice.gov/archive/oip/foiapost/2002foiapost23.htm>). Thus was born, in the trans-administration years of 2000-2001, a uniquely effective collaboration between Congress (through GAO) and the executive branch (through OIP) on improving governmentwide FOIA implementation (<http://www.justice.gov/archive/oip/foiapost/2002foiapost31.htm>).

This led to Congress's use of GAO reviews for purposes of its further FOIA oversight hearings in 2005 (<http://www.justice.gov/archive/oip/foiaproj/2005foiaproj12.htm>) and in 2006 ([http://www.justice.gov/archive/oip/metcalfe\\_foia\\_testimony07252006.pdf](http://www.justice.gov/archive/oip/metcalfe_foia_testimony07252006.pdf)), as well as to the comprehensive implementation of a governmentwide executive order (Exec. Order No. 13,392) on the subjects of FOIA backlog reduction in particular and a wide range of FOIA administration improvements more generally (<http://www.justice.gov/archive/oip/foiaproj/2006foiaproj6.htm>). Having been the principal executive branch official responsible for coordinating these activities, I can strongly commend them to this Committee's attention, based upon first-hand knowledge of their effectiveness. Bluntly put, this approach proved to be far superior to the intermittent congressional oversight attention and the inexplicably deficient executive branch responsiveness to Congress, *inter alia*, that sadly has been the norm in recent years.

Third, Congress should not so lightly accept any executive branch rhetoric on claimed accomplishments in implementing the provisions of the 2007 FOIA Amendments or the lofty policy goals of the current Administration. I know first-hand the difference between rhetoric and reality in this particular regard, and frankly I have been surprised to see a variety of Justice Department claims -- ranging from the blithe to the flatly inaccurate to the seemingly deceptive -- so readily accepted without the degree of skepticism and sustained scrutiny that they deserve. Indeed, my academic center has now conducted a series of four progressive annual program assessments of "Obama Administration Transparency" (see program agendas and Webcasts available at this link: <http://www.wcl.american.edu/lawandgov/cgs/about.cfm#obamatransp>) that together stand as strong testament to this. And CGS's most recent program, conducted in the immediate wake of this Committee's abbreviated oversight hearing, addresses this as well (<http://media.wcl.american.edu/Mediasite/Play/6bc996c7-d6dd-4399-9f78-7decc8603acb>).

Frankly, there simply is no substitute for sustained, uninterrupted questioning of the Justice Department's positions on FOIA issues. Had that occurred at the March 11 hearing, for example, the Committee might have learned that, contrary to what its Chairman was defensively told, the attorney work-product privilege is indeed an appropriate area for discretionary disclosure in implementation of the foreseeable harm standard; in fact, it actually is the second-biggest area for that ([http://www.justice.gov/oip/foia\\_updates/Vol\\_XV\\_2/page3.htm](http://www.justice.gov/oip/foia_updates/Vol_XV_2/page3.htm)). And the Department's transparently self-serving notion that updated regulations are not required by any provision of the 2007 FOIA Amendments likewise would not withstand close scrutiny. See "Sunshine Not So Bright: FOIA Implementation Lags Behind," 34 Admin. & Reg. L. News 5, 6 (Summer 2009), available at <http://www.wcl.american.edu/faculty/metcalfe/sunshinenotsobright.pdf>.

3. As your testimony pointed out, it's been three years since the Supreme Court's decision in *Milner v. Department of the Navy*. You note that many agencies are in a quandary over how to handle sensitive information that in the past would have been withheld under Exemption 2. We've been told, from Director Pustay, that this is a critical issue for Congress to address. In your view, has the government simply decided that the *Milner* decision is not a problem that requires action? Do you also believe that failure to address this decision threatens or impacts national security?

**ANSWER:** No, I do not believe that the government has simply decided that *Milner* is not a problem that requires action. Such a decision would be antithetical to the formal (i.e., OMB-

cleared) position explicitly taken by the Department before this Committee in March 2012, and it would be an irrational one given that *Milner* unquestionably leaves a swath of sensitive information (e.g., computer security vulnerability assessments prepared under the Computer Security Act of 1988) utterly unprotected in the face of a targeted FOIA request. Rather, the only conclusion that can be drawn from outside the Department (i.e., without betraying any inside knowledge) is that, for one reason or another, the Department (in concert with OMB) just “has not gotten around to” completing and submitting a formal legislative proposal on *Milner*. While it of course is easy to say this from “outside” of OIP, I must reiterate that this is truly unfathomable. I began working on FOIA-amendment legislation in 1979 during the Carter Administration and (except for the “midnight” House activity on the 2002 FOIA Amendment) was the principal executive branch point person on every amendment proposal from then until my retirement nearly 28 years later, and I know that during that time the Department never would have allowed *Milner* to be unaddressed by a legislative proposal for more than a matter of days or weeks at most. In fact, when the Supreme Court granted certiorari in the case on June 28, 2010, several former government colleagues and I (not anyone in OIP) discussed the need for anticipatory preparation of what then would have been denominated the “FOIA Amendments of 2011.” And now it is more than three years later.

As to the impact of this failure, I have to delineate carefully between matters of “national security” and those of “homeland security.” As to the former, the protection afforded by FOIA Exemption 1 should be entirely unaffected by the Supreme Court’s *Milner* decision. The only impact that *Milner* can have within this realm (as mentioned in my written testimony) is the post-*Milner* tendency to classify something in desperation in order to protect it in the absence of the protections that had been provided by Exemption 2. Such “overclassification,” of course, is a poor result.

But in what since 9/11 has become known as the “homeland security” realm, the answer is very different. Truth be known, OIP after 9/11 specifically encouraged all federal agencies to view much FOIA-requested information through a new “post-9/11 lens,” by which they might reach a new judgment to withhold some types of information (the blueprints and schematics for federal buildings, for example) on the basis of Exemption 2’s “anti-circumvention” aspect, commonly known as “High 2.” This not only included information that could reasonably be expected to aid terrorist actions against both federal facilities and items of private-sector “critical infrastructure,” it also encompassed information that could be used to target such facilities for terrorist attacks. The current unavailability of “High 2” for such needed protection is, to put it simply, a very bad thing.

Submitted on April 7, 2014

**"Open Government and Freedom of Information:  
Reinvigorating the Freedom of Information Act for the Digital Age"**  
**Questions for the Record submitted by,**  
**Ranking Member Charles E. Grassley**

Questions for Director Nisbet

1. Given the continued rise in FOIA litigation, one neglected resource appears to be the mediation process OGIS provides. I understand that OGIS and requesters must rely on the willingness of an agency involved in a dispute to participate in mediation. What challenges does OGIS face with other agencies in this regard? Additionally, what do you think would be helpful in encouraging greater agency cooperation with OGIS in greater mediation participation?

**Response:** The Freedom of Information Act (FOIA) gives both requesters and agencies the right to request OGIS's mediation services, 5 U.S.C. § 552(h)(3). Agency participation in the OGIS mediation process is not mandatory; however, the vast majority of agencies involved in OGIS cases—including all 15 Cabinet-level departments and dozens of smaller agencies—work well with OGIS.

One area where OGIS is focusing its efforts is helping Federal agencies and requesters alike change the culture by embracing Alternative Dispute Resolution (ADR) as a way to resolve disputes. The Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007, which introduced ADR to the FOIA process, directs that FOIA Public Liaisons assist in resolving disputes between FOIA requesters and Federal agencies, 5 U.S.C. §§ 552(a)(6)(B)(ii) and 552(l). One of OGIS's 2013 Recommendations was to marry FOIA and the ADR across agencies, and in 2014, OGIS recommended that the Executive Branch issue guidance to agencies that focuses on ways agencies can provide exemplary customer service to FOIA requesters, with particular attention to the importance of appropriate dispute resolution through the FOIA Public Liaisons and through working with OGIS.

OGIS believes that embedding ADR into the FOIA process at the agency level offers the first and best place to resolve and prevent disputes that otherwise might end up at OGIS—or in litigation. For example, all agencies should provide requesters with the name and contact information for their FOIA Public Liaisons so that requesters can contact the liaisons for assistance in resolving disputes as mandated in FOIA. Too often, requesters come to OGIS because they are not aware of the FOIA Public Liaison role or they do not have the Public Liaison's name or contact information.

OGIS has observed that when both Federal agencies and requesters embrace Alternative Dispute Resolution (ADR), the FOIA culture is changed such that there are fewer disputes.

**Written Questions for the Record of Chairman Leahy  
for Miriam Nisbet  
Director, Office of Government Information Services  
National Archives and Records Administration  
March 18, 2014**

1. Several Federal agencies have been participating in an online FOIA portal that allows the public to submit, track and review FOIA requests online. Congress is considering legislation to expand the FOIA portal government-wide. Do you support this proposal?

**RESPONSE:** As a founding partner in *FOIAonline*, OGIS continues to support the portal's improvement of services and expansion of partners. OGIS also recognizes that while *FOIAonline* offers agencies customization, it may not work for *all* agencies. OGIS notes that one of the goals of the Administration's Second Open Government National Action Plan is to "Improve the Customer Experience through a Consolidated Online FOIA Service." The existing and expanded *FOIAonline* system—which was the subject of an OGIS Recommendation in 2012—will certainly inform this process. We look forward to assisting in Administration efforts to implement a consolidated online FOIA service that will give requesters a single site across government where they can file their requests and includes additional tools to improve the customer experience.

2. Congress is also considering a proposal to require that all records released under FOIA be posted online. Do you support this proposal?

**RESPONSE:** Under the Freedom of Information Act (FOIA), generally a release to one is a release to all. As such, OGIS supports posting online as many FOIA-released records as practicable, with the understanding that there are costs and technological improvements associated with posting records, including records management, the ability to search for and retrieve records, first-party records requests, and Section 508 compliance, which requires that agencies' web content be equally accessible to all, including those with disabilities.

3. During the March 11, 2014 hearing, you testified that the administration's goal is to implement a shared FOIA portal government-wide. What specific steps is the Office of Government Information Services taking to encourage Federal agencies to participate in the FOIA portal?

**RESPONSE:** *FOIAonline* was established as a shared service, with the developers taking direction from member agencies, one of which is the National Archives and Records

Administration (NARA), OGIS's parent agency. In its role as FOIA ombudsman, OGIS participates in this consensus building effort; OGIS is a member (through its Director) of the *FOIAonline* governing body. OGIS firmly believes that the best way to encourage Federal agencies to participate in *FOIAonline* is to offer a platform that meets agencies' needs.

4. A March 2014 study by the Center for Effective Government found that a majority of the Federal agencies that it graded on FOIA performance did not provide important online services, such as the tracking of FOIA requests via their websites.
  - a. Why are Federal agencies lagging behind in utilizing the Internet and other technologies to facilitate the FOIA process?

**RESPONSE:** OGIS has observed some costs associated with technology improvements in FOIA processing can cause some agencies to lag behind in technology used in their FOIA processes. Also, some agencies' current contractual obligations require costs for any improvements. This is why OGIS recommends that agencies engage their FOIA and/or records management professionals when they consider purchasing new information technology, whether for the FOIA process or for managing agency records in general. As indicated in my response to Question 2 above, OGIS has observed that even when technology allows for posting, there are issues surrounding online posting of FOIA-released records that agencies must consider, including records management, the ability to search and retrieve records, first-party records requests, and Section 508 compliance, which requires that agencies' web content be equally accessible to all, including those with disabilities.

- b. Do you have any recommendations on how Congress can help federal agencies facilitate the FOIA process in the digital age?

**RESPONSE:** At this time, OGIS has no specific legislative recommendations. As you know, this year OGIS had two recommendations for improving the FOIA process, including embedding FOIA into agencies' FOIA information technology (IT) procurement process. We suggest, for example, that when procuring new technology, upgrading existing technology, or even creating a new large agency database, agencies consult with their records managers and FOIA professionals to best determine how the records will be managed, how the agency might efficiently and effectively search for records in response to FOIA requests for the information contained in those records, and, ideally, how the agency might proactively disclose the information or data.

5. I am concerned that OGIS does not always receive the level of cooperation needed from Federal agencies in order to conduct its FOIA compliance work.
  - a. Are there any areas where OGIS needs greater cooperation from Federal agencies?

**RESPONSE:** FOIA gives both requesters and agencies the right to request OGIS's mediation services, 5 U.S.C. § 552(h)(3). Agency participation in the OGIS mediation process is not mandatory; however, the vast majority of agencies involved in OGIS cases—including all 15 Cabinet-level departments and dozens of smaller agencies—work well with OGIS.

One area where OGIS is focusing its efforts is helping Federal agencies and requesters alike change the culture by embracing Alternative Dispute Resolution (ADR) as a way to resolve disputes. The Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007, which introduced ADR to the FOIA process, directs that FOIA Public Liaisons assist in resolving disputes between FOIA requesters and Federal agencies, 5 U.S.C. §§ 552(a)(6)(B)(ii) and 552(l). One of OGIS's 2013 Recommendations was to marry FOIA and the ADR across agencies, and in 2014, OGIS recommended that the Executive Branch issue guidance to agencies that focuses on ways agencies can provide exemplary customer service to FOIA requesters, with particular attention to the importance of appropriate dispute resolution through the FOIA Public Liaisons and through working with OGIS.

OGIS believes that embedding ADR into the FOIA process at the agency level offers the first and best place to resolve and prevent disputes that otherwise might end up at OGIS—or in litigation. For example, all agencies should provide requesters with the name and contact information for their FOIA Public Liaisons so that requesters can contact the liaisons for assistance in resolving disputes as mandated in FOIA. Too often, requesters come to OGIS because they are not aware of the FOIA Public Liaison role or they do not have the Public Liaison's name or contact information.

OGIS has observed that when both Federal agencies and requesters embrace Alternative Dispute Resolution, the FOIA culture is changed such that there are fewer disputes.

b. How can Congress help ensure that OGIS gets the cooperation that it needs?

**RESPONSE:** Congress's continued support of OGIS's work will, in itself, encourage cooperation by agencies and requesters alike.

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

May 05, 2015

The Honorable Charles E. Grassley  
Chairman  
Senate Judiciary Committee  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Melanie Pustay, Director, Office of Information Policy, before the Committee on March 11, 2014, at a hearing entitled "Open Government and Freedom of Information: Reinvigorating the Freedom of Information Act for the Digital Age." We hope that this information is of assistance to the Committee.

Please do not hesitate to contact this office if we may be of additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Peter J. Kadzik  
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy  
Ranking Member

**Questions for the Record  
Director Melanie Pustay  
Office of Information Policy**

**"Open Government and Freedom of Information:  
Reinvigorating the Freedom of Information Act for the Digital Age"  
Committee on the Judiciary  
United States Senate  
March 11, 2014**

**Questions Posed by Chairman Grassley**

1. **As discussed at the hearing, I look forward to receiving from you information regarding cases where the Department of Justice has applied the "foreseeable harm" standard and not defended an agency's use of an exemption. That said, can you also describe or provide information whether, to your knowledge, agencies, including the Department of Justice, are applying the "foreseeable harm" standard when making initial determinations whether to apply an exemption to a FOIA request.**

**Response:**

When the Attorney General's Freedom of Information Act (FOIA) Guidelines were issued in 2009, the U.S. Department of Justice's (the Department) litigators immediately began applying their principles to their litigation cases. While the Department has not kept statistics on this point, there are a number of examples where the agency made a discretionary release of additional information during the course of litigation that was originally withheld at the administrative level. For example, after issuance of the Attorney General's FOIA Guidelines the Office of Information Policy (OIP) conducted a systematic review of all its pending FOIA litigation cases to determine whether any information could be released as a matter of discretion. We determined that releases could be made in eight of those cases. Attached here is a chart OIP compiled in response to a FOIA request on this topic that was prepared in late 2009 and that lists the eight litigation cases where supplemental releases were made after issuance of the Attorney General's FOIA Guidelines. There are also court decisions that reference the fact that releases were made as a matter of discretion, *see, e.g., Judicial Watch, Inc. v. DOJ*, 878 F. Supp. 2d 225, 233 (D.D.C. 2012) (referencing review that the Department had conducted in connection with the litigation and the decision to make discretionary releases as a result of that review); *ACLU v. DHS*, 810 F. Supp. 2d 267, 276 (D.D.C. 2011) (noting that agencies had applied the Attorney General's Guidelines, which were issued during the pendency of the case, and had released records as a result).

More importantly, separate and apart from its impact on litigation, the foreseeable harm standard contained in the Attorney General's FOIA Guidelines has had an ongoing impact on agency decision-making at the administrative level, when agencies are making their initial determinations on FOIA requests. After the Attorney General's FOIA Guidelines were issued in

March 2009, OIP issued guidance to all agencies specifically addressing the foreseeable harm requirement. See DOJ, OIP Guidance: [President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines – Creating a New Era of Open Government](#) (2009). We also discuss the requirement in our [Department of Justice Guide to the FOIA](#) and we have made it a regular part of the many FOIA training programs OIP conducts each year. Through these efforts we are educating agencies about the standard.

Moreover, each year OIP has asked agencies to include in their Chief FOIA Officer Reports information about whether they have made discretionary releases of information after applying the foreseeable harm standard. After reviewing the first set of agency Chief FOIA Officer Reports submitted in 2010, OIP found a strong correlation between those agencies that reviewed their documents with the foreseeable harm standard in mind and those agencies that were able to identify additional information that could be released as a matter of discretion. Accordingly, OIP issued guidance that each agency "should institute a system, or add a step in their processing procedures, to affirmatively consider whether more information can be released as a matter of administrative discretion."

To provide greater transparency to this aspect of the Attorney General's FOIA Guidelines, for the past three years OIP has asked agencies to provide examples of discretionary releases made the previous year in their Chief FOIA Officer Reports. Many of these releases consist of information that could have been protected by the deliberative process privilege of Exemption 5, but information protected by other exemptions, such as Exemptions 2, 7(D), 7(E), and 8, has also been released as a matter of discretion. As reported in the 2015 Chief FOIA Officer Reports, for example, the Department of State, in response to several requests for information about American families' unsuccessful attempts to adopt children in Vietnam, made a concerted effort to release deliberative material to bring greater transparency to the consular and Department officers' decision-making process. The Department of Transportation released internal agency investigatory materials related to motor vehicle recalls and safety related defects in an effort to promote further transparency concerning those safety-related issues. The Federal Bureau of Investigation (FBI) continues to release information with historical value that could be protected by the FOIA's law enforcement exemptions, such as information about counterintelligence operations and records of discussion about whether to prosecute Alger Hiss for espionage and perjury.

We encourage the Committee to review agency Chief FOIA Officer Reports for 2013, 2014, and 2015, which are readily available on the [Reports](#) page of OIP's website, to get a complete picture of the many types of information released as a matter of discretion each year under the Attorney General's FOIA Guidelines.

2. In your testimony, you mentioned the need for standardizing FOIA regulations. As you'll recall, at last year's hearing I was concerned in general about the pace at which agencies were updating their FOIA regulations.

A. Has the Department of Justice updated its FOIA regulations since last year's hearing? If not, why and do you intend to update the Department's FOIA regulations?

**Response:**

The Department published its updated FOIA regulations on April 3, 2015.

B. Is your office working with other agencies and their FOIA officials to ensure that current law and the Attorney General's FOIA guidelines are followed so as to remove any doubt or uncertainty when responding to a FOIA request? On this point, please explain how your office handles this task and whether your office lacks any resources or authority to assist other agencies in this regard.

**Response:**

Yes, the Department and OIP take very seriously our responsibility of encouraging agency compliance with the FOIA and ensuring that the President's and Attorney General's FOIA Memoranda are implemented across the government. We satisfy this responsibility in a number of different ways both by providing agencies with the knowledge and resources they need to apply the law correctly and by holding them accountable for their FOIA administration. These efforts include:

- **Issuing policy guidance:** OIP regularly issues government-wide policy guidance on the proper implementation of the law and the President's and Attorney General's FOIA Memoranda. For example, shortly after the President's and Attorney General's FOIA Memoranda were issued, OIP issued guidance to agencies detailing their obligations in implementing the Administration's policies. See DOJ, OIP Guidance: [President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines – Creating a New Era of Open Government](#) (2009). Since then, we have issued guidance on a host of topics, including two addressing the importance of good communication with FOIA requesters, all of which are available on our website.
- **Conducting FOIA training:** OIP regularly provides training to agency personnel on both the application of the law and the implementation of the President's and Attorney General's FOIA Memoranda. Every year OIP provides training for thousands of FOIA professionals on a range of FOIA topics. We have recently launched a suite of four training resources designed to reach every level of the federal workforce, from the newly arrived intern to the senior executive,

which are designed to ensure that all agencies have important FOIA resources available to them. All of OIP's training sessions fully incorporate the Attorney General's FOIA Guidelines. Details about our training are available on our website.

- **Providing Counseling Services:** OIP provides individualized counseling to agency personnel on all aspects of the FOIA, including legal and policy considerations, through our *FOIA Counselor Service* which is provided by OIP's attorney staff.
- **Creating Reporting Guidelines:** As part of our responsibilities in overseeing agency compliance with the statute and the Attorney General's FOIA Guidelines, OIP issues reporting guidelines each year for agency Chief FOIA Officer Reports. In these reports we ask agencies to describe the steps they have taken to implement the Attorney General's FOIA Guidelines, including steps taken to apply the presumption of openness, to improve efficiency, to increase and enhance proactive disclosures, to increase use of technology in all aspects of FOIA administration, and to improve timeliness and reduce any backlogs. Each year, as agencies' implementation of the FOIA Guidelines has matured, we have revised the reporting requirements to continue to drive and incentivize agencies moving forward.
- **Assessing Agency Progress:** OIP conducts a review of agency activities as reported in both their Chief FOIA Officer Reports and their Annual FOIA Reports and assesses or "scores" their progress under a range of milestones as a way to hold agencies accountable. The assessment provides a visual snapshot of the five key topical areas of FOIA administration addressed in the Attorney General's FOIA Guidelines. For 2014, OIP expanded the assessment to include a five-step scoring system, overall scores for each assessed section, and additional narrative information from agency reports. OIP's assessments are available on our website.
- **Creating FOIA.gov:** Launched during Sunshine Week four years ago, FOIA.gov serves as the government's comprehensive FOIA resource for all information on the FOIA and FOIA data. Among many other functions, FOIA.gov takes the detailed statistics contained in agency Annual FOIA Reports and displays them graphically, so that they can be compared by agency and over time. The site also spotlights recent releases made by agencies under the FOIA and provides the public with an easy way to find all of the information needed for making a request to one of the hundred agencies subject to the FOIA. The Department is currently working in collaboration with the 18F team at the General Services Administration to continue to expand these important resources on FOIA.gov for the public.

3. Regarding your answer to Chairman Leahy's question about the growth in use of Exemption 5, you stated in part that one cause was due to the Department of Homeland Security and the Equal Employment Opportunity Commission's increased Exemption 5 reliance in order to "protect attorney work product and attorney-client information, which is not subject to discretionary release, like deliberative process." It's my understanding that these are, historically, areas of FOIA exemptions where discretionary disclosure is appropriate. In fact, the FOIA Guidance issued by your office, available at <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>, states that when applying the "foreseeable harm" standard to encourage discretionary release:

There is no doubt that records protected by Exemption 5 hold the greatest promise for increased discretionary release under the Attorney General's Guidelines. Such releases will be fully consistent with the purpose of the FOIA to make available to the public records which reflect the operations and activities of the government. Records covered by the deliberative process privilege in particular have significant release potential. In addition to the age of the record and the sensitivity of its content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed in determining whether a discretionary release is appropriate. Documents protected by other Exemption 5 privileges can also be subject to discretionary disclosures.

- A. Please clarify whether agencies are failing to follow OIP Guidance that encourages discretionary release of information that while otherwise covered by a valid Exemption can still be released if it is determined doing so would not cause any "foreseeable harm."

**Response:**

As described above in response to question one, agencies are applying the foreseeable harm standard and making discretionary releases of a wide range of information otherwise covered by a FOIA exemption. OIP has directed agencies to report each year on the steps to apply the foreseeable harm standard and for the past three years OIP has asked agencies to provide examples in their Chief FOIA Officer Reports of records they have released as a matter of discretion. Those Chief FOIA Officer Reports describe each agency's efforts to apply the foreseeable harm standard and to release records as a matter of discretion.

- B. Do you stand by your answer to Chairman Leahy that “attorney work product and attorney-client information” are not subject to discretionary release? If so, how does that align with the guidance your office has issued?

**Response:**

My answer has been misunderstood. As you quote above, I responded to the question by stating that materials covered by the attorney client or attorney work product privileges are not subject to discretionary releases “like deliberative process.” When I said “like” I meant “in the same way as.” My answer was conveying the fact that attorney client and attorney work product material is not subject to discretionary release *in the same way as*, or *to the same extent as*, deliberative process material. As my guidance emphasizes, while documents protected by *any* privilege *can* be subject to discretionary release, those records “covered by the deliberative process privilege in particular have significant release potential.”

4. It has been three years since the Supreme Court’s decision in *Milner v. Department of the Navy*. I have asked you before whether the Department of Justice planned to submit a legislative fix to address the Court’s decision and you said we would receive a proposal. I have yet to see any language from the Department that addresses the *Milner* decision. Why? Does the Department no longer believe a fix is necessary? If so, please explain why.

**Response:**

A number of agencies have been impacted by the decision in *Milner v. Department of the Navy*, all of which have a strong interest in a legislative solution. The Department has been working with these agencies on a thoughtful legislative proposal that does not sweep too broadly, but at the same time provides sufficient protection against circumvention of the law and the safeguarding of our national security. That proposal was recently submitted to Congress by the Department of Defense (DOD) as part of DOD’s FY16 Defense Authorization Act proposal.

RESPONSES OF MELANIE ANN PUSTAY TO QUESTIONS  
SUBMITTED BY SENATOR LEAHY

Questions Posed by Senator Leahy

5. Several Federal agencies have been participating in an online FOIA portal that allows the public to submit, track and review FOIA requests online. Congress is considering legislation to expand the FOIA portal government-wide. Do you support this proposal?

Response:

The Department supports the concept of a government-wide FOIA portal for the submission of requests. Indeed, as part of the Administration's commitment to modernize FOIA in the Second Open Government National Action Plan, the Department has funded and is working closely with the White House Open Government Team and General Services Administration (GSA) to launch new functionality that will improve the FOIA intake process for both requesters and agencies. A key feature of this effort is the ability for requesters to make a request to any federal agency from a single website and to include other features to improve the customer experience. Given that there are one hundred agencies subject to the FOIA, with vastly different FOIA needs, the technical and fiscal challenges of attempting to establish a single site for the submission and tracking of requests are great. As this effort is fully underway, legislation requiring participation in a particular online portal or that specifies specific requirements for a portal, is unnecessary and could be counterproductive.

6. Congress is also considering a proposal to require that all records released under FOIA be posted online. Do you support this proposal? Please explain.

Response:

The Department has consistently encouraged agencies to proactively post records online. The Attorney General emphasized in the 2009 FOIA Guidelines that "agencies should readily and systematically post information online in advance of any public request." However, imposing a broadly applicable legal requirement that all records released under the FOIA be posted online could have the unintended consequence of significantly impacting agencies' ability to timely process the ever-increasing numbers of requests that are received by the government each year. Prior to posting records online, agencies are obligated to ensure that the information being posted is accessible to individuals with disabilities, as required by Section 508 of the Rehabilitation Act of 1973. For many agencies the resources needed to ensure compliance with Section 508 would be taken from resources otherwise used to process FOIA requests in the first instance and so ensuring the proper allocation of resources for both releasing and posting is a critical consideration. Further, such a policy would need to take into account the privacy interests of requesters who ask for their own records.

Significantly, the FOIA already contains a provision that requires agencies to post records that are, or are likely to be, frequently requested, and that provision currently offers a structured and workable way to promote affirmative disclosures. In addition, the President's and Attorney

General's FOIA Memoranda encourage proactive disclosures of records above and beyond the statutory requirements. OIP issued guidance just last month addressing the importance of the FOIA's proactive disclosure provisions, with a focus on the requirement to post "frequently requested" records on popular topics. See DOJ, OIP Guidance: *Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request (2015)*. We also ask agencies to report each year in their Chief FOIA Officer Reports on the steps they have taken to improve proactive disclosures at their agencies.

7. A March 2014 study by the Center for Effective Government found that a majority of the Federal agencies that it graded on FOIA performance did not provide important online services, such as the tracking of FOIA requests via their websites.

- A. What is the Department of Justice doing to help Federal agencies utilize the Internet and other technologies to facilitate the FOIA process?

**Response:**

The Department strongly believes in the importance of technology to improve FOIA administration. Indeed, in his 2009 FOIA Guidelines, Attorney General Holder emphasized President Obama's call for agencies to "use modern technology to inform citizens what is known and done by their Government." Notably, this marked the first time that an Attorney General's FOIA Guidelines addressed the use of technology in FOIA.

To reinforce the President's and Attorney General's call to use technology in FOIA, every year OIP has issued guidelines for agencies' Chief FOIA Officer Reports that require each agency to report on the steps they have taken to greater utilize technology in FOIA. As a part of the first Chief FOIA Officer Reports, submitted in 2010, agencies were surveyed to determine the extent to which they were using technology to receive, track, and process requests, and to prepare their Annual FOIA Reports. The 2010 Reports showed that the vast majority of agencies were using technology for those functions.

As has been done for each section of the Chief FOIA Officer Report, every year we have refined the questions for the technology section as the use of technology in FOIA has matured. For the 2012 and 2013 Reports, the Department expanded this section to survey agencies on the extent to which they were using more advanced technologies to assist with the actual processing of requests. Such technologies could include software that can sort and de-duplicate documents, shared platforms that facilitate the FOIA consultation process, and technology that improves the agency's search capabilities.

In addition to these questions, for the 2014 Chief FOIA Officer Reports agencies were asked whether they provide requesters the ability to track the status of their requests online, and if so, to provide details regarding the functionality of such online services. For their 2015 Chief FOIA Officer Reports, OIP again asked agencies to report on the technology they are using to provide online FOIA services and to process FOIA requests. We also asked agencies to describe their

use of technology to communicate with requesters and any new and different ways they are posting material online to make that information more useful for the public.

To further emphasize the important role of technology OIP established a FOIA Technology Working Group to explore the use of technology in improving agencies' FOIA administration. This Technology Working Group serves as an important forum for agency personnel to discuss the application of technological and digital tools to various aspects of FOIA administration and to share best practices on the use of technologies.

Moreover, OIP issued government-wide guidance to agencies on the use of technology to improve communications with requesters. See DOJ, OIP Guidance: *The Importance of Good Communication with FOIA Requesters 2.0: Improving Both the Means and the Content of Requester Communications (2013)*. As part of this guidance, agencies were directed to communicate electronically with requesters whenever possible and to make such a means of communication their default.

The Department has also championed the use of advanced technological solutions that assist with the core functions of document processing as a key component of improving FOIA administration. It is in this area where we believe technology can have the biggest impact on improving the efficiency with which agencies respond to requests. For example, conducting an adequate search for responsive records often involves the review of both paper and electronic records originating with multiple employees throughout the agency. In turn, these searches can locate hundreds, if not thousands, of pages of material that need to be reviewed for both responsiveness and duplication before a FOIA disclosure analysis can be conducted. With the widespread use of e-mail and the common practice of employees forwarding the same email to multiple other people, with each employee then building still further on that email, long chains of overlapping and duplicative email are frequently created. The benefits of using technology to de-duplicate and sort and thread all those emails automatically, rather than doing so manually, are readily apparent. OIP continues to lead the effort to explore the use of these more advanced technologies for the benefit of not only the Department's, but all agencies' FOIA administration.

Finally, as noted above, the Department is actively working on the Administration's commitment to launch a consolidated FOIA portal that allows the public to submit a request to any agency from a single website and that will include additional tools to improve the customer experience. In addition, as part of the Second Open Government National Action Plan's commitment to modernize FOIA and improve FOIA processing at agencies, we created a new series of agency *Best Practices* workshops where agency personnel can learn about, and leverage, the success of other agencies on specific topics in FOIA. Technology was a key part of our July 17, 2014 workshop which focused on proactive disclosures and making online information more useful to the public. On December 9, 2014, we held a workshop specifically focused on various ways that use of technology is improving FOIA administration. The best practices from that workshop are summarized on OIP's *Best Practices Workshop Series* webpage.

**B. Do you have any recommendations on how Congress can help Federal agencies facilitate the FOIA process in the digital age?**

**Response:**

Given the Department's focus on the use of technology in FOIA and all of the good work that is already underway in this area, as described above, we do not have a legislative recommendation at this time.

**8. The Mountain Press, a local Tennessee newspaper, recently reported that it took the Office of Special Counsel 230 days to respond to its FOIA request seeking a single record -- only to deny the request.**

**A. Do you agree that it should not take our Government almost a year to respond to a simple FOIA request?**

**B. What is the Department of Justice doing to ensure that Federal agencies respond to FOIA requests in a timely manner?**

**Response:**

The Department has long focused on encouraging agencies to improve timeliness and reduce any backlogs of pending requests. Indeed, in his FOIA Guidelines the Attorney General emphasized that “[t]imely disclosure of information is an essential component of transparency.”

While OIP cannot comment on a specific request to another agency, OIP has made substantial efforts to provide guidance on, and hold agencies accountable for, improvements in timeliness and reduction of any backlogs. Going back to Fiscal Year 2008, it was OIP that established the requirement for agencies to report on backlogs in their Annual FOIA Reports. In creating this requirement, OIP expanded on the reporting obligations set out in the OPEN Government Act, which did not include backlog as a reporting metric.

OIP has also emphasized that reduction of backlogs includes two distinct elements – reduction in the *numbers* of pending requests and reduction in the *age* of the oldest requests. Indeed, the closing of agencies' oldest pending requests is a distinct backlog reduction goal, which OIP has reiterated to agencies in April 2012, August 2012, and August 2013 guidance. Two years ago OIP established a new reporting requirement that agencies publicly report on a quarterly basis the size of any FOIA backlog and the status of their ten oldest pending requests. This information is then displayed on FOIA.gov, the Department's comprehensive FOIA resource.

Every year since 2010, OIP has asked agencies to report in their Chief FOIA Officer Reports whether they have achieved backlog reduction and closed their ten oldest pending requests and appeals from the prior fiscal year. Agencies that were not able to do so are required to provide an explanation and plan for improvement. OIP has also issued guidance to agencies specifically encouraging them to focus on responding to requests in their “simple” processing track within an

average of twenty working days. For the past two years in particular, OIP has held agencies accountable for this effort by scoring them on this metric, as well as their backlog reduction efforts, in the FOIA assessments we prepare and post publicly.

Given the importance of improving timeliness in responding to FOIA requests, OIP chose that topic for its inaugural *Best Practices* workshop series, held in May 2014. At that workshop a panel of agencies that had success in this area shared their strategies and approaches for achieving their goals. The panel provided a very robust discussion on various approaches their agencies had used to achieve backlog reduction and to improve the timeliness of responses at their agency. Based on the panel discussion, OIP issued government-wide guidance on best practices that agencies can utilize to achieve backlog reduction and improve timeliness. See DOJ, OIP Guidance: Reducing Backlogs and Improving Timeliness (2014).

9. **I have worked to improve proposed legislative exemptions to FOIA by including a requirement that Federal agencies weigh the public's interest in obtaining information before using the exemption to withhold the information from the public. What are your views on codifying a so-called "public interest balancing test" in the FOIA statute?**

**Response:**

As you know, there is a public interest balancing test already built into the FOIA's privacy exemptions, Exemptions 6 and 7(C), which requires agencies to balance the privacy interest of an individual against the public interest of shedding light on agency activities. Imposing a balancing test for other exemptions would be ill-advised as it could, upset the carefully created judicial framework for conducting litigation, disrupt agency decision-making processes, as well as increase the administrative burden at agencies and invite more requests and more litigation which itself would become more complex as evidentiary disputes over balancing would inevitably arise.

10. **During the March 11, 2014 hearing, you testified that the Office of Information Policy is leading an interagency team to develop a common FOIA regulation that will apply to all Federal agencies.**
  - A. **When will this new regulation be complete?**
  - B. **When do you expect Federal agencies will be ready to implement the new FOIA regulation government-wide?**

**Response:**

This project is active and on-going. As part of our commitments under the Second National Action Plan, OIP is leading the effort to determine the feasibility and potential content of a core FOIA regulation that is both applicable to all agencies and retains flexibility for agency-specific requirements. The timetable for completion of the commitment is the end of 2015. In May 2014 we kicked-off this effort by meeting with interested members of the open government community as well as with agency personnel. Since then OIP has formed an interagency task force comprising separate teams responsible for each part of the proposed core FOIA regulation. OIP also facilitated several meetings with those teams and civil society organizations to discuss in more detail the possible content of each specific subsection of the common regulation. OIP has just led a discussion with the agency teams on April 8, 2015 and we plan to meet again in another month. We will continue to meet regularly with the teams and will engage with civil society throughout the entire process.

RESPONSES OF MELANIE ANN PUSTAY TO QUESTIONS  
SUBMITTED BY SENATOR CORNYN

Questions Posed by Senator Cornyn

11. On April 15, 2009, a month after Attorney General Eric Holder's FOIA memorandum was publicly released, Gregory Craig, Counsel to the President, sent a memorandum to the executive departments and agencies of the federal government ordering all executive departments and agencies to consult with White House Counsel "on all document requests that may involve White House equities" before releasing them in response to a FOIA request. While past administrations have required consultation on "White-House-originated" documents in FOIA requests, this administration has gone much further.

As Director of the Office of Information Policy, presumably you are aware of this memorandum. Please clarify how the phrase "White House equities" has come to be defined and applied in the Department of Justice and other agencies. Also, explain what types of records are being submitted to the White House for "consultation" under this memorandum.

Response:

As a matter of sound administrative practice, when one agency locates records that are of interest to another agency or entity, the government's policy has long been to consult with the other agency or entity to get its views on the sensitivity of the document's contents prior to making a disclosure determination. The April 15, 2009 Memorandum was a reminder to agencies of the longstanding policy of consulting with the White House when processing records that contain White House equities. The use of the term "equities" in the 2009 White House Memorandum did not change how or when agencies should consult with the White House. As with previous administrations, agencies typically consult with the White House whenever records processed for disclosure under the FOIA contain information that originated with, or are of interest to, the White House. This consultation process is similar to the one that occurs when an agency reviews records that originated with, or contain the interests of, another federal agency. On December 5, 2011, OIP issued guidance to agencies on the consultation process and the procedures for processing records that contain other agency equities. See DOJ, OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records when Another Agency or Entity Has an Interest in Them (2011).

As detailed in that guidance, such consultations procedures help ensure that agencies making release determinations are fully informed of any sensitivity in the content of the documents.

12. Has the White House ever required that FOIA documents involving "White House equities" be redacted or withheld? If so, under which FOIA exemption were such documents redacted or withheld? Please list all examples of which you are aware.

**Response:**

The agency in receipt of the FOIA request has ultimate responsibility for responding to that request and for asserting any exemptions that are appropriate. Documents containing White House equities could be releasable in full, or could potentially be subject, in whole or in part, to any of the FOIA's nine exemptions, although in my experience the most commonly applicable exemptions are Exemption 5 (privileged communications) and Exemption 6 (personal privacy). Even if exempt, some documents could be released as a matter of discretion. Whatever the disposition, the agency responding to the request will provide the requester with the legal basis for any withholdings that are made.

13. Has the Department of Justice provided any guidance, formal or informal, within the Department of Justice or to other agencies, on the meaning or scope of the April 15, 2009 memorandum? If so, please provide the Committee with copies of those documents. If such documents do exist and you are unwilling to release them to the Committee, please provide an explanation of why they are being withheld.

**Response:**

The Department has not issued guidance specifically on the April 15, 2009, memorandum. As noted above, this memorandum reminded agencies of the longstanding policy for conducting FOIA consultations with the White House. From our perspective the procedures for consulting with the White House did not change as a result of the memorandum. Moreover, as occurred in prior administrations, if we are asked for our views, we would advise agencies to consult with the White House, just as they would consult with another agency, if during the course of processing records the agency determines that the White House has equity in the records. This is the same process that agencies undergo when consulting with another agency that has equity in the records being reviewed for disclosure under the FOIA. As mentioned above, in 2011, OIP issued detailed guidance on FOIA consultations and the processing of records that contain outside equities. See DOJ, OIP Guidance: *Referrals, Consultations, and Coordination: Procedures for Processing Records when Another Agency or Entity Has an Interest in Them (2011)*.

14. The April 15, 2009 memorandum also requires that agencies consult with White House Counsel on Congressional committee requests. What public policy justification is there for the White House ordering less information to be shared with Congress?

**Response:**

As mentioned above, when an agency *consults* with another entity it is simply obtaining the views of that entity to inform the disclosure decision that is ultimately the responsibility of the agency receiving the request. The fact that a consultation occurs does not somehow mean that information will be withheld. Indeed, after conducting a consultation, the agency may be in a position to release the requested information.

