

**WE THE PEOPLE: FULFILLING THE PROMISE OF
OPEN GOVERNMENT FIVE YEARS AFTER THE
OPEN GOVERNMENT ACT**

HEARING

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

MARCH 13, 2013

Serial No. J-113-7

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE

90-863 PDF

WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
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WE THE PEOPLE: FULFILLING THE PROMISE OF OPEN GOVERNMENT FIVE YEARS AFTER THE OPEN GOVERNMENT ACT

WEDNESDAY, MARCH 13, 2013

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

The Committee met, pursuant to notice, at 10:35 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

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

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

Chairman LEAHY. I apologize for the delay. As always, my friend from Iowa is here right on time, even if I was not, so I appreciate that.

Senator GRASSLEY. Sometimes I am not on time.

Chairman LEAHY. I cannot remember.

This is an important hearing on one of our most cherished open government laws, the Freedom of Information Act, or FOIA. It is one part of our system of laws that means the most to me. We are also commemorating Sunshine Week. That is an annual celebration of transparency in our democratic society. The more transparency you have in any society, the more apt it is to be a democratic and open society.

For more than four decades, FOIA has translated our great American values of openness and accountability into practice by guaranteeing access to government information. Sunshine Week is a timely opportunity to take stock of the progress we have made in improving the FOIA process, as well as some of the very real challenges that remain when citizens seek information from their government.

Five years ago, Congress enacted the *Leahy-Cornyn OPEN Government Act*. This was the first major reform to the *Freedom of Information Act* in more than a decade. It was a bipartisan bill with Senator Cornyn and myself. We wanted to demonstrate that we wanted freedom of information whether we have a Republican or a Democratic administration. It should be the same. And so today we are going to examine how federal agencies are implementing the reforms in this landmark law.

When Congress enacted this bipartisan legislation, I said that our goal was to help reverse the troubling trends of excessive FOIA

delays that we had witnessed for so many years and, by eliminating them, restore the public's trust in their government. The *OPEN Government Act* sought to restore meaningful FOIA deadlines but also increase transparency.

In the five years since we enacted it, there have been some promising developments, and I commend the Obama administration for establishing innovative initiatives such as Data.gov and FOIA.gov, which have significantly increased the public's access. I am also pleased that we are beginning to witness progress in reducing FOIA backlogs across government. Now, these are all good signs, but there are still some major challenges.

Too many of our federal agencies are not keeping up with the FOIA reforms in the *OPEN Government Act*. A recent audit conducted by the National Security Archive found that 56 out of 99 federal agencies—more than half—have not updated their *Freedom of Information Act* regulations to comply with the *OPEN Government Act*.

Now, I would tell those 56 that we did not pass this law just for the sake of having a law on the books. We worked very hard. Republicans and Democrats came together to have a good law, and to have it ignored is putting oneself above the law.

I am troubled by reports that the Obama administration is becoming more secretive about its national security policies. According to the Associated Press, during the past year, the Obama administration withheld more information for national security reasons in response to FOIA requests than at any other time since the President took office.

Now, for many years—during both Democratic and Republican administrations—I have urged the Justice Department to be more transparent about the legal opinions issued by its Office of Legal Counsel. Our government must always balance the need to protect sensitive government information with the equally important need to ensure public confidence in our national security policies. Simply saying everything is secret does not instill confidence in the American people. The uneven application of fee waivers, the growing use of exemptions, and inadequate communication with FOIA requesters also are key impediments.

Now, I am pleased that representatives from the Department of Justice and the National Archives and Records Administration are here to discuss these challenges and detail how the Obama administration is implementing FOIA. We have a distinguished panel of expert witnesses.

Speaking of the Leahy-Cornyn Act, which I was just praising, here is Senator Cornyn. I appreciate you being here, Senator.

This Committee has a long tradition of working across the aisle when acting to protect the public's right to know, during both Democratic and Republican administrations. I value the strong bipartisan partnership that I have formed over the years with Senator Cornyn and Ranking Member Grassley on open government matters. Again, I do not care which party holds the Presidency. Open government is important to every single American, no matter what their political affiliation. The annual celebration of Sunshine Week reminds us that openness and transparency in government

is important to all Americans. So I hope that this spirit is going to guide our work today. I look forward to a good discussion.

Senator Grassley.

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

Senator GRASSLEY. Well, first of all, I can say that I listened to everything you just said, and I agree with you, and I thank you for making those strong statements. There is probably no reason for me to speak, but I want to speak anyway.

Before I go to my remarks, I think that the Chairman has said something I am just going to say. This is a problem whether you have Republican or Democrat administrations, and I have been in this business long enough to work under both. If there is a difference with this administration, it is not different from previous administrations only in the sense that the President has said, when he was first sworn into office, that this was going to be the most transparent administration of any. And I know he still believes that because he has updated that statement with some recent things I have seen on television. And that would be the only difference. So that is a standard he set, not one that the law sets or anything. But it is a problem in all administrations.

So I thank you for holding this hearing today during Sunshine Week. It is always good to focus on the important topic of transparency. Fortunately, every March we have the opportunity to do so.

Today we are looking at the most recent amendments of the *Freedom of Information Act*. Five years ago, thanks to the work of the Chairman and Senator Cornyn, the *OPEN Government Act* became law. That law sought to strengthen the *Freedom of Information Act* in several ways. However, five years later problems remain. Agencies are not putting into practice what this law requires.

It is frustrating that there are so many reports criticizing this administration's implementation of the law. As we make clear, every administration has put too many impediments into open government. It should be just the opposite. The President reports criticizing and not implementing law, reports complimenting administrations and more openness. So I would like nothing more than to see groups praising this administration or any administration for being really transparent.

Instead, there is a December 2012 study from the National Security Archive which found that 56 federal agencies have not fully complied with the 2007 law. Things can move slowly within government, but this seems to be a bit too much.

As reports show, the Department of Justice has not even updated its own *Freedom of Information Act* regulations since 2003, which also means that they were not updated during a Republican administration. Ironically, the Justice Department is charged with encouraging and monitoring governmentwide *Freedom of Information Act* compliance.

Delays from the Justice Department are not just confined to private citizens. Last year I asked the Attorney General about the House Committee on Oversight and Government Reform 2011 De-

partment of Homeland Security investigation. The investigation found that political staff under Secretary Napolitano corrupted the agency's *Freedom of Information Act* compliance procedures. I discussed this investigation at last year's hearing in this Committee. I then asked the Attorney General about it as a follow-up question to his September 2011 Committee testimony. However, to date, I have not received a response from the Attorney General to these questions.

Additionally, I have not yet received any proposals from the Department of Justice to address the Supreme Court's decision in *Milner v. the Navy*. I recall that *Milner* had been characterized as leaving unprotected a great deal of information that could threaten public safety if disclosed. At the hearing last year, one of our witnesses here back again, Ms. Pustay, told us legislation was needed. In fact, we were told that the Justice Department was "actively working" on a proposal and that she "looked forward to continuing to working with the Committee on this issue." So here we are again, and I have still not seen this legislative language.

So there is widespread frustration with this administration—only because it is this administration. Ten years from now, it will be a different one, unrelated to the freedom of information process. But problems with implementing the *Freedom of Information Act* are even more troubling because the law compels certain actions, and the Department of Justice has the responsibility to be a leader.

Unfortunately, DOJ actions set a bad example for other agencies. When the Department of Justice failed to update its own regulations, we should not be surprised when other agencies failed to update theirs as well. Such behavior undermines the President's transparency pledge.

Another recent example highlighted this culture of obfuscation coming from the EPA. Last week I joined in a letter sent from Senator Vitter and Congressman Issa to the Attorney General. Senator Vitter's staff recently discovered a troubling exchange between government officials. The documents show advice from the Environmental Protection Agency Office of General Counsel to a regional official handling freedom of information requests. The Office of General Counsel said, first, that it is standard protocol in such cases to instruct the requester to narrow their request because it is overbroad. Second, the Office of General Counsel at EPA instructed the regional officials to tell the requester that it will probably cost more than the amount of money that they have agreed to pay. This exchange validates those who criticize bureaucrats for deterring citizen engagement.

And the advice regarding fees may even be against the law. Last month Congressman Issa and the Democratic leader over there, Mr. Cummings, sent a letter to the Office of Information Policy. That letter covered a lot of ground regarding *Freedom of Information Act* compliance.

These are questions that the Justice Department needs to answer, so I support this bipartisan effort. Hopefully we will get an update today as to the progress being made in responding to the letter.

Justice must lead by example. Unfortunately, the evidence demonstrates that the Department has a lot of work to do. I look for-

ward to hearing from our witnesses, and we need candid discussion of this issue.

Mr. Chairman, you have been very forthright in your statement, and I compliment you for it, and your weight around here will do a lot of good in getting us the results we can expect.

Chairman LEAHY. Thank you, and I thank you for the help from all four of you. We have Senator Franken and Senator Cornyn here. Senator Franken is going to take the gavel a little later on, but did either one of you want to say anything before we start with the witnesses?

Senator FRANKEN. I have no opening statement. I just want to say what a privilege it is to be with these three gentlemen who have been champions of open government—Senator Cornyn and the Chair, the authors of the *OPEN Government Act*, and Senator Grassley, who has always been focused on transparency in government and has been a real champion of that. So it is a pleasure to be here.

Chairman LEAHY. Thank you.

Senator Cornyn.

Senator CORNYN. Mr. Chairman, thank you for your kind words earlier. I know people consider us the “Odd Couple” in many respects on open government issues, but to me it is a no-brainer. Democracy only works when the public knows what their government is doing and holds public officials accountable. And like it or not, our friends in the news media are the ones who generally are in the business of rooting that information out, and that is their job. It is different from our job. But we have to learn to live with it in public life. And it is very important.

So I want to just thank you again for your leadership, Mr. Chairman, in holding this hearing during Sunshine Week. As you noted, it has been a little over five years since President Bush signed the *OPEN Government Act* into law, and I will not repeat what you and Senator Grassley have already said about concerns. We can address those to the particular witnesses here today that we are glad to have.

But I do want to brag, if you will permit me just briefly. I want to submit for the record an editorial from yesterday’s *Austin American Statesman* that is entitled, “Texas gets high marks regarding transparency in legislative matters, but still needs more sunshine.”

[The editorial appears as a submission for the record.]

Senator CORNYN. It gets an A rating, along with seven other States, and I think the reason why Texas is a leading light in open government reform is because not only do we have the right laws in place, but Texas leads because its leaders are committed to making sure the cause of open government is enforced, and it requires government agencies to comply with the law. And until we have the same level of commitment to permeate the federal bureaucracy, I fear we can pass more laws that will do very little to shed sunlight on the operation of the Federal Government.

But I think we have made a good start, Mr. Chairman. Thanks for having this hearing, and I look forward to learning from the witnesses whether there are additional things we need to do in order to let the sunshine in.

Thank you.

Chairman LEAHY. Well, thank you very much, Senator Cornyn. As I said, I have enjoyed the partnership on this, and we will continue it. I think the American people expect us to, and they should.

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

Please go ahead with your statement, and then after you, we will hear Ms. Nisbet's statement, and then we will go to questions. Please go ahead.

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

Ms. PUSTAY. Thank you, and good morning, Chairman Leahy, Ranking Member Grassley, and Members of the Committee. I am pleased to be here today during Sunshine Week to discuss the *OPEN Government Act* of 2007 and the Department of Justice's continued efforts this past year to assist agencies in improving their FOIA administration and ensuring that President Obama's Memorandum on the FOIA and Attorney General Holder's FOIA Guidelines are fully implemented.

As you know, this Sunshine Week we celebrate the fourth anniversary of the Attorney General's FOIA Guidelines, and I am pleased to report to you today that agencies are taking concrete steps to improve FOIA administration, and significant accomplishments have been achieved. The number of requests received by agencies has increased every year since Fiscal Year 2009, and during this past year in particular, the Government was faced with the historically high number of over 650,000 requests. But in response to this ever increasing demand, agency FOIA offices processed more than 665,000 requests. That is 14,000 more than were received, and it is over 34,000 more than were processed the last fiscal year.

Even more significant than that, agencies processed this record number of requests while still maintaining a high release rate, releasing information in 93 percent of requests where records were processed for disclosure.

Additionally, as you know, the *OPEN Government Act* highlighted Congress' desire for agencies to respond to requests more timely, and agencies have made progress in this area as well.

The government's overall processing time for both simple and complex requests has significantly improved as agencies are providing information to requesters more quickly. And as a result of those efforts, I am very proud to report that the government overall achieved a 14-percent reduction in the request backlog this past fiscal year. This marks a nearly 45-percent reduction in the number

of backlog requests that existed four years ago. This illustrates the progress that agencies are making in implementing the Attorney General's Guidelines. And all of these efforts are more than just statistics. They represent real improvements to the FOIA process as agencies are getting more information to more requesters more quickly.

I am particularly pleased to report on the successes achieved by the Department of Justice. In response to record high numbers of incoming requests, we once again increased the number of requests we processed at the Department. We improved our average processing time and maintained a high release rate. In fact, of our requests that were processed, nearly 75 percent resulted in a full release of records.

My office has been actively engaged in a variety of initiatives to help FOIA administration across the government. For example, this past year my office continued to lead the effort to maximize agencies' abilities to utilize more advanced technology to streamline the most time-consuming parts of FOIA processing, such as the time it takes to search for and review records.

OIP partnered with the Department's Civil Division to conduct a digital FOIA pilot program so we could assess the impact of using these existing document management tools to automate tasks that were previously done manually. The results of the study are very encouraging, and we are going to continue our work in this area for the benefit of all agencies.

Additionally, just yesterday my office issued new agencywide guidance on metadata tagging standards for FOIA that lays the groundwork for enabling easy aggregation of FOIA data into one governmentwide FOIA library where all the records posted by agencies can be assessed easily in one place.

And, finally, to increase agency accountability, OIP recently instituted a new quarterly reporting requirement for all agencies that will provide the public with a more real-time assessment of the flow of FOIA requests handled by the government.

Starting with this current fiscal year, agencies will report on four key FOIA statistics each quarter. The Department recently enhanced our "Reports" page on FOIA.gov, which will display all this quarterly reporting data.

Looking ahead, the Department is fully committed to achieving the new era of open government that the President and Attorney General envision. We have accomplished a great deal these past four years, but OIP will continue to work diligently to help agencies achieve even greater transparency in the years ahead.

In closing, the Department of Justice looks forward to working together with the Committee on matters pertaining to governmentwide administration of the FOIA, and I am, of course, pleased to answer any questions you might have.

Thank you.

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

Chairman LEAHY. Thank you very much.

Our next witness is Miriam Nisbet, who is the founding Director of the Office of Government Information Services at the National Archives and Records Administration. Before that, she served as

Director of the Information Society Division for the United Nations Educational, Scientific, and Cultural Organization (UNESCO) in Paris. Her extensive information policy experience also includes previous work as legislative counsel for the American Library Association, and the Deputy Director of the Office of Information Policy for the Department of Justice. She earned her bachelor's degree and her law degree from the University of North Carolina, and is no stranger to this Committee.

Good to have you here. Please go ahead.

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

Ms. NISBET. Thank you, and good morning, Mr. Chairman, Ranking Member Grassley, and Members of the Committee. I am very pleased to be here with you during Sunshine Week, and I would like to just mention we do have the original *Freedom of Information Act* on display in the Rotunda of the National Archives, and we would love to have you come take a look at it.

Chairman LEAHY. I will.

Ms. NISBET. Thank you.

I appreciate the opportunity, too, because as Director of the Office of Government Information Services, we, of course, were created by the *OPEN Government Act* of 2007.

As you know, we work with all executive branch departments and agencies as well as requesters. We are in a unique position to observe various aspects of agency *Freedom of Information Act* processes.

As I have shared with this Committee before, much of OGIS' work in the last three years has been to establish the office, including determining our role in the FOIA process while actively carrying out our important mission.

The model that Congress chose for our office is a hybrid. We are a neutral place for FOIA requesters and agencies to come for non-binding assistance with FOIA disputes, and at the same time we have a review function. We look at agencies' FOIA policies, procedures, and compliance. And these two missions may at times be in tension with one another. On the one hand, in mediation we provide voluntary and partial assistance to agencies and must encourage them to work with us. And on the other hand, we have a review mandate that is not a voluntary process. In both instances, we must build the trust of agencies and gain their confidence in our work.

Because mediation cases continue to arrive in increasing numbers—our workload was up in the first quarter of Fiscal Year 2013 considerably compared with last year—our staff spends most of its time responding to those cases, and we have not yet been able to fully turn to building and carrying out the more robust review program that we envision. But we hope that will improve.

The 2007 amendments centered on a few tenets, including executive support, customer service, and dispute resolution. The new provisions in the law added heightened statutory roles for the Chief FOIA Officers and FOIA Public Liaisons within the agencies, both

to provide top-down support for FOIA activities and also to improve interaction between requesters and agencies.

Introducing dispute resolution to the FOIA process was another important aspect of the amendments. Our observations providing mediation services and reviewing agencies' FOIA policies, procedures, and compliance helped shape our FOIA recommendations. We determined early on that nearly everything we do at OGIS is geared toward improving FOIA in some way. We regularly provide suggestions to agencies and requesters on various aspects of the FOIA process, and we also identify and target bigger-picture recommendations. Last year, we shared five recommendations to improve the FOIA process, and my written testimony updates you on where we have been working on those recommendations. And I would also like to share with you recommendations that are new this year.

We recommend that agencies encourage and support the use of dispute resolution in FOIA processes. OGIS seeks to more strongly connect FOIA professionals, legal counsel, and dispute resolution professionals to embed dispute resolution firmly into the FOIA process with the goal of preventing and resolving disputes administratively.

We also encourage agencies to remind all staff of the importance of FOIA, and I have attached to my testimony the message that the Archivist of the United States, David Ferriero, sent to our staff last week in anticipation of Sunshine Week.

Additionally, this year we have identified two issues to research and explore. We plan to examine FOIA fees. As you all have noticed and brought out today, it is a persistent problem for requesters and agencies. And we also want to look at immigration records and FOIA. While not ripe for recommendations yet, we anticipate that they will be forthcoming.

There are still many improvements to be made in FOIA administration. Indeed, my office hears too often from requesters who cannot get a simple answer to when they can expect to get a reply from the agency. At the same time, many requesters may not appreciate the challenges that agency FOIA professionals face in dealing with complex requests and voluminous records. We also believe there continues to be too much FOIA litigation. The latest figures show a cost of about \$23 million a year. I think that might be conservative, too.

Nevertheless, we believe that OGIS is making a positive impact on the FOIA process from the standpoint of requesters and agencies. We appreciate our unique position to observe and reflect on FOIA activity across the government, and we believe our role will be an important part of improving the FOIA process in years to come.

Thank you, and I will be happy to answer any questions.

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

Chairman LEAHY. Well, thank you, and I note your comment at the end there about too much FOIA litigation. Of course, some would argue that if there were speedier answers to FOIA requests and more openness, there might be less litigation, too. I am especially concerned about that in the area of national security.

You know, when Senator Cornyn and I worked with others on the *OPEN Government Act*, we made it very clear that we were not doing this just as an exercise. We really wanted it to work, and we wanted it to work whether we were in the Senate or not. And no matter who was President. We just wanted this to work. And I saw a recent report by the National Security Archive saying more than half of all federal agencies have failed to update their FOIA regulations to comply with this law. That is worrisome. They said that 62 percent of all federal agencies have not updated their regulations to comply with the Attorney General's March 19, 2009, FOIA memorandum.

Why is this? Let me ask Ms. Pustay first. Why are the majority of federal agencies not in compliance with the *OPEN Government Act*? And what is the Justice Department doing to make sure they update their regulations?

Ms. PUSTAY. I am happy you asked this question because the—
Chairman LEAHY. You are probably more happy than some of those agencies that have not updated that I asked this question, but go ahead.

[Laughter.]

Ms. PUSTAY. Why I am happy to respond is that the key fact that is missing in this discussion is that the amendments that you put into the FOIA through the *OPEN Government Act* were effective upon enactment. They did not require implementing regulations. So they were effective once the bill was signed into law. A couple provisions had later effective dates.

And, similarly, the Attorney General Guidelines did not require agencies to promulgate or change their regulations. The Attorney General Guidelines are fully—the agencies' compliance with the Attorney General Guidelines are fully detailed in the first-ever reporting requirement that we initiated specifically under those Guidelines, which are the Chief FOIA Officer Reports. We have actually never had such a robust vehicle for learning from agencies the steps they are taking to implement the Attorney General's Guidelines.

Chairman LEAHY. No, I understand that, but why haven't the 62 percent of them updated their regulations?

Ms. PUSTAY. Of course, we encourage agencies to update regulations if they need to, if they need updating, and the Department of Justice is in the process of updating our regulations literally as we speak. But the importance of the *OPEN Government*—we have done a range of things to make sure that agencies fully understand the requirements, the changes to the FOIA that were made by the *OPEN Government Act*—

Chairman LEAHY. But the *OPEN Government Act* has been there for a number of years.

Ms. PUSTAY. Exactly.

Chairman LEAHY. I understand that a certain amount of time is needed for the learning process, but this seems awfully long. I went to law school in less time.

Ms. PUSTAY. Right. The agencies, again, there is a disconnect, I think, between the premise that you need a change in your regulations and the idea of the *OPEN Government Act*. As I said, the *OPEN Government Act* made changes to the law that were effective

immediately. And so what my office did in response to the enactment of the *OPEN Government Act* was we immediately issued guidance to agencies. We had very detailed guidance on each of the substantive provisions of the *OPEN Government Act*.

Chairman LEAHY. How many agencies are fully in compliance with the *OPEN Government Act*? What percentage?

Ms. PUSTAY. I think all agencies are in compliance with the *OPEN Government Act*.

Chairman LEAHY. So there should be no delays in getting FOIA requests?

Ms. PUSTAY. I think, as I mentioned in my opening statement, Senator Leahy, there are improvements in processing times across the government. There is a reduction in backlog. The very things that were designed to be addressed by the *OPEN Government Act* are taking hold. We have real reduction, and we have real improvement in time.

Chairman LEAHY. Let me ask Director Nisbet about it, because OGIS has completed its report to Congress and has recommendations to improve the FOIA process. What are those recommendations generally?

Ms. NISBET. Well, we have specific recommendations, Senator Leahy, that we have provided to you last year that related to technology to improving and supporting dispute resolution in the agencies, a number of specific recommendations.

We also make recommendations in a sense all the time with suggestions to both requesters and agencies about how they can improve the way they work and particularly how they can communicate with each other.

The regulations are a particularly difficult area, I think, for agencies because it can take quite a long time to review them. I would note that a number of them have started coming to OGIS to have us sort of work through and look at their proposals before they get to the point that they actually put them out for notice. That is a service that we offer.

I think there is a strong interest in updating regulations, particularly nowadays, to be plainer, perhaps, than regulations were in the past, easier for requesters to read—

Chairman LEAHY. You actually have them in English so people can read and understand them?

Ms. NISBET. Yes, sir.

Chairman LEAHY. Fewer of the “wherefore,” “hitherto,” “whereas” B.S.?

Ms. NISBET. Yes. Some of us have a hard time getting away from that, but we are trying.

Chairman LEAHY. I was asked if I was using Latin up here. I am going back to my grade school and high school education, although one of our colleagues on this Committee introduced me as the “President Pro Tempore,” saying, “That is Latin for ‘longest-serving dude.’”

[Laughter.]

Chairman LEAHY. I will not say which of the Carolinas that Senator is from, but I thought it was pretty funny.

Can I ask—do you mind if I ask just one more question here?

Senator GRASSLEY. Go ahead.

Chairman LEAHY. Ms. Pustay, I have called on the Department of Justice to be more transparent about opinions from the Office of Legal Counsel. We even got into a discussion of this yesterday with the President at a meeting he had with a number of us. And according to a study by the Sunlight Foundation, the Office of Legal Counsel is withholding more than a third of the legal opinions that this office promulgated between 1998 and 2012.

Now, I understand you have to balance the importance of sensitive government information. We all understand that. We are all used to handling classified and other information. But I also wonder if sometimes that can be an easy crutch to say, well, it is sensitive so let us hold it back.

Can you provide the Committee with a list of all OLC memoranda, a list of those that are currently in force?

Ms. PUSTAY. That specific question is an oversight matter that is beyond the purview of my office, which, of course, is focused on implementation of the FOIA.

Chairman LEAHY. Well, I understand, but, you know, I get—every time I ask the question, you know, of various people—the Attorney General, the President, and others—it is always somebody else’s department. Bring back that question to the Department and tell them—and I think Senator Grassley would join me in this—that we would like to see the list of all the OLC memoranda that are in force.

Senator GRASSLEY. You just asked for both of us.

Chairman LEAHY. Yes. Is that okay?

Senator GRASSLEY. Yes. Very good.

Chairman LEAHY. Thank you. And we would like to know whether they can be made available to the public. You may want to emphasize back at DOJ that this is something we are very serious about. We have had one especially that this Committee may end up subpoenaing if we cannot get it.

Senator Grassley.

Senator GRASSLEY. Well, I would back you up on that. In fact, probably we have been pussyfooting around too long. So if you want to do that, you surely have my backing.

I am going to start out with Ms. Nisbet. Last December the thing housed at Syracuse University, the Transactions Records Clearinghouse, had a study released, finding that there were more *Freedom of Information Act* lawsuits during the Obama administration’s first term as compared to the second Bush term. These lawsuits forced the government to release information. It is obviously costly and burdensome for individuals. This increase has occurred even though the *OPEN Government Act* created your office to mediate disputes between the government and FOIA requesters.

Now, you said in your testimony that this year your office is recommending agency heads “encourage and support the use of dispute resolution in FOIA processes.” Is it your view that agencies are not currently taking full advantage of dispute resolution that your office provides?

Ms. NISBET. Senator Grassley, let me answer in two ways.

Bringing dispute resolution into the FOIA process was really new with the amendments from 2007. My office got started in September 2009, and we provide dispute resolution across the execu-

tive branch. But, also, the law now gives dispute resolution responsibility to the agencies as well.

One of the things that really needs to be done and that we are trying to do—it does take time; it also takes leadership to emphasize how important it is—is to have that working at the agency level. That is the best place to prevent disputes and to resolve disputes. In fact, if we could put us out of business so that it is all being taken care of at the agencies, that would be terrific. I do not think that is going to happen.

The second thing I just want to mention is in terms of litigation. Dispute resolution, mediation, seems to be becoming more and more accepted in the courts for a way to approach FOIA disputes. For example, the DC Circuit Court of Appeals, the United States Court of Appeals for the DC Circuit, now has a pilot program in which it is requiring—requiring—mediation in every FOIA lawsuit that comes before it. I think that is a really good signal that you can mediate before, you can mediate later, but probably better to mediate early.

Senator GRASSLEY. Ms. Pustay, your written testimony is silent on the topic of reducing litigation. Does the Justice Department encourage the use and support of dispute resolution?

Ms. PUSTAY. Oh, sure we do. In fact, we have sent thousands of requesters to OGIS since they have been in office, since they have been up and running. But more importantly, we are doing a variety of things all connected with implementation of the Attorney General's FOIA guidelines which would have significant potential to reduce lawsuits.

As I mentioned, the fact that we have reduced backlogs and improved processing times helps to reduce litigation. The fact that we are maintaining, as a government, a high release rate, releasing records in full or in part in more than 92 percent of requests—and that is for the last four years. Under the leadership of the Attorney General, we have had such a high release rate. That cannot help but have a positive impact on reduction in litigation.

We have also issued guidance to agencies, informing them of the importance of good communication with requesters. This is one of the first things that my office did after the Attorney General Guidelines were issued, because there are—oftentimes the simple ability to pick up a phone or send an email to a contact at an agency to ask a question about your request, to have a human being explain that, yes, your request is here on my desk, or it is here in my queue, here is the status of your request, that can be tremendously important. And that is something that we encourage and that we are constantly reinforcing to agencies in our training.

So we think there is a wide range of activities that we are certainly undertaking as part of the Attorney General Guidelines all for the benefit of improving FOIA administration and reducing litigation.

Senator GRASSLEY. If I could ask one more question.

This is for you, Ms. Pustay. The *OPEN Government Act* had a goal of compelling faster FOIA processing. Agencies must provide a response to the requester within 20 days indicating how the agency plans to proceed. Example: whether or not the agency will release the requested information.

Unfortunately, the Federal Elections Commission is arguing in federal court that a simple response acknowledging receipt of a request is sufficient, and the Justice Department, who is not involved in this case, has filed a brief supporting the argument.

So to you, why is the Justice Department arguing that any communication with a requester satisfies the 20-day response requirements? Isn't the law clear that more than a receipt of acknowledgment is required? So why is the Justice Department disregarding the plain meaning of the law, as I read it?

Ms. PUSTAY. I am certainly not going to discuss anything connected with an ongoing litigation case, as I am sure you understand. But what I can tell you is that we have had, in addition to the general focus that the Attorney General and the President put in their FOIA memorandum about making more prompt responses to requests, my office has actually pinpointed that focus even further by calling on agencies to work to process their simple track requests within—actually process them within—an average of 20 working days. And we now actually assess agencies on that requirement as part of what we do every year when we review agency Chief FOIA Officer Reports.

So we think it is very important that there be improved processing time and particularly with simple track requests. We have been encouraging agencies to do what they can to process those requests within 20 working days.

I am very proud to report, as I mentioned in my testimony, that at the Department of Justice our average processing time for simple track requests is under 19 days. So we are below the 20-working-day requirement for that metric, and for the government overall, we have seen improvement in processing times.

Senator GRASSLEY. Okay. I am done asking questions. Just let me sum it up. I think this Chairman and I discussed in our opening statement about regulations, and I think the exchange you and I just had is an example of why regulations would be helpful to provide clarity and instruction. We cannot satisfy the requests just because they have responded within 20 days with the first communication.

Thank you.

Senator FRANKEN [presiding]. I would like to thank the Ranking Member.

Senator Cornyn, if you would like to go now, please.

Senator CORNYN. Well, thank you, Mr. Chairman. Welcome. Good to see you both.

I am troubled by the costs and the delay associated with the increase in litigation that we have seen over the last couple of years. The whole purpose, or at least one of my purposes, in working with Senator Leahy on the *OPEN Government Act* and creating the ombudsman office was to help informal resolution of any misunderstandings about either the scope or the nature of a request for documents. That was based—I think we have had this conversation before—on my experience when I was Attorney General of Texas that many times people not familiar with how to navigate government, they may be making requests broader than they really want, or they may be directing it to the wrong person. And the whole idea was to, way before any kind of adversarial process is created,

just create more of a culture of customer service, for lack of a better term. And I think that is part of the cultural shift that has not yet occurred here in Washington, DC, but hope springs eternal.

Ms. NISBET, the response that you made, I believe, about the D.C. Circuit Court alternative dispute resolution for these cases, of course, you know and Ms. Pustay knows that the purpose was to prevent litigation in the first place, if possible. And so it does not seem satisfactory to me to say that the court as a docket management tool has instituted a pilot program to deal with, mediate these cases.

How do we prevent them from getting to the court in the first place?

Ms. NISBET. First of all, I want to be sure you understand that I was not suggesting that the D.C. Circuit is a solution; rather, it is a great indication that they think mediation should be working in FOIA cases.

Senator CORNYN. In this case, I agree with the D.C. Circuit Court.

Ms. NISBET. Yes, I do, too. I think it is a great start. And so it is a model. It is also an incentive, I think, to agencies to know that if they are going to have to—if a lawsuit is filed against them, certainly in the DC Circuit—and I understand there might be other circuits to do the same thing—and they are going to be directed immediately to mediation, that is an incentive to do it earlier.

It does take a culture change. It is going to take time. But certainly the dispute resolution skills training that we teach, that the Office of Information Policy participates in with OGIS, is aimed at giving people in the agencies the skills they need to be able to better communicate with requesters, to prevent those disputes in the first place, and become much more comfortable with exactly the kind of give and take that you are pointing to and that can make a difference and can head off litigation so that we do not have somebody having to file a federal case just because they cannot get—they cannot have a communication with the agency about what they are looking for and when they are going to get it.

Senator CORNYN. I do not have any statistics at hand, but I would imagine that the number of people or the percentage of people who actually file lawsuits is a much smaller number than those who make FOIA requests in the first place. And, of course, lawsuits are expensive, and so it seems to me to be an inadequate remedy—I know you are not suggesting otherwise—to provide for mediation at the circuit court.

Are there other tools that you believe that are needed? In other words, do Senator Leahy and I and the Committee need to look at additional reforms aimed at preventing litigation or otherwise resolving these disputes more quickly?

Ms. NISBET. Well, I do think the amendments from 2007, the *OPEN Government Act* was really an innovation, and it is going to take time. I think support from this Committee, support from the House as well for this kind of approach and really encouraging it and encouraging agencies to do it is going to continue to go a long way.

It does require a change in thinking. It requires a change in approach. But I think agencies are receptive to that, and we are just going to keep at it.

Senator CORNYN. I know patience is considered a virtue, but in this instance, it seems like we have waited a long time since 2007. And I would just ask you or any of the other witnesses or people in the audience who are interested in this topic to please send to me, Senator Leahy, Senator Franken, and the Committee any other suggestions you may have, because the litigation expense alone is something it seems like we would want to avoid in these times of sequestration and concerns over our fiscal condition here at the Federal Government.

Ms. NISBET. Yes.

Senator CORNYN. But in terms of getting people access with minimum hassle, minimal expense, and just—because it is something I think we are going to have to change in terms of the attitude on, as I suggested, customer service, one where this is an obligation of government officials, not a nuisance to be tolerated, which I fear so often is the attitude.

Thank you very much.

Ms. NISBET. Thank you.

Senator FRANKEN. Thank you both for your testimony and answering the questions.

Director Pustay, last year a group of Minnesotans visited my office to report problems with their FOIA requests. The group was trying to make sure that federal contractors were complying with the Davis-Bacon laws, but they experienced some very long delays in recovering the records they had requested, and at this point, I would like to enter the letter that I wrote to you on that topic.

[The letter appears as a submission for the record.]

Senator FRANKEN. Though some delays are unavoidable, I think we are all in agreement here that we should try to avoid—reduce avoidable delays. Actually, in the letter that I got back from Judith Appelbaum, it says, “Delays can also be the result of long queues of FOIA requests at agencies, which are typically processed in a first-in, first-out basis to be fair to all requesters.”

Is this backlog getting shorter?

Ms. PUSTAY. The backlogs are tremendously shorter. That is one of the key accomplishments of this administration. We have reduced—when you compare the backlog from 2009 to the backlog at the end of Fiscal Year 2012, the last 4 years, the backlog was reduced nearly 45 percent, nearly half. So it is a tremendous accomplishment, and during that time more than 2.5 million requests were processed by agencies.

Senator FRANKEN. And that is more requests than have been done—is every year more—

Ms. PUSTAY. Every year the number of requests is increasing. And agencies are marshaling their resources and matching that by processing more requests. And a 45-percent reduction in the backlog in the past four years, I think, is a tremendous accomplishment.

Senator FRANKEN. Does that translate into a shorter wait on most requests?

Ms. PUSTAY. Right. In addition, of course, as the backlogs decrease, then that makes it—then the responses are also more quick, are also more prompt. But we also had governmentwide improvements in processing times, so there is a complementary process that agencies are both reducing backlogs and responding more quickly. And it is important to note that they are doing that by keeping a high release rate. Records are being released in full or in part in a really high percentage of cases. So, overall, I think there are really solid, concrete improvements from these past four years.

Senator FRANKEN. You spoke earlier about that when the *OPEN Government Act* became law, effectively the rules in that became rules of all the agencies, covering all the agencies on FOIA requests.

Ms. PUSTAY. Exactly.

Senator FRANKEN. And so the Chairman asked you about agencies that have not adopted those regulations yet, but you say they are in force. Actually, there are a number of agencies which have updated their regulations and not necessarily done so in compliance with the *OPEN Government Act*.

Ms. PUSTAY. Right.

Senator FRANKEN. How is your office working to make sure that agencies update their regulations in compliance with existing law?

Ms. PUSTAY. As just a general concept, of course, it is important to have up-to-date regulations, so that is something that we would encourage all agencies to do. And as I mentioned, the Department of Justice is in the process of updating our own regulations, and our thought all along has been that agencies can use our regulations as a model for their own. So it is something that we—

Senator FRANKEN. But you have not finished yours.

Ms. PUSTAY. We are in the final stages of the process of updating them, yes.

Senator FRANKEN. Okay. But they cannot very well use them as a model if they are not complete.

Ms. PUSTAY. No, not until they are done. That is right. Of course.

Senator FRANKEN. Unless the model is incomplete regulations.

Ms. PUSTAY. Right. The—

Senator FRANKEN. That is kind of silly.

Ms. PUSTAY. The idea behind updating regulations is—updating our own regulations is that once they are finalized, they will be a model for other agencies to use.

Senator FRANKEN. And how long have you been working on those?

Ms. PUSTAY. We have been working on those for a couple years.

Senator FRANKEN. Okay.

Ms. PUSTAY. It is a time-consuming process to update regulations. That is why it is important to remember that updating regulations was not required by the *OPEN Government Act*. It was not required by the Attorney General Guidelines. And those provisions have been fully implemented across the government, and certainly at the Justice Department, and we have done that through a wide range of efforts—training, specialized guidance, reporting requirements and Chief FOIA Officer reports, assessments of agency progress, a specialized focus on some of the key provisions of the

OPEN Government Act. So through all those initiatives, we have been making sure that the FOIA is understood by agency professionals across the government and that we are giving them the tools they need to implement the law correctly and also in accordance with the Attorney General's Guidelines.

Senator FRANKEN. Well, I want to thank you for your testimony and for answering questions, and Ms. Nisbet as well.

We will go to the second panel now, so you are excused. Thank you.

Senator FRANKEN. I would ask the second panel to take their seats. Thank you, gentlemen.

I would now like to introduce our second panel of witnesses:

Sean Moulton is director of Open Government Policy at the Center for Effective Government. He is the author of several reports on open government and transparency.

Kevin L. Goldberg is an attorney and is here representing the American Society of New Editors and the Sunshine in Government Initiative.

Thomas Blanton is the director of the National Security Archive, an independent research institution at George Washington University.

Thank you all for joining us. Your complete written testimonies will be made part of the record. You each have five minutes for any opening remarks that you would like to make.

Mr. Moulton, please go ahead.

STATEMENT OF SEAN MOULTON, DIRECTOR, OPEN GOVERNMENT POLICY, CENTER FOR EFFECTIVE GOVERNMENT, WASHINGTON, DC

Mr. MOULTON. Mr. Chairman, Members of the Committee, thank you for inviting me to testify today on the important topic of fulfilling the promise of open government, the impacts of the *OPEN Government Act*, and agency performance on FOIA. My name is Sean Moulton. I am the director of Open Government Policy at the Center for Effective Government—formerly OMB Watch—an independent, nonpartisan policy organization. Improving citizen access to public information has been an important part of our work for almost 30 years. I would like to begin with a quick look at FOIA implementation.

Today we published our analysis of FOIA performance at 25 agencies, including most Cabinet-level departments. Our analysis evaluated performance on processing of requests, the rates of requests granted, and the use of exemptions.

In Fiscal Year 2012, the Obama administration processed more FOIA requests than in any year since 2004. Specifically, the 25 agencies processed more than 512,000 requests, an eight percent increase over the previous year. As a result, 12,000 fewer requests were still pending at the end of the year, a 12-percent decline compared to 2011. Nevertheless, more than 80,000 requests remained unprocessed at year's end.

In terms of granting requests, 19 of the 25 agencies fully denied requests less than 10 percent of the time. The Department of Homeland Security denied requests less than one percent of the time. Not surprisingly, the Central Intelligence Agency and State

Department were the most likely to fully deny requests, rejecting 59 percent and 44 percent, respectively.

Overall, in 2012 agencies granted, in full or in part, 94 percent of requests processed. However, the administration's performance continues to rely much more heavily on partial releases rather than full releases. In fact, granting in full declined to the lowest level on record to just under 41 percent. Conversely, partially granted requests are at a near record high, and based on the information reported, we are unable to say just how partial these releases were. We could be talking about releasing 99 documents out of 100 or withholding 99 documents and only releasing one. Both would be a partial grant.

We also found that the total use of exemptions rose by 26 percent from the previous year. Three exemptions accounted for almost three-quarters of exemptions used: personal privacy, law enforcement personal privacy, and law enforcement techniques for prosecution. Each were used approximately 100,000 times or more.

The use of the internal rules exemption, which was once among the most frequently used, was almost entirely eliminated, with a 92-percent reduction, part of an ongoing shift from a 2011 Supreme Court ruling that restricted the use of the exemption. However, an increase in the use of the interagency memos exemption suggests that some agencies may have expanded it to withhold records previously claimed as internal rules.

This overview of FOIA performance indicates that the changes brought from the *OPEN Government Act* and the Obama administration's new FOIA policies have made some positive impact on FOIA implementation. But serious challenges and disparities remain. We would like to offer six recommendations to improve FOIA performance: improve compliance efforts, a stronger ombudsman, expanded proactive disclosure, better technology, congressional oversight, and expanded reporting.

First, we believe that the Justice Department should be more aggressive in overseeing FOIA compliance. There need to be greater incentives for strong performance and stronger penalties for failures to comply.

Second, the Office of Government Information Services, created under the *OPEN Government Act*, should be expanded and strengthened. OGIS is already having a positive impact on FOIA implementation, and we firmly believe the benefits would be greater if its capacity were increased.

Third, we recommend expanding FOIA's proactive disclosure requirements to make more information available without needing a filer request. Agencies should be required to routinely post key information about how they are operating. Agencies should also have to post records already released in response to other FOIA requests.

Fourth, agencies should leverage technology to build on the tracking numbers required by the *OPEN Government Act* and provide automatic status updates to FOIA requests. Additionally, agencies should be able to receive requests and post responses online. The new interagency portal, FOIA Online, already offers many of these features, and it should continue to be improved, and participation should be expanded to include more agencies.

Fifth, Congress should codify the presumption of openness, the foreseeable harm standard, and the affirmative obligation to disclose. We also encourage committees of jurisdiction to continue to exercise assertive oversight into FOIA by holding regular hearings, issuing letters of inquiry, and ordering GAO studies.

Finally, we recommend expanded reporting requirements to describe how much information is being withheld under these partial releases, such as a record or page count of what is being released and what is being withheld.

Like the Committee, the Center for Effective Government is committed to improving FOIA and ensuring that federal agencies provide timely and complete responses to the public's requests for information. I look forward to the Committee's questions. Thank you.

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

Senator FRANKEN. Thank you, Mr. Moulton.

Mr. Goldberg.

STATEMENT OF KEVIN M. GOLDBERG, ESQ., FLETCHER, HEALD & HILDRETH, PLC, ARLINGTON, VIRGINIA, ON BEHALF OF THE SUNSHINE IN GOVERNMENT INITIATIVE, AMERICAN SOCIETY OF NEWS EDITORS

Mr. GOLDBERG. Thank you. Mr. Chairman, Members of the Committee, I am pleased to represent the Sunshine in Government Initiative and the American Society of News Editors, because I recall how optimistic we all felt almost eight years ago when we first started working with Congress to reform FOIA.

Eight years ago, the starting point for what would become the *OPEN Government Act* was Senator Cornyn's desire to create an enforcement mechanism like he had enjoyed as the Attorney General of Texas. Though not everybody may agree that "everything is better in Texas," we did think Senator Cornyn was onto something here, and the *Austin American Statesman* has actually agreed and proven that.

Our optimism grew when President Obama proclaimed that his administration would be the most transparent administration ever. But these eight years have not brought the desired changes to FOIA processing itself. In the words of what I understand to be Chairman Leahy's favorite Grateful Dead song, the public still sees a black muddy river that rolls on forever.

Why? Well, that is because our original effort was quickly diluted to include several less effective provisions. I will first highlight those that have worked.

We believe the Office of Government Information Services has been successful. OGIS has helped avoid bigger disputes and avoid litigation when agencies fail to communicate with requesters. If anything, this office needs more power and resources to perform an enforcement role.

We also are pleased with the fix to the so-called Buckhannon tax to make it easier to recover attorneys' fees when challenging a FOIA denial in court.

There has been a lot of discussion about the increase in litigation. We actually view this as somewhat of a good thing. It is clear evidence that requesters use the *OPEN Government Act* to enforce

their rights. But excessive secrecy, of course, still remains. Examples include the withholding of Office of Legal Counsel memoranda, and a recent change by the U.S. Marshals Service, which has begun ignoring a longstanding federal appellate decision requiring the disclosure of mug shots.

The procedural of processing has also been a mixed bag. The major enforcement element from the *OPEN Government Act*—waiving processing fees when an agency fails to meet the 20-day response deadline—has not kept agencies in line. But enforcement issues aside, FOIA processing simply needs an infusion of leadership, resources, and technology.

I will praise the administration here. It has not received enough credit for harnessing technology to make processing more efficient. It just needs to go a little further, and it may need some help from Congress to get there.

The Justice Department's FOIA.gov Web site is a step in the right direction, but as Justice Department officials told the GAO last year, FOIA.gov was never intended to manage FOIA requests. It is simply a tool to hold agencies accountable for meeting their FOIA responsibilities.

The new multi-agency FOIA Online system offers more promise by creating a freely searchable, online data base of already disclosed records that will advance the proactive disclosure of frequently requested records. It will create a streamlined electronic tracking system, fulfilling a mandate of the *OPEN Government Act*, that could save as many as 30 minutes per request by automating the logging and confirmation of requests.

Now, if you look at the over 650,000 requests in Fiscal Year 2012, that would offer a savings of about 325,000 person-hours, possibly the equivalent, if you want to look at it this way, of creating 163 new FOIA officers. It is also a mechanism to allow agencies or components of agencies to more freely talk to one another to reduce the tolling of every individual request.

So against this backdrop of moderate success, greater disappointment, and vast potential, we ourselves offer five steps for congressional action.

Number one, strengthen OGIS by increasing its funding and its independence authority to hold other agencies accountable.

Two, hold OGIS itself accountable. OGIS should exercise its advisory opinion power to create a record that requesters themselves can use to hold agencies accountable.

Three, hold individuals accountable. Information disclosure should be a part of every Federal Government employee's overall performance review.

Four, codify the disclosure-friendly standard laid out by Attorney General Holder that information should only be withheld if foreseeable harm would result from its disclosure.

And, five, save taxpayers some money by encouraging agencies to switch to FOIA Online as their existing software contracts expire.

The proposals we suggest are a vital part of Congress' ongoing oversight efforts and are necessary to avoid finding ourselves back here five, six, eight years from now summing up an unchanged *Freedom of Information Act* landscape with the lamentations of one of my musical icons, Bruce Springsteen, who wrote, "somewhere

along the line, we slipped off track, Going one step up and two steps back.”

Mr. Chairman, we appreciate working with you to ensure transparency moves two steps forward for every step back. Thank you for the opportunity to testify today. I look forward to answering your questions.

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

Senator FRANKEN. Thank you, Mr. Goldberg.

Mr. Blanton.

STATEMENT OF THOMAS BLANTON, DIRECTOR, NATIONAL SECURITY ARCHIVE, GEORGE WASHINGTON UNIVERSITY, WASHINGTON, DC

Mr. BLANTON. Thank you very much, Mr. Chairman and all the terrific Committee staff who have helped make this hearing happen and this oversight happen. It is a lot of work, I know.

I have a prepared statement already for the record, and I have also brought copies of the brand-new *Freedom of Information Act* audit that we just posted this morning to celebrate this hearing and Sunshine Week. It has some new numbers that might correct the numbers that Senator Leahy and Senator Grassley used on the number of agencies. But I want to use the limited time here just to address the Justice Department presentation, which I wish we had Glenn Kessler of the *Washington Post* and his renowned Fact Checker column with us, because while that presentation was happening, I could just see the little symbols of the Pinocchios just hitting the page, because the stretches that were involved there were really extraordinary.

I think the Justice Department might be the only player in the entire freedom of information environment that thinks new regulations are just optional, that you do not really need them to make the system work.

You go to any training session of Government Freedom of Information Officers, and the senior folks up on the podium say, “Guys, look at your regs. That is the basis of your implementation. Do not worry about the statute. And that AG memo? Ah, you know, do not worry about that. Your regs, that is what counts.”

So having a list of agencies—this is the red—that have not updated their regulations since Congress passed the *OPEN Government Act* of 2007 is just—it is a tragedy and a farce.

The folks who disagree with the Justice Department on the need for new regs include federal judges who ruled against the government in the National Park Service case because the agency involved had not updated its regs to charge fees.

The folks that disagree include former Attorney General Janet Reno, who, when she did a memo to the agencies to try to get a presumption of openness in there, said, “Change your regs to fit the new policy.”

This Attorney General failed to do so in a memo drafted by that office of the folks who were just testifying.

The people who disagree with the Justice Department include the entire open government community that see new across-the-board regs as the opportunity for this Congress and this adminis-

tration to really bring everybody up to the standard of openness that we need to expect.

Among the folks who disagree but are way too polite to say so is the Office of Government Information Services, because OGIS has done a systematic effort to comment on every new agency FOIA regulation proposal because it is vital for OGIS' success that they be mentioned in those regs as a core resort for every requester and for every agency to figure out disputes.

So the entire community of folks, government and requesters, who care about the Freedom of Information Act disagree with the Justice Department on this. And yet that piece of litigation that she would not comment on is the most direct attack by this government on the *OPEN Government Act* of 2007. They are attempting to eviscerate the one single enforcement provision, which is you cannot charge fees if you delay your answer. It was very simple. As Senator Cornyn and Senator Leahy's idea, it was a great idea. It was one of the first pieces of teeth that we have seen in the law anytime, anywhere. The Justice Department is trying to gut that out. That is why they will not comment on that lawsuit.

It is absurd. There has never been a litigation review by the Justice Department to look at what the Attorney General or the President is saying about open government and trying to look at those cases and figure out: What can we settle? What can we get rid of? What can we disclose? That is why litigation is going up, not down, despite the best efforts of OGIS, which is dramatically, I think, improving the requester experience with the freedom of information process.

And then another Pinocchio. That release rate, I think I heard it five times in that presentation: 94-percent release rate. The only way the Department of Justice gets to that number is by leaving out nine of the 11 reasons the government does not answer your FOIA requests. Those other nine reasons are: fee-related issues that do not get resolved or the agency has a "No records" response or it sends the request to another agency for a referral. If you add in those reasons why FOIA requesters go away unsatisfied, your actual response rate gets down to a more pedestrian, more realistic 55, 60 percent, roughly.

So that is the kind of number we ought to be getting out of the Justice Department. We are not getting them. We are getting hyped-up numbers that you cannot really rely on. You are getting a secret sneak attack on the *OPEN Government Act* in the courts. And you are getting claims that just do not hold scrutiny. You get no implementation on new freedom of information regulations.

So I could say it is bad news, but we have had three agencies just since December who have updated their regs and added into the green side of our ledger. But as you pointed out, Mr. Chairman, updated regs do not necessarily mean good regs, because only one of those three agencies actually included OGIS in their regulations, language about dispute resolution. We have got to do more. We have got to order agencies to update their regs along a best practices template. In my written statement, I have got the top 10 best practices we think ought to be in every reg.

OGIS itself has done a series of excellent comments on different proposed regulations that talk about how agencies should be run-

ning their processes to make them better, to make them more responsive, to avoid disputes and litigation.

Congress could order this. There is some energy over on the House side. The Issa-Cummings bill that Senator Grassley mentioned actually would order agencies to do this within 180 days. It does not take two years. It does not take three years. The reason the Justice Department is still struggling with its own regulations is its first draft was so bad that all of us had to gather and put a stake through the heart to keep that set of regulations in the basket so it would not come out and bite us at night. Terrible regulations. And I hope—the new ones are not likely to be a better model either.

So Congress has got an opportunity. I think the President has a real opportunity. We have advocated that President Obama put this in the next action plan for the Open Government Partnership, that agencies should update their regulations and include these best practices and the excellent suggestions that Kevin and Sean and many others in our community are making.

I am just really glad that this Committee has decided to take on this issue, to have this oversight, and to bring some pressure to bear.

And my final point would be—and I wish Senator Leahy was here, and Senator Grassley. They talked about maybe doing a subpoena for those Office of Legal Counsel memos. I think the next nominee for a Justice Department confirmation position that comes up here ought to be told, “I am sorry. Your confirmation is not going to go through until you turn over the OLC memos.” I think maybe Senator Leahy sits on an Appropriations Committee. I just remember when a Secretary of State named Jim Baker showed up in front of the Appropriations Committee, and Senator Leahy said, “Don’t you have a big FOIA backlog?” And Secretary Baker went back to the Department and found a couple million dollars to clean out the backlog. It takes some pressure. It takes leverage of money. It takes holding up some confirmations. And yes, it might take a subpoena.

But I would love the opportunity, and I ask your patience, Mr. Chairman, if we could also submit some further comments to the record just to take into account the responses of the Justice Department, which I think are part of the problem.

Thank you.

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

Senator FRANKEN. Yes, absolutely.

[The comments appears as a submission for the record.]

Senator FRANKEN. Well, I would like, Mr. Moulton and Mr. Goldberg, your reactions to Mr. Blanton’s testimony there. He was basically saying—when he was talking Pinocchios, he is talking—we know what Pinocchio did. He lied.

Mr. BLANTON. His nose stretches.

Senator FRANKEN. Well, the nose stretched because he lied.

[Laughter.]

Senator FRANKEN. So let us be clear about what you are saying, which is that the testimony of the first two witnesses was not truthful.

Mr. BLANTON. Not the first two witnesses. Just the first.

Senator FRANKEN. Oh, the first witness.

Mr. BLANTON. Yes. Thank you.

Senator FRANKEN. Do you gentlemen have any reaction to that?

Mr. MOULTON. I was disappointed by Ms. Pustay's testimony because I felt it was extremely one-sided. It was very serpentine in bending over backward to find all the highlights and all the positives and talked about none of the clear weaknesses, and I do think there was some omission on those points. The high release rate, even if you do not adjust—or even if you do adjust for these other reasons that people go away or that the request does not get processed—

Senator FRANKEN. So the release rate throughout those that were denied because of some of the normal reasons to exempt things. Is that right?

Mr. MOULTON. Yes. Tom is talking about—

Senator FRANKEN. So is that a normal way to look at the release rate, to take out those that are exempted because of the list of normal exemptions?

Mr. MOULTON. It is a way, and there is a certain validity to it if you are trying to figure out the exemptions and how often the exemptions are being used, because the others are not about exemptions. They are about disagreements on fees. There are still, as Tom is pointing out, very big concerns in these other denials as to whether or not the system is still being gamed.

Senator FRANKEN. So you said in your testimony on the list of improvements that need to be made, one was an improvement by Congress in oversight.

Mr. MOULTON. Yes.

Senator FRANKEN. So how would you suggest that we do that?

Mr. MOULTON. Well, I think Tom is raising some good points about, you know, really holding the Department of Justice's feet to the fire in terms of their follow-through with their responsibility to oversee agencies, their regulations, and their compliance with the law and the mandate to requests substantively inside the statutory 20-day deadline.

Senator FRANKEN. Now, Mr. Blanton was recommending, it sounded like, more resources put toward ending the backlog or just in terms of fixing some of these problems and holding up a nomination toward that end. We are currently under a sequester, and we do have budgetary limits, and I am not sure that we would want to hold up a nomination by demanding that more resources be applied when we are kicking kids off of Head Start and we are limiting women, infant, and children and their food. Would you like to say something?

Mr. BLANTON. In Kevin Goldberg's testimony, he has a wonderful suggestion for dealing with exactly this problem, which is if the FOIA Online portal really reached its full potential, it would be the equivalent in time savings on freedom of information requests of adding 163 new Freedom of Information Officers without a single additional dollar of our resources being—I think this is—this goes right to heart of why the new technologies can address some of these issues without us getting caught in the resource trap that we are all very well aware of.

Senator FRANKEN. Mr. Goldberg.

Mr. GOLDBERG. Thank you, Tom.

[Laughter.]

Mr. GOLDBERG. I should just stop there.

I cannot possibly speak with more authority than either of these gentlemen on that topic. I will just hit three things that stood out to me.

I was not going to jump all over the lack of agency implementation of the *OPEN Government Act* changes, but then I think I will, because something was running through my head with regard to the idea that Congress should not—or, I am sorry, the agency should not be required to do this because it was not required, you know, in the law itself. And a problem with that is that some of the regs are actually now out of sync with the changes in the Act. They were wholesale changes that now create a conflict. That sort of demands—

Senator FRANKEN. The new regs that have been promulgated or the old regs?

Mr. GOLDBERG. No, no. The regulations that were not changed.

Senator FRANKEN. Oh, okay.

Mr. GOLDBERG. And then, you know, once the Act changed the language of the law itself, you have regs that are in conflict and simply need to be changed. And I do not buy the idea that you should be required to make a change before you make the change. I have the words of my wife ringing in my ears right now, and I am going to go on record under oath saying, “Brenda, I love you, you are right. I should not have to be asked to take out the trash.”

You know, I get that all time. “I should not have to ask you to do this.” And it is true. If you view the interaction between the agencies—

Senator FRANKEN. So we have had Jerry Garcia, Bruce Springsteen, and your wife now in the record.

[Laughter.]

Mr. GOLDBERG. I am trying to cover all my bases here.

I mean, if you think about the interplay between the agencies as a relationship, the relationship will work better if everybody works to their potential and does things voluntarily to help out. They should not have to wait for the others to press them on it. We all know it is true.

You know, and I will go out as well on one last topic, back to oversight, which is I do think oversight from this Committee and from the House Committee and from any Committee that can possibly oversee FOIA is incredibly important. We come up here once a year, quite often, for a very important hearing during a very important—to me—week since ASNE is one of the creators of Sunshine Week. And I think that is good. But you hear a lot of statements, you hear a lot of promises, and then there is not a lot of follow-through to make sure those promises have been met until the next year.

I think the letter from Chairman Issa and Representative Cummings was a very good example of how to hold people’s feet to the fire, listen to what was said, go back through the testimony, look at what they have promised, look at where they are saying

they are making progress, and specifically hone in on that and make sure they have kept those promises. That is what I would do.

Senator FRANKEN. Well, thank you. Thank you, gentlemen, for your testimony. And I will note that we will hold the record open for one week for submissions of questions for the witnesses and for other materials.

I want to thank the Ranking Member and Senator Cornyn and the Chairman for being here today, and this hearing is now adjourned.

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

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

UPDATED Witness List

Hearing before the
Senate Committee on the Judiciary

On

“We the People: Fulfilling the Promise of
Open Government Five Years After The OPEN Government Act”

Wednesday, March 13, 2013
Dirksen Senate Office Building, Room 226
10:30 a.m.

Panel I

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

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

Panel II

Sean Moulton
Director, Open Government Policy
Center For Effective Government
Washington, DC

Kevin M. Goldberg, Esquire
On behalf of the American Society of News Editors and the Sunshine in Government Initiative
Fletcher, Heald & Hildreth, PLC
Arlington, VA

Thomas Blanton
Director
National Security Archive
Washington, DC

PREPARED STATEMENT OF CHAIRMAN PATRICK LEAHY

**Statement Of Senator Patrick Leahy (D-Vt),
Chairman, Senate Committee On The Judiciary,
Hearing On "We the People: Fulfilling the Promise of Open Government Five Years After
The OPEN Government Act"
March 13, 2013**

Today, the Committee holds an important hearing on one of our most cherished open government laws, the Freedom of Information Act (FOIA). We also commemorate Sunshine Week -- an annual celebration of transparency in our democratic society.

For more than four decades, FOIA has translated our great American values of openness and accountability into practice by guaranteeing access to government information. Sunshine Week is a timely opportunity to take stock of the progress we have made in improving the FOIA process, as well as the challenges that remain when citizens seek information from their government.

Five years ago, Congress enacted the Leahy-Cornyn OPEN Government Act -- the first major reforms to the Freedom of Information Act in more than a decade. Today, the Committee will examine how federal agencies are implementing the important reforms in this landmark law. When Congress enacted this bipartisan legislation, I said that our goal was to help reverse the troubling trends of excessive FOIA delays that we had witnessed for so many years, and to restore the public's trust in their government. The OPEN Government Act sought to restore meaningful FOIA deadlines and increase transparency in the FOIA process.

In the five years since we enacted the OPEN Government Act, there have been promising developments. I commend the Obama administration for establishing innovative initiatives such as Data.gov and FOIA.gov, which have significantly increased the public's access to government information. I am also pleased that we are beginning to witness progress in reducing FOIA backlogs across the government. These are all good signs, but there are still many challenges ahead.

Too many of our federal agencies are not keeping up with the FOIA reforms in the OPEN Government Act. A recent audit conducted by the National Security Archive found that fifty-six out of ninety-nine federal agencies -- more than half of all federal agencies -- have not updated their Freedom of Information Act regulations to comply with the OPEN Government Act.

I am also troubled by reports that the Obama administration is becoming more secretive about its national security policies. According to the Associated Press, during the past year, the Obama administration withheld more information for national security reasons in response to FOIA requests than at any other time since the President took office. For many years -- during both Democratic and Republican administration's -- I have urged the Justice Department to be more

transparent about the legal opinions issued by its Office of Legal Counsel. Our Government must always balance the need to protect sensitive government information with the equally important need to ensure public confidence in our national security policies. The uneven application of fee waivers, growing use of exemptions and inadequate communication with FOIA requesters also remain key impediments to obtaining information under FOIA.

I am pleased that representatives from the Department of Justice and the National Archives and Records Administration are here to discuss these challenges and detail how the Obama administration is implementing FOIA. We also have a distinguished panel of expert witnesses.

This Committee has a long tradition of working across the aisle when acting to protect the public's right to know, during both Democratic and Republican administrations. I value the strong bipartisan partnership that I have formed over the years with Senator Cornyn and Ranking Member Grassley on open government matters. The annual celebration of Sunshine Week reminds us that openness and transparency in government is important to all Americans -- regardless of political party affiliation or ideology. I hope that this spirit will guide our work today. I look forward to a good discussion.

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PREPARED STATEMENT OF MELANIE ANN PUSTAY, DIRECTOR, OFFICE OF
INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE, 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
"WE THE PEOPLE: FULFILLING THE PROMISE OF OPEN GOVERNMENT FIVE YEARS
AFTER THE OPEN GOVERNMENT ACT"

PRESENTED
MARCH 13, 2013

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

**Committee on the Judiciary
United State Senate**

**“We the People: Fulfilling the Promise of Open Government Five Years After the OPEN
Government Act”
March 13, 2013**

Good morning Chairman Leahy, Ranking Member Grassley, and Members of the Committee. I am pleased to be here today during Sunshine Week to discuss the OPEN Government Act of 2007 and the Department of Justice’s continued efforts this past year to assist agencies in improving their FOIA administration and ensuring that President Obama’s Memorandum on the FOIA and Attorney General Holder’s FOIA Guidelines are fully implemented. As the lead agency responsible for implementing the FOIA across the government, the Department of Justice is strongly committed to encouraging compliance with the Act by all agencies and to promoting open government.

As you know, this Sunshine Week we celebrate the fourth anniversary of the Attorney General’s FOIA Guidelines. Issued during Sunshine Week on March 19, 2009, the Attorney General’s FOIA Guidelines address the presumption of openness that the President called for in his FOIA Memorandum, the necessity for agencies to create and maintain an effective system for responding to requests, and the need for agencies to proactively and promptly make information available to the public. Stressing the critical role played by agency Chief FOIA Officers in improving FOIA performance, the Attorney General called on all Chief FOIA Officers to review their agencies’ FOIA administration each year and to report to the Department of Justice on the steps taken to achieve improved transparency.

The Chief FOIA Officer Reports continue to serve as an invaluable tool for assessing agencies’ implementation of the FOIA Guidelines. The Reports provide a detailed description of each agency’s efforts throughout the year to address the five key aspects of the Attorney General’s Guidelines. I highly recommend that the Committee review these reports to see the broad array of activities that agencies have undertaken to improve their FOIA administration.

OIP is responsible for providing guidance and direction to agencies on the content of their Chief FOIA Officer Reports, and each year as agencies’ implementation of the Guidelines has matured, including their application of the foreseeable harm standard, we have modified the requirements of the reports to build on the successes of the previous years. For example, focusing on the Attorney General’s foreseeable harm standard, we began by asking agencies to

report whether they had made any discretionary releases of information that otherwise would have been protectable under the FOIA. When we saw the direct link between making such releases and having a system in place to identify them, we issued guidance to agencies encouraging adoption of such a system. By 2012, ninety-seven of the ninety-nine agencies subject to the FOIA reported that they had a system in place in their FOIA processing for considering discretionary releases. For the 2013 Chief FOIA Officer Reports we took this milestone even further by adding a new requirement that agencies provide narrative descriptions or examples of the types of information they released as a matter of discretion.

I am very pleased to report to you today that based on our initial review of both the 2013 Chief FOIA Officer Reports and agency Annual FOIA Reports for Fiscal Year 2012, agencies have continued to take concrete steps to improve their FOIA administration. Specifically, these reports illustrate how agencies continue to effectively apply the presumption of openness called for by the President and described in the Attorney General's Guidelines, and the steps they have taken to improve efficiency in their FOIA processes, reduce backlogs, expand their use of technology, and proactively make more information available online. While there are always areas in which any given agency can do more, for the fourth straight year, agencies have shown that they are improving their FOIA administration and increasing transparency.

During Fiscal Year 2012, agencies were once again faced with an increase in the number of incoming FOIA requests, which rose from more than 640,000 in Fiscal Year 2011 to over 650,000 in Fiscal Year 2012. Notably, since Fiscal Year 2009, the number of FOIA requests received by the government has increased each year. The 651,254 requests received this past fiscal year are nearly 17% more than the 557,825 requests received during Fiscal Year 2009. Nonetheless, in response to this ever-increasing demand, agency FOIA offices once again increased the number of requests they processed this past fiscal year. During Fiscal Year 2012, the government processed 665,924 requests, which is 14,670 more than were received this year, and 34,500 more than were processed in Fiscal Year 2011.

Agencies' sustained efforts to keep pace with the ever-increasing number of incoming requests clearly paid off this past fiscal year as I am proud to report that the government overall achieved a 14% reduction in its request backlog, moving from 83,490 backlogged requests in Fiscal Year 2011 to 71,790 in Fiscal Year 2012. Reducing agency backlogs to even lower levels is an ongoing goal, but the reduction this past year is a milestone, particularly given the increases in incoming requests. Moreover, it is even more significant when compared with the backlog from Fiscal Year 2008, which were 130,419 requests. The backlog reduction achieved this past fiscal year represents a nearly 45% reduction from Fiscal Year 2008, which is the year before President Obama and Attorney General Holder issued their FOIA Memoranda.

This remarkable achievement can be attributed to the concerted efforts of many agencies that worked to reduce their backlogs. For example, at the Department of Homeland Security (DHS), the U.S. Citizenship and Immigration Services (USCIS) took multiple approaches to improve efficiencies in their FOIA process, including hiring additional FOIA staff and completing a Six Sigma study that highlighted specific areas of improvement. USCIS's efforts

resulted in a remarkable 70% reduction in backlog, and directly contributed to DHS's overall backlog reduction of 32.7%. In a similar effort, the Department of Defense (DOD) realized a backlog reduction of 12.2%, which marks the fifth straight year in which DOD reduced its backlog. The Department of Veterans Affairs also achieved a significant 22.5% reduction in backlog, as did the Department of Treasury (15.3%) and the Department of Health and Human Services (12.1%).

In addition to reducing the overall number of requests pending in their backlogs, agencies have also continued to focus on reducing the age of their oldest requests. In 2007, OIP instituted a specific backlog reduction goal: for each agency to close its ten oldest pending perfected requests every year. This goal ensures that agencies are answering the President's and Attorney General's call to respond to requests promptly. As you know, Congress reinforced the importance of this effort through the passage of the OPEN Government Act by codifying the requirement that agencies report on their ten oldest requests in their Annual FOIA Reports. Over half of the agencies reported in 2013 that they either closed their ten oldest pending requests or had no such requests to close. Moreover, many of those agencies that were not able to close their ten oldest requests this past fiscal year did make progress in this area by closing some. Fully embracing the importance of closing its oldest requests, this past year the Department of Education created a new team responsible for closing all of the agencies pending requests between Fiscal Years 2009 and 2010 by the close of Fiscal Year 2012. The team was able to successfully close seventy of the eighty-nine cases that fit this criterion. Similarly, the National Aeronautics and Space Administration reported that for the first time it closed all of its pending requests from the prior fiscal year and had no requests that were older than Fiscal Year 2012.

The OPEN Government Act also highlights Congress's desire for agencies to respond more timely to those requests that do not present "unusual" or "exceptional" circumstances (as those terms are defined in the FOIA), by limiting the fees that can be charged for such requests if an agency's response is untimely. To further this goal, OIP has encouraged agencies to focus on processing their "simple track" requests within twenty working days. Agencies are responding to this challenge. During Fiscal Year 2012 over sixty agencies reported processing their "simple track" FOIA requests within an average of twenty days or less and the government's overall average time for processing these requests was reduced by almost a full day to 22.66 days. This represents a significant reduction of over 5.5 days from the average of 28.34 days reported in Fiscal Year 2010. Moreover, in addition to improving processing times for "simple track" requests, during Fiscal Year 2012 agencies on average also reduced the time it took to process complex requests by over twenty-one days. Moreover, as agencies work to reduce backlogs and process the record numbers of requests they receive more efficiently, they have also continued to maintain a high release rate. Indeed, during Fiscal Year 2012, the government released records in full or in part in response to 93.4% of requests where records were located and processed for disclosure, marking the fourth straight year in which such a high release rate has been achieved.

Fully implementing the President's directive to apply the FOIA with a presumption of openness, as well as the Attorney General's foreseeable harm standard, the majority of agencies in 2013 reported making discretionary releases of information. As mentioned above, for 2013

we asked agencies to provide examples of the types of records released as a matter of discretion. As detailed in their Chief FOIA Officer Reports, the Department of Agriculture (USDA) released a variety of material that could have been protected under Exemption 5 of the FOIA such as records concerning the Department's briefings, talking points, draft letters, and notes taken during enforcement proceedings. Similarly, DHS's Privacy Office released thousands of pages of records concerning the "Occupy Wall Street" movement. The Federal Emergency Management Agency released information pertaining to flood mapping documents, internal memoranda and reports on policy issues, and grant application evaluation sheets. In another example, the Department of Interior's (DOI) Bureau of Land and Management made discretionary releases of information concerning the North Steens 230-kV Transmission Line Project and items related to the Economic Analysis of Critical Habitat Designation for the Northern Spotted Owl. DOI's Fish and Wildlife Service released material on the impact of wind turbines on migratory birds, including information on bird and bat mortality. These are only a few of the examples provided in agencies' Chief FOIA Officer Reports and I would again urge the Committee to review each agencies' report for a more complete picture.

Agencies also continue to meet the demand for public information by proactively posting more material that is of interest to the public online. For example, at the Department of Commerce, the FOIA office for the National Oceanic and Atmospheric Administration (NOAA) partnered with NOAA's Central Library office, to post information on the Deepwater Horizon Oil Spill in its online Library catalog. At DOD, the Department of the Army posted an internal investigation on Agent Orange, an ecological report on the Missouri River Mainstream Reservoir, a Historical Review of Chemical/Biological Weapons, and a Fire Cause and Origin Report-Aberdeen Proving Ground. Among other things, the Department of the Navy posted the inspection report for the Naval Post Graduate School as well as Naval Research Laboratory video and photos. The National Security Agency (NSA) recently posted its 60th anniversary publication entitled "National Security Agency: 60 Years of Defending our Nation." The publication includes an interactive DVD with 250 declassified documents, seven audio recordings, two videos, and over 150 photographs. One hundred and ninety-six of the documents in the publication were released for the first time. Additionally, the Federal Communications Commission began modernizing its forty year-old public inspection file rules, which for the first time placed over 550,000 public disclosure documents associated with TV stations into one easy to use portal. Over 250,000 of these documents were previously not available anywhere online. Finally, as a major multi-year project, the U.S. Copyright Office is making historical copyright records created between 1870 and 1977 available online in a searchable form. The Copyright Office has already imaged nearly twenty-three million index cards for copyright registrations and assignments from 1955 to 1977, and has finished digitizing all 667 volumes of the Catalog of Copyright Entries from 1891 to 1978.

In addition to 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, USDA's National Agricultural Library launched the [Life Cycle Assessment \(LCA\) Digital Commons](#), an online resource that provides assessments of the potential impacts for a given agricultural product, process, or activity throughout its entire life span. The website offers the public fully

searchable access to a broad inventory of peer-reviewed, standard-formatted United States Life Cycle Assessment data.

Taking advantage of direct public feedback and usability testing, in October 2012 the Department of Transportation (DOT) redesigned its website to make it easier for the public to find information. The redesign makes it easier for users to view DOT's webpage on their mobile devices and DOT's new topic and audience pages are now among the most visited areas of its website. DOT also added a feedback button on every single page of its website encouraging visitors to provide suggestions for further improvement. The Social Security Administration, Federal Maritime Commission, Inter-American Foundation, National Labor Relations Board, and many other agencies have similarly taken steps to revamp their websites to make them more user-friendly and to improve searchability.

I am particularly pleased to report to you on the successes achieved by the Department of Justice this past year. During Fiscal Year 2012, the Department received a record high 69,456 FOIA requests, over 6,300 more than were received in Fiscal Year 2011. This also marks the fourth straight year in which the Department has received over 61,000 requests. In response to these historically high numbers of incoming requests, the Department's dedicated FOIA offices once again increased the number of requests they processed during the year. In Fiscal Year 2012, the Department processed over 4,500 more requests from 63,992 in Fiscal Year 2011 to 68,531. This increase in processing helped the Department meet the rising tide of incoming requests, so that while our backlog did go up, it increased by only 1,380, despite receipt of over 6,300 more requests.

This past fiscal year also marked the fourth straight year in which the Department maintained a high release rate of 94.3% for all requests where records were located and processed for disclosure. Perhaps even more significant, in response to 74.8% of these requests, the Department released records in full with no exemptions applied. We also closed our ten oldest pending requests from the prior fiscal year and improved the average processing times for both simple and complex FOIA requests. Notably, during Fiscal Year 2012, the Department processed all of its "simple track" requests within an average of 18.9 days.

Further, this past year the Department continued to lead by example in making proactive disclosures and using technology to disseminate information to the public. For example, the Department posted the most recent FOIA Logs for its senior management offices, including the Offices of the Attorney General, Deputy Attorney General and Associate Attorney General, in both a searchable pdf and open CSV format. By posting the FOIA Logs in an open format, members of the public can easily sort through and manipulate the data. The Bureau of Alcohol, Tobacco, Firearms and Explosives began posting the list of all active Federal Firearms Licensees (FFLs) on a monthly basis. Additionally, the Federal Bureau of Investigation continued to update its massive FOIA Library known as "The Vault." Launched in April 2011, The Vault initially posted records on 240 subjects and now has nearly 500. In addition to posting new information on their websites, many of the Department's components such as the Federal Bureau of Prisons and the Executive Office for Immigration Review either updated or redesigned their

websites to make them more user friendly. Finally, several of the Department's components maintain a very active social media presence, reaching new audiences in different ways.

My Office, the Office of Information Policy (OIP), carries out the Department's statutory responsibility to encourage compliance with the FOIA. We have been actively engaged over the years in a variety of initiatives to inform and educate agency personnel on the legal requirements of the FOIA, including all the provisions of the OPEN Government Act, as well the policy directives from the President and the Attorney General.

As you know, the OPEN Government Act amended several provisions of the FOIA. Among other things, the Act added additional reporting requirements for agencies' Annual FOIA Reports, required agencies to assign tracking numbers to certain requests and provide requesters with status updates, added new obligations to mark documents and to route misdirected requests, and provided standards and limitations on tolling FOIA response times and assessing certain fees.

Promptly after the passage of the OPEN Government Act, my Office issued guidance to agencies explaining each of the changes that were made to the statute. We then followed this up with a series of detailed guidance articles issued in 2008 that address each of the changes made to the statute in detail. To reinforce this guidance and ensure compliance with the OPEN Government Act provisions, OIP held three government-wide conferences specifically addressing various aspects of the FOIA amendments. The changes were also thoroughly discussed in our 2009 edition of the United States Department of Justice Guide to the FOIA. Since then, the changes made to the law by the OPEN Government Act have been fully integrated into all of our regular training and guidance to agency FOIA professionals.

Similarly, within two days of the issuance of President Obama's FOIA Memorandum, OIP sent initial guidance to agencies informing them of the significance of the President's directive and advising them to begin applying the presumption of disclosure immediately to all decisions involving the FOIA. Following the issuance of the Attorney General's FOIA Guidelines, OIP issued extensive written guidance which provided agencies with concrete steps to use and approaches to follow in applying the presumption of openness. Over the past four years, OIP has provided training to thousands of agency personnel. We have also issued guidance on steps to take in fulfilling the President's and Attorney General's transparency directives, as well as a range of other issues relating to the FOIA. Both the guidance my Office has issued and the training we provide has continuously been updated over the past four years to address the application of the Attorney General's Guidelines in light of agencies' maturation in implementing the policy as well as new developments in the law.

We continue to reach out to the public and the requester community. In 2009, OIP began holding roundtable meetings with interested members of the FOIA requester community to engage in a dialogue and share ideas for improving FOIA administration. In response to concerns raised by the FOIA requester community OIP has, on multiple occasions, issued policy guidance to all agencies to specifically address those concerns.

I have also continued to reach out to, and individually meet with, the Chief FOIA Officers of those agencies that receive and process the overwhelming share of the government's FOIA requests. Additionally, I regularly join the Acting Associate Attorney General, who is the highest-ranking Chief FOIA Officer in the government, in meeting with these Chief FOIA Officers to discuss the implementation of the Attorney General's FOIA Guidelines and other open government initiatives. These meetings have become an invaluable opportunity for the Chief FOIA Officers to hear directly from the Department of Justice as we promote the goals of the President's and the Attorney General's directives and reinforce our joint commitment to openness and transparency.

In an additional effort to assist agencies in improving the government's FOIA administration, OIP has developed, in collaboration with interested agency representatives, a list of FOIA Best Practices which in turn has been used as a basis for further training of agency personnel. Moreover, OIP continues to hold meetings of its FOIA Technology Working Group and has led the effort to maximize agencies' ability to utilize advanced technology to streamline the core tasks of processing requests. During these meetings, the Group has engaged in robust discussions about the tools and applications available to assist with FOIA processing, including technology to aid 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.

The advantages seen by automating these processes are clearly evident. 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. Employing electronic systems that can consolidate and perform some of these necessary administrative tasks allows the Department's FOIA staff to focus their efforts on reviewing responsive material and responding to requesters more promptly. This has great potential to improve timeliness in responses and reduce backlogs.

Recognizing the potential impact of leveraging this type of technology to streamline FOIA processing efforts, this past year OIP partnered with the Department's Civil Division to conduct a digital-FOIA pilot program. During the pilot, we compared status-quo processing techniques with digital processes to assess their impact and build the business case for their use. Just a few weeks ago, OIP hosted a seminar to present the results of this pilot to agency representatives with the aim of enhancing awareness of the possibilities these technologies hold for increased efficiencies across the government.

OIP is also engaged in efforts to make systemic improvements to the procedures used by agencies to become transparent, which will expand the public's access to information. Just this week, in keeping with the President's and Attorney General's emphasis on both proactive disclosures and greater use of technology, OIP issued new agency-wide guidance that lays the groundwork for enabling easy aggregation of FOIA data into a government-wide FOIA Library where all the records posted by agencies in FOIA Libraries across the government can be easily accessed in one place. This will be done through the use of a uniform metadata "FOIA tag"

assigned to all FOIA processed records that are posted online in agency FOIA Libraries. With the addition of a uniform metadata tag, records can reside on individual agency websites, where they most naturally would be maintained and, utilizing the uniform metadata tags, search engines can scroll across all government websites to identify all the records on a given topic that have been posted by an agency in its FOIA Library. Once implemented, this uniform metadata tagging will help make it easier for the public to readily access the information that agencies are posting online in their FOIA Libraries, including frequently requested records processed under the FOIA.

In addition to encouraging agency compliance with the FOIA statute and with the Attorney General's Guidelines through comprehensive guidance and training, OIP has also undertaken several initiatives to increase agency accountability. Just this year, OIP instituted a new quarterly reporting requirement for all agencies. Starting with this current fiscal year, agencies must report four key FOIA statistics each quarter, thereby allowing for a more real-time assessment of the flow of FOIA requests handled by the government throughout the year. The four key statistics are 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. This new reporting requirement will not only provide the public with more timely access to important FOIA data, but will also assist agencies and agency components in actively assessing the state of their FOIA caseloads in order to take the appropriate measures to reduce backlogs and improve timeliness.

In 2012, for the second straight year, OIP conducted a formal assessment of agencies' FOIA administration by scoring all ninety-nine agencies subject to the FOIA on seventeen milestones tied to each of the five key areas addressed in the Attorney General's Guidelines. Because each agency inevitably faces different challenges in meeting the demands of their FOIA operations, OIP intentionally used a wide range of milestones to more completely capture every agency's efforts. We post the assessment each year, along with a summary of agency activity and guidance for further improvement.

Finally, FOIA.gov continues to revolutionize the way in which FOIA data is made available to the public. While it was initially a project undertaken by the Department in response to a strong interest by open government groups to have a "dashboard" that illustrates statistics collected from agencies' Annual FOIA Reports, the Department almost immediately began to expand its capabilities and we continue to add new features every year. With well over a million visitors since it was launched in March 2011, the website has become a valuable resource for both the requester community and agency FOIA personnel. The website takes the detailed statistics contained in agency Annual FOIA Reports and displays them graphically. FOIA.gov allows users to search and sort the data in any way they want, so that comparisons can be made between agencies and over time. This past year we continued our efforts to enhance FOIA.gov to provide additional resources and up-to-date information for the benefit of the public. Just this past January, the Department redesigned the "Reports" page of the website to feature Snapshot Reports of Annual FOIA Report data and the new Quarterly Report data that agencies are now required to provide. Additionally, we have added the data from agencies' Fiscal Year 2012

Annual FOIA Reports so that they too can now be sorted and compared by agency and over time. New charts and graphs show the evolution of key FOIA statistics over the past five fiscal years. FOIA.gov also continues to be updated with recent FOIA news and spotlights on the new releases agencies have made that are likely to be of interest to public.

FOIA.gov also serves as an educational resource for the public by providing useful information about how the FOIA works, where to make requests, and what to expect through the FOIA process. Explanatory videos are embedded into the site and there is a section addressing frequently asked questions and a glossary of FOIA terms. The website also serves as a central location for all the resources a requester needs to make a request to any agency subject to the FOIA. The website includes FOIA contact information for each agency, including their Chief FOIA Officer and all their FOIA Requester Service Centers and FOIA Public Liaisons. Additionally, hyperlinks to agency online request forms are provided so that requesters can begin making their requests right from FOIA.gov. As agencies look for ways to improve the FOIA process and to increase efficiency, many have developed the capability to accept FOIA requests online. Currently there are over 100 offices throughout the government that provide this capability and all of their online forms are available on FOIA.gov.

Last year the Department expanded the scope of services offered by FOIA.gov in yet another way by adding a search feature designed to help the public locate information that agencies have already posted online. FOIA.gov's "Find" feature allows users to enter search terms on any topic of interest, which FOIA.gov then searches for across all federal government websites. The "Find" feature captures not just those records posted in agency FOIA Libraries, but also records posted anywhere on an agency's website. Further, with our new guidance on the use of FOIA metadata tagging, the Department will be enhancing this search capability even further by allowing for a targeted search of documents located in FOIA Libraries. Through these features, FOIA.gov will continue to provide the public with an easy way to first see what information is already available on a topic and potentially preclude the need for a FOIA request to be made in the first place. These features also allow requesters the ability to make more targeted requests by reviewing the information that is already available on a topic.

Looking ahead, agencies submitted their Fiscal Year 2012 Annual FOIA Reports in February and have just completed their 2013 Chief FOIA Officer Reports. OIP has begun its reviews of both these reports, and we will assess where agencies stand in their ongoing efforts to continue improving the government's overall FOIA administration and sustaining the many achievements we have made thus far. We will also continue our outreach to both the requester community and agencies on the important goal of improving transparency. As I stated earlier, the Department is fully committed to achieving the new era of open government that the President envisions. We have accomplished a great deal these past four years, but OIP will continue to work diligently to help agencies achieve even greater transparency in the years ahead.

In closing, the Department of Justice looks forward to working together with the Committee on matters pertaining to the government-wide administration of the FOIA. I would

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

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



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

"We the People: Fulfilling the Promise of Open Government Five Years After
The OPEN Government Act"

MARCH 13, 2013

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Good morning, Mr. Chairman, Senator 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 before you during Sunshine Week to discuss implementation of the OPEN Government Act of 2007, which included the creation of OGIS as one of its key amendments.

As you know, at OGIS, we work with *all* Executive Branch departments and agencies on various aspects of the Freedom of Information Act (FOIA). We are in a unique position to observe various aspects of agency FOIA processes, including efforts to implement the 2007 amendments. I also want to take this opportunity today to share more about OGIS's work.

The 2007 FOIA amendments centered on a few tenets: executive support, customer service, and dispute resolution. The new provisions in the law added heightened statutory roles for the Chief FOIA Officers and FOIA Public Liaisons within the agencies, both to provide top-down support for FOIA activities and also to provide a resource to improve interaction between requesters and agencies. Agencies benefit by having these roles filled by individuals well-suited as leaders on FOIA who provide exemplary service to the public. Officials in these positions may hold regular meetings of the FOIA staff, implement their own training sessions, and host special FOIA events, such as FOIA forums or symposiums. Introducing dispute resolution to the FOIA process was another important aspect of the amendments. Congress included this concept in three separate new provisions, which established OGIS and directed agencies to make its FOIA Public Liaisons available to assist in the resolution of disputes between the requester and the agency.¹

In the three-and-a-half years that OGIS has been a part of the FOIA landscape, we have worked hard to reach out to agencies and to the public to let them know about us and our services. We

¹ 5 U.S.C. §§ 552(h)(1) and (3); (f); and (a)(6)(B)(ii).



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have had extensive contacts with FOIA operations across the government as we carry out our two-pronged mission: providing mediation services to resolve FOIA disputes, and reviewing agencies' FOIA policies, procedures and compliance. We have assisted requesters and agencies in nearly 2,100 FOIA-related instances, ranging from disputes over the application of a FOIA exemption to helping requesters find the right place to send requests. In some cases, OGIS is able to assist a requester directly without involving an agency, but in most cases, we have an opportunity to connect with agencies and observe their FOIA processes at work. We also hear directly about obstacles and successes in FOIA operations as we provide training in dispute resolution skills for agency FOIA professionals.

Agencies maintain great autonomy in the FOIA context and OGIS was not created to serve as the "FOIA police" in that regard. But OGIS does provide a review of FOIA activity and can share its views with agencies where their approach may differ from the work of other agencies or can offer recommendations on how to apply FOIA law and policy. In our dispute-resolution cases, we typically discuss the matter with both parties to identify any issues with which we may be able to assist. In these conversations, OGIS can sometimes expand on agencies' response and appeal letters in order to provide a more detailed explanation to requesters as to why the agency acted as it did.

In some cases, a requester has found that an agency's correspondence does not provide sufficient detail about the agency's actions. In those situations, OGIS is able to assist requesters in better understanding the process and complexities of FOIA so they have a clearer picture of the agency's actions and the law or policy behind it. OGIS also offers suggestions to agencies in those cases on how they might provide more information to assist their requesters from the start.

OGIS also is in a unique position to observe agencies' FOIA practices as we review their FOIA policies, procedures, and compliance. We review proposed changes to agency FOIA regulations and offer to collaborate with agencies as they improve their own policies and procedures. To date, we have offered suggestions to 17 agencies that have proposed changes to their FOIA regulations or forms.

OGIS's review program also includes developing government-wide Best Practices, which we develop by analyzing agencies' Annual FOIA reports and Chief FOIA Officers' reports, as well as through observations from our dispute-resolution processes. Some examples of agency best practices are:

- In cases involving voluminous records, agencies are sending the requesters estimated completion dates for rolling releases and contacting the requesters with a new estimated completion date if the agency is unable to meet the original date.
- Agencies are increasingly working collaboratively in teams to address FOIA-related issues including release of large data sets, both proactively and in response to requests; processing backlogged requests; and examining an agency's FOIA process with a view to bettering it.

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- In some cases, agencies have agreed to OGIS-facilitated conversations with the requester to discuss his or her request and the agency's action. As a result of these conversations, agencies have run additional searches and released records.

Our observations also help shape our FOIA recommendations. We determined early on that nearly everything we do at OGIS is geared toward improving FOIA in some way. We regularly provide suggestions to agencies and requesters on various aspects of the FOIA process and we track this activity on our "Improving FOIA" webpage. We also identify and target bigger-picture recommendations. Last year, we shared five recommendations to improve the FOIA process; I would like to update you on those recommendations and also share with you additional recommendations that are new this year.

- This year, OGIS recommends that agency heads encourage and support the use of dispute resolution in FOIA processes. Although dispute resolution has been a fixture within Federal agencies since the mid-1990s, it is relatively new to the FOIA administrative context. OGIS seeks to more strongly connect FOIA professionals, legal counsel and dispute resolution professionals to embed dispute resolution firmly into the FOIA process with the goal of preventing and resolving disputes administratively. OGIS is available to work with an agency's Chief FOIA Officer along with the dispute resolution program, general counsel's office and FOIA office to develop an approach that would allow an agency to benefit from the expertise of its own employees to prevent and resolve disputes. Such an approach could help to conserve administrative resources, improve customer service, and avert costly and time-consuming litigation.
- We also recommend that each agency leader send an annual message to his or her staff members reminding them of the importance of FOIA and that "FOIA is everyone's responsibility." FOIA professionals are leaders in delivering that message in their everyday work, but other agency professionals who may work on more mission-specific aspects of an agency's work will benefit from a refresher on the law and its applicability to their own work. OGIS worked with our parent agency, NARA, to write a message to be distributed to the NARA staff this Sunshine Week. The Archivist of the United States, David Ferriero, agrees this is an important message and intends to send an annual announcement to this effect. We have attached the National Archives' memo as well as a template for agencies to use as exhibits to this testimony and posted them on the OGIS website (in our agency FOIA toolkit) so that anyone may use them as a model.

Additionally, this year we have identified two FOIA-related issues that we will research and explore. While not ripe for recommendations just yet, we anticipate recommendations will be forthcoming.

- Examination of FOIA fees: The Office of Management and Budget last issued FOIA fee guidance in 1987.² Since then, agencies have moved toward digitizing records, have established online FOIA Libraries and may now be providing records through

² Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012, available at: http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/foia_fee_schedule_1987.pdf

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FOIAonline. Additionally, amendments to the law in 1996 and 2007 have addressed fees. OGIS has observed that fees and fee waivers remain a persistent point of contention administratively and in litigation. OGIS would like to work with stakeholders from both inside and outside government to review the myriad issues surrounding FOIA fees. We anticipate this will take some time, and may or may not include recommendations for legislative or executive action, but we hope to come away with consensus support for some options for improvement.

- Immigration records and FOIA: Individuals who are not U.S. citizens or lawful permanent residents access immigration-related records from various agencies through FOIA requests. OGIS has observed a large increase in our own cases related to these requests and has learned from the agencies that maintain these records that the volume of requests continues to grow each year. U.S. Citizenship and Immigration Services, the agency that maintains Alien files, reported that it averaged nearly 10,000 requests per month in Fiscal Year 2011. OGIS has already communicated with agency officials who receive these types of requests as well as some of the requester organizations and representatives who file them. We began in May 2012 with a preliminary examination of the records and issues. We now recommend that OGIS continue to work with the agency to develop possible methods to streamline the process. We do not anticipate that this effort will lead to a change in the FOIA itself.

The recommendations OGIS shared in 2012 continue to be a priority for the Office. We addressed five separate issues related to improving FOIA:

- Misdirected Inquiries [to OGIS] from the Public: OGIS joined the Office of Information Policy at the Department of Justice (DOJ) to host a Requester Roundtable event where we brought together agency FOIA professionals and the public to discuss first-party requests which are most often, but not always, considered Privacy Act requests. The offices provided information about Privacy Act requests and wrote about the roundtable on their blogs. OGIS also added a webpage to our site that provides more information about the Privacy Act including links to OMB guidance documents implementing the statute and agency Privacy contacts.
- Facilitating Agencies' Sharing of Information with OGIS: OGIS, in coordination with OMB, worked with DOJ to write model language that agencies can consider using in their Systems of Records Notices (SORNs) that would allow agencies to share information with OGIS, where appropriate. (Both FOIA and Privacy Act request files at every agency are covered by the Privacy Act. Without a routine use that expressly states that the agency will share those files with OGIS, we must get the individual's consent to communicate with the agency about the request. The consent authorizes OGIS to inquire on a customer's behalf regarding the request or administrative appeal at issue; the consent also authorizes departments and agencies to release to OGIS information and records related to the request or appeal.)

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- Improving Public Access to FOIA Information: OGIS continues to work with the partner agencies as well as requesters to implement and improve *FOIAonline*, the multi-function FOIA portal that launched in October 2012. This system allows requesters to file and track their requests from one place, communicate with the processing agency, and as agencies post responsive records to the site, requesters can browse already released documents. *FOIAonline* provides agencies with a secure website to receive and store requests, assign and process requests, and post responses and generate reports. There are currently six agency partners. We will continue to talk with other agencies about whether *FOIAonline* might help them carry out their statutory responsibilities; additional partners will make this shared service even more cost-effective for the government and taxpayers.
- Coordinating FOIA Responses Across Government: OGIS developed a strategy to coordinate agency contacts and facilitate communication on certain complicated and voluminous requests that are simultaneously sent to dozens of agencies across the Executive Branch. We continue to hear from both agencies and requesters in these cases — sometimes there are issues ripe for our assistance, and other times it is simply “for your information” outreach. Our experience is that this type of coordination reduces the burden on each agency, improves the quality of the responses, and provides better service to requesters.
- Dispute-resolution skills training for FOIA professionals: OGIS continues to encourage agencies to partner to expand and provide this training for their FOIA professionals. Congress’ innovation in bringing dispute resolution into the world of FOIA will work best when it is the agencies themselves that are preventing and resolving disputes. This effort is a good example of using existing agency resources to improve customer service and avoid litigation.

Finally, as I have shared with this Committee before, much of OGIS’s work in the last three years has been to establish the Office, including determining our role in the FOIA process while actively trying to carry out our important mission. The model that Congress chose for this office is a hybrid: we are to serve as a neutral place for FOIA requesters and agencies to come for non-binding assistance with FOIA disputes, and at the same time we review agencies’ FOIA policies, procedures, and compliance. On the one hand, we provide voluntary, impartial assistance to agencies and must encourage them to work with us, and on the other we have a review mandate that is not a voluntary process. In both instances, we must build the trust of agencies and gain their confidence in our work.

We recognize our limits as a small office with a large mandate within the executive branch. Our staff aims to split efforts between our two missions. However, because mediation cases continue to arrive in increasing numbers (up 130% in the first quarter of FY 2013 in comparison to the first quarter of FY 2012), the staff spends most of its time responding to those cases and has not yet been able to turn to building and carrying out the more robust review program that we envision. We continue to hope that will evolve and improve in the coming year.

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There are still many improvements to be made in FOIA administration – indeed, my Office hears too often from requesters who cannot get a simple answer to when they can expect to get a reply from the agency. We also hear complaints from many requesters who do not appreciate the challenges that agency FOIA professionals face in dealing with complex requests and voluminous records. We believe that there continues to be too much FOIA litigation. Nevertheless, in carrying out our mission we believe we are making a positive impact on the FOIA process both from the standpoint of requesters and of agencies. We appreciate the unique position we are in as a way to observe and reflect on FOIA activity across the government. We continue to believe our role will be an important part of improving the FOIA process in years to come.

PREPARED STATEMENT OF SEAN MOULTON, DIRECTOR, OPEN GOVERNMENT POLICY,
CENTER FOR EFFECTIVE GOVERNMENT, WASHINGTON, DC



Testimony of Sean Moulton
Director of Open Government Policy
Center for Effective Government

Before the
United States Senate Committee on the Judiciary

On
We the People:
Fulfilling the Promise of Open Government Five Years After the OPEN Government Act
March 13, 2013

Chairman Leahy, Ranking Member Grassley, members of the committee: My name is Sean Moulton and I am the Director of Open Government Policy at the Center for Effective Government, formerly OMB Watch — an independent, nonpartisan policy organization dedicated to improving government accountability and openness. Improving citizen access to public information has been an important part of our work for almost 30 years. Mr. Chairman, Mr. Grassley, thank you for your continuing interest and commitment to this issue, and thank you for inviting me to testify today on the important topic of how we can improve the working of the Freedom of Information Act (FOIA).

My testimony will examine how the OPEN Government Act and recent executive actions have had an impact on agencies' performance in responding to FOIA requests. Between FY2011 and FY2012, processing of FOIA requests improved significantly, and the number of unprocessed requests fell by 12 percent. However, in 2012, the requests that were granted were more likely to have some portion of the content withheld or redacted than at any time previously.

We believe FOIA would be a more effective system for ensuring government transparency and accountability if: compliance efforts were bolstered; the Office of Government Information Services (OGIS) was strengthened; FOIA's requirements to proactively disclose information were updated; agency IT provided faster processing; and congressional oversight was increased.

About the Center for Effective Government

The Center for Effective Government has advocated for greater online disclosure of FOIA requests on agency websites, for penalties if agencies fail to honor FOIA requests, and for more robust congressional oversight. We also have experience in helping make government information more accessible to the public. In 1989, before widespread public and commercial use of the Internet, we began operating the Right-To-Know Network (RTK NET), an electronic service providing public access to Environmental Protection Agency data. In 2006, we advocated for the policies incorporated in the Federal Funding Accountability and Transparency Act (FFATA),¹ which mandated that federal spending data be displayed on a website, with searchable and downloadable data, and later developed FedSpending.org, a website that contained so many of the legislation's mandated characteristics that it

¹ P.L. 109-282.



was licensed to the federal government and became the starting point for USAspending.gov, which launched at the end of 2007.

FOIA and Effective Government

We believe that in a democracy, citizens should have easy access to the information that their government gathers – all but the most sensitive information. This was the logic behind the passage of FOIA in 1966 and remains the driving force for transparency. FOIA provides the public with access to information about food safety, compliance with environmental standards, and special interest influence in government decision making.

Yet some issues have persistently reduced FOIA's effectiveness and delayed agency responses by months and sometimes years. Large backlogs in the processing of requests are common. Some agencies overuse exemptions to withhold documents from disclosure. These problems can result in lawsuits that make obtaining government information more costly for both agencies and the public; furthermore, when the requested information is finally released, it is no longer timely. Recent reforms have made progress on addressing these concerns, but significant problems remain.

1. Impact of the OPEN Government Act on Agency Compliance

The passage of the Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007² was a significant advance in addressing loopholes and weaknesses in the FOIA process that contributed to delayed releases and growing backlogs of requests. We supported the OPEN Government Act at the time of its passage and believe it has contributed positively to the effectiveness of the FOIA system.

Specifically, the OPEN Government Act:

- Created the Office of Government Information Services (OGIS) within the National Archives and Records Administration and directed it to offer mediation services when FOIA requesters and reviewers disagree.
- Made it easier for litigants to recover attorney fees in FOIA cases where an agency makes a "voluntary or unilateral change in position" in the face of a lawsuit. This means agencies will no longer be able to avoid the cost of paying attorney fees if they force complainants to bring a lawsuit and then release the materials at the last minute. This is an important disincentive to bad behavior by agencies, and there are signs that this provision is helping get more information out to the public. We heard that some news organizations had not pursued any FOIA litigation for years before this provision passed; they simply gave up when agencies failed to produce requested information, due to the expenses of litigation. With the new provision in place, however, requesters have been able to challenge agency withholding decisions in court.³

² P.L. 110-175.

³ Overall, FOIA litigation has increased since enactment of the OPEN Government Act. See Transactional Records Access Clearinghouse, "FOIA Lawsuits Increase During Obama Administration," *The FOIA Project*, Dec. 20, 2012. <http://foiaproject.org/2012/12/20/increase-in-foia-lawsuits-during-obama-administration/>.



- Discouraged undue delays in FOIA processing by financially penalizing agencies that fail to respond to FOIA requests within the statutory deadlines, since it bars them from collecting search fees from all requesters and duplication fees from certain favored requestors like the news media. Yet, despite this provision, only modest improvements in timeliness have been noticed at most agencies.
- Required agencies to create a FOIA tracking system that would allow requestors to monitor the progress of their requests on the Internet or by telephone. We believe that this provision has benefitted requesters, but problems remain with consistent and effective agency implementation of this provision. In many agencies, the tracking system is not automated. We have waited for days for agencies to return calls simply asking about the status of a FOIA request.
- Finally, the OPEN Government Act also added several new reporting requirements that demand agencies provide information about their timeliness in processing requests and administrative appeals, their grants of expedited processing and fee waivers, and their use of Exemption 3 statutes. Still, important gaps remain. Most importantly, none of the current statutory reporting requirements asks for data on the *quantity* of information released under FOIA's proactive disclosure requirements or in response to requests from external sources.

In sum, the OPEN Government Act appears to have reduced the “gaming” of FOIA requests by agencies and some of the costs of requesting information, but it has not significantly increased the speed or scale of FOIA processing in most agencies.

2. Executive Actions to Improve FOIA Compliance

On his first day in office, President Obama demanded faster FOIA processing: “Agencies should act promptly and in a spirit of cooperation” when processing FOIA requests.⁴ “Each agency must be fully accountable for its administration of the FOIA,” wrote Attorney General Eric Holder in a 2009 memo, which established new reporting requirements for FOIA processing.⁵ Both memos and the Open Government Directive of December 2009 instructed agencies to proactively disseminate information online to reduce the necessity and costs associated with reviewing and processing FOIA requests.⁶

The 2009 Open Government Directive also tasked agencies with significant backlogs of FOIA requests to reduce them by 10 percent annually. A 2010 memo directed agencies to “assess whether you are devoting adequate resources to responding to FOIA requests.”⁷

⁴ Barack Obama, “Freedom of Information Act,” memorandum, The White House, Jan. 21, 2009.

http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

⁵ Eric Holder, “The Freedom of Information Act (FOIA),” memorandum, Office of the Attorney General, March 19, 2009.

<http://www.justice.gov/ag/foia-memo-march2009.pdf>.

⁶ Peter R. Orszag, “Open Government Directive,” memorandum, Office of Management and Budget, Dec. 8, 2009.

<http://www.whitehouse.gov/open/documents/open-government-directive>.

⁷ Rahm Emanuel and Bob Bauer, “Freedom of Information Act,” memorandum, The White House, March 16, 2010.

<http://www.archives.gov/ogis/memos/foia-memo-03-16-10.pdf>.



Despite this prodding, progress in implementing these reforms has been uneven. Of the 11 cabinet agencies with more than 500 backlogged requests in fiscal year (FY) 2009, only three met the backlog reduction goal each year: the Departments of Health and Human Services, the Interior, and the Treasury. Three other agencies met the goal in two years out of three, while the remaining five agencies met their goal in only one year. At the end of FY 2012, nearly 60,000 backlogged requests remained in these 11 agencies; this represented a total cumulative reduction of less than nine percent, instead of the goal of 10 percent each year.⁸

Yet there has also been important progress in building a government-wide infrastructure for FOIA processing. Several agencies collaborated to develop FOIAOnline, an interactive website that launched in October 2012.⁹ This multi-agency FOIA portal, long a goal of open government campaigners, allows the public to submit and track FOIA requests, receive responses, and search others' requests through a single website. The platform is also expected to improve the efficiency of agency processing of requests.

3. Agencies' Performance in Processing FOIA Requests in 2012

Federal agencies responded to more than half a million FOIA requests last year, which presents plenty of opportunities for a citizen to disagree with an agency decision or to criticize its customer service in a particular case, but at a systemic level, the three primary indicators used to gauge effectiveness are: how many FOIA requests are processed in a timely way; how many requests for information are actually granted; and how many and what are the exemptions used to withhold information.

For the third year in a row, my staff and I analyzed the annual FOIA reports from 25 federal agencies. We assessed the performance of most cabinet-level departments and compared their performance in 2012 with similar data collected since FY 1998.¹⁰

Processing FOIA Requests

In FY 2012, the Obama administration processed more FOIA requests than in any year since 2004. Specifically, the 25 agencies processed more than 512,000 requests, an increase of more than 39,000, or eight percent, over the number processed in 2011. Although these agencies received over 11,000 more requests in 2012 than in 2011, agencies' processing more than kept pace and requests unprocessed at the end of the year declined by 12 percent.

The agency most responsible for the decrease in pending requests was the Department of Homeland Security (DHS). This agency receives the most FOIA requests – more than 38 percent of all requests received by the 25 agencies – and in 2012, DHS received 15,000 more requests than in 2011. But it managed to process 60,000 more requests in 2012 than it did the year before, resulting in a 30 percent decrease in unprocessed requests.

⁸ Data from agency annual FOIA reports. See <http://www.justice.gov/oip/reports.html>.

⁹ "National Archives Joins Federal Agencies to Launch New Freedom of Information Act (FOIA) Online System," press release, National Archives and Records Administration, Oct. 1, 2012. <http://www.archives.gov/press/press-releases/2013/nr13-01.html>.

¹⁰ FY 1998 was the first year of reporting under the statutory reporting requirements as revised by Sec. 10 of the Electronic Freedom of Information Act Amendments of 1996, P.L. 104-231.



Granting FOIA Requests

Nineteen of the 25 agencies denied fewer than 10 percent of FOIA requests in 2012. The Department of Homeland Security denied requests less than one percent of the time. Not surprisingly, the State Department and Central Intelligence Agency were most likely to deny FOIA requests. They provided information, in full or in part, for only 56 and 41 percent, respectively, of the requests processed in 2012.

Overall, the agencies provided information, in full or in part, in 94 percent of the FOIA requests processed in 2012. After a steady decline in the Bush years in the percentage of FOIA requests that released the full information requested, the percentage rebounded in 2010, then fell through 2012 to the lowest level on record – just under 41 percent.

Federal agencies varied in their willingness to release complete information. In 2012, 95 percent of the FOIA requests released by the Small Business Administration provided full and complete information, but less than five percent of the FOIA releases from the Equal Employment Opportunity Commission's (EEOC) did so.

Our analysis excluded requests that have been denied for reasons other than exemptions, such as information requested from the wrong agency or requests for which no records were found.

Use of Exemptions

Under FOIA, there are nine reasons why agencies can deny a request. In FY 2012, total use of exemptions rose by 26 percent from the previous year. Three exemptions accounted for almost three quarters of all exemptions: personal privacy, law enforcement personal privacy, and law enforcement techniques for prosecution. These three exemptions were each used approximately 100,000 times or more.

The use of personal privacy and law enforcement personal privacy exemptions rose 23 percent and 35 percent, respectively, in 2012 to their highest usage levels since 2002, when the use of both exemptions experienced extreme spikes likely related to greater information withholding in the aftermath of the 9/11 terrorist attacks.

The use of the internal rules exemption, once one of the most frequently used exemptions, was almost entirely eliminated (92 percent reduction) in the ongoing shift after the March 2011 U.S. Supreme Court ruling in *Milner v. Navy*, which restricted how broadly the government could apply the exemption.¹¹ However, a subsequent increase (43 percent) in the use of the interagency memos exemption suggests

¹¹ *Milner v. Navy*, 131 S.Ct. 1259 (2011), <http://www.supremecourt.gov/opinions/10pdf/09-1163.pdf>.



that some agencies may have expanded the use of this exemption to withhold records that had previously been claimed as internal rules.

The “statutory” exemption, which was the fastest growing exemption in 2011, declined in use almost 15 percent in 2012. This drop was primarily driven by a significant reduction in use at the State Department: its use fell 62 percent between 2011 and 2012. (In 2011, the State Department sharply increased its use of an exemption to withhold information relating to visa applications, which drove up the usage temporarily.) The overall decline in the use of exemption 3 would have been larger if not for the doubling of its use at DHS and a 30 percent increase at the Equal Employment Opportunity Commission.

Cost Effectiveness

For the first time, we also evaluated the amount spent by each agency to process FOIA requests. The 2012 cost data reveals enormous variation. The highest costs per processed request in 2012 among the 25 agencies examined were at the Nuclear Regulatory Commission (\$8,900) and Department of Energy (\$3,800). Several agencies were able to keep costs per request under \$200, including the Department of Homeland Security, which receives and processes more requests than any other agency.

The 10 agencies with the highest cost per request all processed fewer than 10,000 requests, so there may be some economies of scale in processing FOIA requests. However, four other agencies processed fewer than 10,000 requests and had significantly lower costs per request – the National Labor Relations Board, the Small Business Administration, the Consumer Product Safety Commission, and the National Science Foundation – so it is possible for agencies with smaller FOIA programs to achieve a lower cost per request.

4. Recommendations for Improving Agency Responses to FOIA

We believe that FOIA performance could be improved significantly with improved compliance efforts, a stronger ombudsman, expanded proactive disclosure, better technology, congressional oversight, and expanded reporting. It should be possible to further reduce backlogs while continuing to release high amounts of the information requested, and limiting claims of exemptions.

Improve Compliance Efforts

Despite the OPEN Government Act’s requirements and new FOIA policies from the Obama administration, agencies seem to feel little pressure to improve FOIA performance. The Justice Department should be more aggressive in overseeing compliance by agencies. To improve compliance, Congress should codify the Obama memo’s presumption of openness and the Holder memo’s foreseeable harm standard for withholding. Additionally, the Justice Department should follow the Holder memo’s standard and direct agencies to take all reasonable steps to avoid litigation, including resolving disputes without litigation. When cases do come to court, agency lawyers should argue positions consistent with the president and attorney general’s transparency principles.

Strengthen the Ombudsman



The Office of Government Information Services (OGIS), created under the OPEN Government Act, is already having a positive impact on FOIA processing, despite its limited budget and authority. OGIS has developed a set of best practices for agencies to follow in FOIA implementation, ranging across issues like communications, customer service, and regulations. The administration should explore ways to expand and strengthen OGIS to get the full benefit of an independent ombudsman on FOIA. The office's authority to research and investigate FOIA implementation issues should be expanded so OGIS can explore the more troubling trends – the increased use of partial releases of information requests, the expanded use of key exemptions, and the extent of withholding in partial grants. OGIS should also be tasked with more regularly providing recommendations for improving information collection and enforcement and the creation of new incentives for compliance.

Expand FOIA's Proactive Disclosure Requirements

In an ideal world, the public would be able to easily find government information without needing to file a FOIA request. A 21st century framework for public access must start with a presumption of openness in government. Agencies should explain their activities and operations to the public by routinely posting information online in timely, easy-to-find, and searchable formats.

FOIA already requires agencies to proactively make available certain information, such as final opinions, statements of policy, and votes in agency proceedings.¹² However, these requirements have not been updated since the E-FOIA Act of 1996.¹³ More robust proactive disclosure of information could save staff time and effort by reducing duplicative FOIA requests. The Obama administration made good progress during its first term with the development of Data.gov and new requirements to post information online, but more is needed.

Congress should establish agencies' affirmative obligation to proactively disclose information online, making the principle stated in President Obama's FOIA memo law. This would set openness as the norm and raise awareness of agencies' disclosure responsibilities.

In addition, Congress should require agencies to establish procedures to proactively identify information of public interest and post it online. This would provide an instrument for realizing agencies' affirmative obligation to disclose. A few agencies have already moved to incorporate such procedures in their FOIA regulations.¹⁴

Congress should expand the types of information that agencies are required to proactively disclose to better provide transparency and accountability for core agency functions. All agencies should be required to post key data and records to show how the agency is operating. Specifically, the minimum

¹² 5 USC 552(a)(1), (2), (5).

¹³ See Sec. 4 of the Electronic Freedom of Information Act Amendments of 1996, P.L. 104-231.

¹⁴ Interior Department at 43 CFR 2.67; Special Inspector General for Afghanistan Reconstruction at 5 CFR 9301.4. *Cf.* Justice Department, "Freedom of Information Act Regulations," proposed rule, March 21, 2011, 76 FR 15236 ("Each component is responsible for determining which of its records are required to be made publicly available, as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting such records.").



standards for disclosure should require agencies to proactively release communications with Congress, FOIA requests and released documents, visitor logs, employee directories, calendars of senior officials, and information about agency advisory panels.¹⁵

Congress should also require agencies to post documents that have been released by the agency in response to a FOIA request. Under E-FOIA, agencies are required to post released documents that the agency considers likely to be the subject of multiple requests.¹⁶ Expanding this requirement to *all* released records, with appropriate exemptions,¹⁷ would make the information more accessible and reduce duplicative requests.

Leverage Technology for Faster Processing

Congress should build on the tracking numbers assigned to each FOIA request required by the OPEN Government Act and mandate that agencies provide automated status information in order to minimize delays. Congress should also require every agency to receive requests and post responses online.

The new interagency portal, FOIAonline, should be improved to add additional functions and a better user interface. The administration and Congress should begin planning to scale up the website to handle government-wide participation.

Codify Reforms and Provide More Oversight

The administration made progress on stronger FOIA policies in its first term, but without legislative action, much of this progress could disappear when the next president assumes office. Congress should pursue legislation to secure FOIA improvements for the long term. A legislative FOIA update should begin by codifying the presumption of openness, withholding records only in the event of foreseeable harm, and an affirmative obligation to disclose.

In addition, Congress should actively exercise its independent oversight role and hold regular hearings on FOIA performance and policies. The goal of this oversight should be to discover best practices, improve on existing efforts, and develop FOIA legislation, not just uncover shortcomings. Congress should also address issues such as the allocation and effective use of resources to implement FOIA.

Expand Reporting Requirements

The expanded reporting requirements under the OPEN Government Act have helped shed new light on the state of agencies backlogs and their responsiveness to different types of requests. The new quarterly FOIA reporting requirements that DOJ has initiated should help identify problems within agency performance quicker, but more data is needed.

¹⁵ See “Minimum Standards of Open Government,” <http://www.foreffectvegov.org/files/info/open-gov-min-standards-final.pdf>.

¹⁶ 5 U.S.C. § 552(a)(2)(D).

¹⁷ *E.g.*, records released in response to “first-person requests” for records about the requester, such as those made jointly under FOIA and the Privacy Act (5 U.S.C. § 552a).



For instance, agencies should be reporting how much information is being withheld under partial releases. This could be as simple as a record or page count. Ideally, the data on withholding could be linked with the exemptions claimed so we could better understand how much withholding occurs under each exemption.

6. Conclusion

Like the Committee, the Center for Effective Government is committed to improving FOIA and ensuring that federal agencies provide timely and complete responses to the public's requests for information.

The OPEN Government Act and the Obama administration's new FOIA policies have had a positive impact. Agencies are steadily increasing the number and percentage of requests processed and bringing the number of pending and backlogged requests down.

However, the recent FOIA reforms and Obama administration's emphasis on open government seem to have encouraged a new surge in the use of FOIA requests, increasing the compliance challenge.

Unfortunately, agencies continue to use exemptions and partial granting of requests at high rates to withhold information from the public. In the last four years, we have seen the percentage of full information requests granted fall to its lowest levels. Agencies are increasingly using exemptions to limit the amount of information disclosed in response to FOIA requests. Full granting of requests is seen as more open and likely more cost effective. Data from the late 1990s indicates that it is possible to grant full information requests at much higher rates.

With improved compliance efforts, a stronger ombudsman, expanded proactive disclosure, better use of online technology, more congressional oversight, and expanded reporting, we believe improved compliance and better implementation of FOIA can occur.

I sincerely thank you for the opportunity to address this Committee. Chairman and members of the Committee, I look forward to your questions.



PREPARED STATEMENT OF KEVIN M. GOLDBERG, ESQ., FLETCHER, HEALD &
HILDRETH, PLC, ARLINGTON, VIRGINIA, ON BEHALF OF THE SUNSHINE IN GOVERN-
MENT INITIATIVE, AMERICAN SOCIETY OF NEWS EDITORS

Testimony of Kevin M. Goldberg

On behalf of

Sunshine in Government Initiative
American Society of News Editors

On

“We the People: Fulfilling the Promise of Open
Government Five Years After The OPEN Government
Act”

Before the

Committee on the Judiciary
United States Senate

March 13, 2013

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 both the Sunshine in Government Initiative ("SGI"), a coalition of nine media organizations dedicated to promoting policies that ensure government is accessible, accountable and open, and one of SGI's members, the American Society of News Editors ("ASNE"), for whom I serve as Legal Counsel.

With some 500 members, ASNE is an organization that includes editors of daily news entities throughout the Americas. Founded in 1922 as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, and leadership development. ASNE launched Sunshine Week in 2005 and continues to serve, with the Reporters Committee for Freedom of the Press, as a co-coordinator of this important effort that is generously funded by the John L and James S Knight Foundation and Bloomberg News.

FOIA and the OPEN Government Act: A Mixed Bag of Mainly Unrealized Expectations.

I am glad to be submitting this testimony because I feel a sense of responsibility that we are even discussing this topic today. As a participant in the conversations leading to passage of the Openness Promotes Effectiveness in our National (OPEN) Government Act, I clearly recall how optimistic we all felt almost *eight years ago* when we set out to reform the federal Freedom of Information Act (FOIA) for the 21st Century. Those 2007 amendments to FOIA noted Congress should remain an active participant in ensuring agencies comply with FOIA's requirements:

Congress should regularly review section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), in order to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the fundamental 'right to know'.

A year later our optimism grew when President Obama took office, proclaiming on January 21, 2009 that his Administration would be:

[C]ommitted to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.

Five years after the passage of those amendments, and despite the President's decree, there remains significant, often heated, discussion as to whether these aspirations have turned into reality.

The impact of the OPEN Government Act has been a very mixed bag. Some elements have worked; others have fallen completely flat. Some provisions ultimately didn't go far enough. It may not surprise you when I say that most of the original goals of the OPEN Government Act – and FOIA itself – simply haven't been realized. For the majority of FOIA requesters, FOIA processing appears unchanged; in the words of what I understand to be Senator Leahy's favorite Grateful Dead song, it remains a "Black Muddy River" that "simply rolls on forever."

Clearly the Administration has promoted openness through such efforts as the Justice Department's FOIA.gov site and the internationally-focused Open Government Partnership. The Administration has reinstituted the presumption of openness that Congress intended and so many of us see when reading the text of FOIA. The Administration, too, has set a clear goal for agencies to reduce backlogs.

At the same time, these strong efforts only go so far. Enforcing the law has always been challenging. FOIA remains a law with few teeth and little bite.

And too often agencies devote resources to backlogged requests at the expense of other aspects of their FOIA duties. This occurs even though there is exciting new technology that could reinvent both how agencies manage FOIA requests while also guaranteeing that agencies remain accountable; but they, like FOIA compliance generally, need active support from Congress and the White House to ensure their promise is realized.

While pessimism has overshadowed our earlier optimism, it has not purged it. That's why I'm glad to work with this Committee to start the process of getting us back on the right track – to finish what we started eight years ago.

Specifically, *the* starting point for the OPEN Government Act was Senator Cornyn's desire to put teeth into the federal FOIA by creating an enforcement mechanism like he enjoyed as the Attorney General of Texas. Though not everybody may agree with the oft-repeated mantra by his fellow Lone Star staters that "everything's better in Texas," we sure thought Senator Cornyn was onto something.

But the effort to insert a strong enforcement mechanism for FOIA was quickly diluted. As often occurs, once the door was opened, several other changes were ushered in. These provisions can generally be divided into "substantive disclosure provisions," which might be described as those intended to make the government adhere to the letter of the law, and "procedural processing provisions" which might be described as attempts to make the system work better.

The OPEN Government Act Created Tools to Give Requesters Some Leverage, but the Administration's Unwillingness to Commit to Transparency Shows Further Enforcement Mechanisms Are Needed.

On the substantive disclosure side, the strongest enforcement tool has always been the right to judicial review. But litigation is expensive for all litigants, especially individuals without corporate backing. That's why our ultimate hope for the OPEN Government Act could be boiled down to two goals: (1) the law would give requesters a way to avoid protracted litigation and (2) the law would compensate those who still must endure litigation.

Open Government Act Success Stories: OGIS and the "Buckhannon Fix".

We continue to believe that the new Office of Government Information Services (OGIS) created by the OPEN Government Act and housed in the National Archives and Records Administration has offered some initial positive assistance as a litigation avoidance tool. It has also held agencies accountable and changed agency mindsets regarding disclosure. If anything, this office needs more power and resources in order to perform an enforcement role. OGIS has helped avoid bigger disputes when agencies fail to communicate and resolve processing issues that arise. However, we would like agencies to be more receptive to mediation. This would free OGIS to tackle substantive disputes. It would also allow OGIS to offer interpretive guidance to agencies via advisory opinions and independent recommendations.

Another successful change made in 2007 – fixing what Senator Cornyn called the "Buckhannon Tax" – has emboldened the requester community to fight back against excessive government secrecy. This change broadened those instances in which a litigant could receive attorney's fees from the government when required to pursue an adverse FOIA decision in court.

As Senators Leahy and Cornyn are well aware, for several years requesters were discouraged from bringing suits against the government in part due to the 2002 Supreme Court decision (unrelated to FOIA but later extended to apply to FOIA litigation) in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*. The number of lawsuits declined, but not because cases were settled or requests were granted. Rather, potential litigants simply didn't sue. Buckhannon effectively created a loophole that allowed the government to avoid paying legal fees by offering some or all of the records in a settlement prior to the issuance of a final court order.

Since 2007, however, federal court litigation of FOIA issues has steadily increased. According to a study released by the Transactional Records Access Clearinghouse on December 20, 2012, there were 720 FOIA lawsuits filed in federal court in Fiscal Years 2011-2012, up from 562 filed in Fiscal Years 2007-2008, before the attorney's fee provisions of the OPEN Government Act took hold.

While one might say that increased litigation is a failure, we view this as clear evidence that requesters are emboldened to take advantage of the strongest enforcement mechanism within the law: the ability to turn to the independent federal judiciary to resolve the dispute. This fix made it harder for the government to play the waiting game, drawing out the process, stalling at every turn, and emotionally and financially frustrating the requester until the requester simply gave up.

One recent example further shows how important this change has been. When famed civil rights photographer Ernest Withers died in October 2007, a reporter from the Memphis Commercial Appeal requested records relating to Withers from the FBI. Just enough was

disclosed to confirm a tip that Withers had been an FBI informant during the civil rights era, but the agency refused to disclose an even larger amount of information. Last month the Commercial Appeal and the FBI reached a settlement that will result in disclosure of a significant amount of information about the FBI's surveillance of civil rights leaders. The Commercial Appeal will receive \$ 186,000 in attorney's fees as a result of the settlement. Given that the Commercial Appeal might have faced chasing those records down the rabbit hole without any prospect of financial reimbursement, it is unclear that the paper would have prosecuted its claim before 2007. In this instance, the "system" worked: the Administration took an ill-advised position regarding the disclosure of important records but the law held them accountable.

But this Administration continues, at times, to unrelentingly cling to information in ways that would appear to be directly contrary to the OPEN Government Act and its own leaders' stated goals in the area of government transparency. Perhaps it is not surprising that little has changed in the way of substantive disclosure when even the straightforward updates that Congress enacted have spread across federal agencies slowly. According to a study released on December 4, 2012 by the National Security Archive, only 43 of 99 Executive Branch agencies have revised their FOIA regulations to conform to the OPEN Government Act. Just to be clear on the math: that's less than 50 percent over five years later.

Continued Substantive Withholding and Reliance on (B)(3) Exemptions Remain a Problem.

But one would certainly expect more based on the President's own words from January 2009. One would definitely expect more given Attorney General Holder's March 19, 2009 "Memorandum for Heads of Executive Departments and Agencies," in which agencies were told

that FOIA should be administered with a clear presumption of disclosure. Attorney General Holder also told agencies that exemptions should only be applied if an agency reasonably foresees that disclosure would harm an interest protected by one of those exemptions or if disclosure is prohibited by law.

Yet, this memorandum has had little visible impact for many reporters and other citizens requesting information from the government. Agency annual reports reveal no clear evidence that agencies have changed their practices. FOIA's text already has the right balance between the presumption of openness and strong national security protections. But the Administration still may be encouraging secrecy by rejecting transparency in tough cases.

One example is the refusal to release photographs showing the treatment of detainees by U.S. troops at Abu Ghraib prison in Iraq (a decision that was overturned by the United States Court of Appeals for the Second Circuit). We can also point to the withholding of Office of Legal Counsel memoranda. But perhaps one of the more egregious examples is a recent change in position by the U.S. Marshals service with regard to the release of federal booking photos (more commonly known as "mug shots"), which runs contrary to long-standing and established precedent within the area covered by the United States Court of Appeals for the Sixth Circuit that such records cannot be withheld under FOIA. So despite the words on paper, the reality is that FOIA still lacks enforcement.

And where the Administration has affirmatively embraced transparency, the actions seem to come with an asterisk. For several years now, the Administration has pointed to the disclosure of the Secret Service's White House Visitor Logs as Exhibit A to support its claim of unprecedented transparency. However, it still fights against any legal basis within FOIA that

requires the Secret Service to release these names, thus reserving the right for it or future Administrations to change course at any time.

The continuing problem of withholding under the exemption found in 5 U.S.C. 552 (b)(3) (information exempted under other statutes) remains one of the biggest substantive impediments in the Act. Executive branch agencies or special interests attempt to pitch these exemptions to congressional committees. Committee members and staff who are focused on the substantive issues often show little to no concern for transparency and oversight on those issues. The Sunshine in Government Initiative has counted over 250 such statutes already in existence, preventing access to seemingly harmless from the location of historical caves to the losing bids filed to obtain federal contracts, all of which would be useful to the public in a variety of ways. Congress attempted to slow the proliferation of these exemptions in 2009 by requiring a specific citation to 5 U.S.C. 552 in order for the exemption to be effective. The idea behind this provision was to make it easier for parties wishing to oppose the proposed (b)(3) exemption to actually find it without sifting through every line of every bill introduced in Congress. However, this has been only moderately successful. We continue to find (b)(3)'s tucked into much larger bills, and we have been able to find them earlier in the legislative process and are therefore more effective in addressing transparency and the needs for confidentiality. But finding these bills still takes time and Congress has done a poor job of reviewing these proposals to ensure they make good policy.

Congress Should Build on the Administration's Successful Use of Technology to Improve on Still Sluggish Processing of Requests.

The procedural side also reveals a mixed bag, though this time the root causes and possible answers go beyond just enforcement issues. We see great potential for technological

advances to improve FOIA processing; we are simply not sure whether that potential will be fully realized.

The Attempt to Hold Agencies to the Twenty Day Response Time Did Not Work.

The major enforcement element from the OPEN Government Act – one which merely sought to compel faster FOIA processing – simply has not been successful. The requirement that agencies respond to requests within twenty days or lose the right to collect certain fees, has been riddled with exceptions and, frankly, wasn't all that strong to begin with. We have not seen any change in the agencies' practices as a result of this "enforcement mechanism." The twenty day deadline failed to cause agencies to respond quickly.

Let me give you an illustration of that failure. On March 7, 2011, Citizens for Responsibility and Ethics in Washington (CREW) requested records from the Federal Election Commission relating to correspondence between three FEC Commissioners and outside individuals and entities. It also sought calendars and agendas for these commissioners and all written *ex parte* communications sent to an FEC ethics officer. Within a day, the FEC gave a relatively standard response acknowledging receipt of the request and granting a waiver of search and review fees. It did not indicate whether it would grant or deny the request; it certainly did not provide the records themselves. On May 24, 2011, CREW filed a lawsuit in the United States District Court for the District of Columbia which ruled for the FEC, stating that "[i]n the event [an] agency intends to produce documents in response to [a] request, the agency need only (1) notify the requesting party within twenty days that the agency intends to comply; and (2) produce the documents 'promptly.'"

The case is now on appeal to the United States Court of Appeals for the District of Columbia Circuit. The FEC is one of the few agencies that represents itself in federal court in FOIA litigation but -- astonishingly -- the Department of Justice filed an amicus brief supporting the FEC's position that even a standard issue "we have your request" constitutes a response under FOIA. In other words, the official position of the Justice Department is that any communication with a requester satisfies the twenty day response requirement. This shows complete and utter disdain for the law and begs for Congressional clarification regarding the twenty day deadline.

A Better Answer Lies with Technology -- Especially That Already In Use by Some Agencies.

But enforcement or not, the issue has always been a lack of resources. While we understand that Congress is unlikely and probably unable to allocate more money to FOIA processing, we believe encouraging the Administration to focus -- and perhaps forcing it to improve -- on the area where the Administration has shown its greatest success will be the most efficient and effective way to move FOIA forward.

The Administration has not gotten enough credit on the procedural processing side for all it has done in terms of harnessing technology to make processing more efficient. The new records management edict recently approved by the Administration to transition to digital recordkeeping by 2020 will pay huge dividends for FOIA requesters as records are easier to search, duplicate and produce in a useable format. The Administration rightly recognizes that FOIA processing -- in fact, all records management and administration -- has been hindered by the incredible number of paper records which take up space and are difficult to maintain and produce. Efforts to address this can go further and Congress can assist the efforts in this areas.

Digitizing and better organizing the government's records is just one step. It is clear that the FOIA system itself is bogged down by the sheer number of requests and the sheer lack of resources available to process those requests. There were 631,424 requests processed across government in Fiscal Year 2011. But the FOIA backlog at the end of the fiscal year was 83,490 requests, which represents a slight increase from the prior fiscal year. The oldest pending request at the end of fiscal year 2011 was filed with the National Archives and Records Administration on September 28, 1992.

However, two FOIA-related technology projects provide the most direct way to unburden this system.

The first of the two, the Justice Department's FOIA.gov website, is intended to give the public a sense of how well or poorly federal agencies are keeping up with their FOIA responsibilities. FOIA.gov is a step in the right direction. The site provides good guidance for requesters starting out, links to federal agency FOIA offices and data on how well or poorly agencies are fulfilling their FOIA responsibilities. We urge the Department to continue to improve the analytic tools available through FOIA.gov and improve the quality of data from agencies.

But, as Justice Department officials told the Government Accountability Office last year, the Justice Department never intended FOIA.gov to be a tool for agencies to manage their FOIA requests. That's why a separate project to do exactly that merits full support.

The new "FOIA Online" system being created by the Environmental Protection Agency (EPA) with the Department of Commerce and National Archives and Records Administration promises to be a cost-efficient, build-once shared system for agencies to accept, process and

respond to FOIA requests with a release-for-one, release-for-all approach. It came online on October 1, 2012 and the number of participating agencies can be counted on two hands. It's a good start, but FOIA Online needs to rapidly expand. Unfortunately, its development has not attracted the support that its benefits would merit.

This is tragic. FOIA Online can help reduce backlogs in several ways. First, it will increase "proactive" disclosure of frequently requested records. Passed as part of the 1996 "Electronic Freedom of Information Act Amendments" or "E-FOIA," proactive disclosure of frequently requested records has been one of the most unfulfilled promises of the Freedom of Information Act. The law requires that agencies make available without request:

[C]opies of all records, regardless of form or format, which have been released to any person ...and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.

The idea behind this provision was to take pressure off the system by removing the low-hanging fruit. Every record that is voluntarily produced is one less record that must be requested, processed and delivered.

The lack of a clear definition for "frequently requested records" however, means agencies do not provide records in this manner. FOIA Online creates a mechanism to automate proactive disclosure. If a record has been requested and produced via FOIA Online, it will automatically become part of an online database of records that can be searched and obtained by anyone. Because these are documents that are already public, there should be no concern that any exemptions apply. They should be public for one and for all, immediately.

The process will also be streamlined for individual requesters filing new requests. The FOIA Online system builds on one of the requirements created in the OPEN Government Act:

that each agency create a tracking system to allow individuals to track their requests throughout the process. FOIA Online can automate this function.

The EPA's early data demonstrated that significant benefits are reaped from the system from the moment a request is filed. Whereas it takes approximately twenty minutes for the request to be manually entered into most of the proprietary software used by the various agencies today and another ten minutes to generate a letter acknowledging the request, FOIA Online automates this as well, generating an instantaneous confirmation.

Here are some fun facts to put that time savings into perspective. If one looks at the 651,254 requests filed in Fiscal Year 2012 and multiplies that number by 30 minutes per request, the result is a savings of 325,627 person-hours that could be better spent on substantive processing tasks. Another way to look at that second number is that it equates to 162.8 full-time employee equivalents – you'd effectively be creating 163 new FOIA officers by using this new system.

The system also makes it easier for intra-agency conversations to occur. One of the biggest delays in FOIA processing occurs when one component of an agency must check with another component to determine if records exist that are responsive to a particular request. This is also one of the areas in which the agencies get a free pass, as the twenty day response time is legally tolled when an agency component must check with other components in order to respond to a request.

The FOIA Online system provides multiple benefits here. One request can effectively be sent to each component at the same time. Furthermore, when components or agencies that must interact are using different processing software, the process slows down even more; use of FOIA

Online would allow components or agencies to “talk” to one another more efficiently. It will also circumvent agency attempts to delay response or even delivery of records by taking advantage of the tolling provisions, putting some teeth back into the law.

Creating, maintaining, growing and promoting FOIA Online will cost money, but it is money that agencies can divert from more expensive proprietary software licenses. The government can both avoid costs immediately as agencies join FOIA Online, and spend less money fulfilling its FOIA responsibilities.

Congressional Action Items.

Against this backdrop of moderate success, greater disappointment and vast potential, we offer a few modest proposals for Congressional action.

Changes to Enhance Substantive Disclosure.

On the substantive enforcement side, we hope that Congress can strengthen the Office of Government Information Services and do more to hold agencies directly accountable. Congress should find a way to allocate more money to OGIS. It should increase the office’s authority to hold other agencies accountable. It must be clear that OGIS has the power to speak independently.

However, given more independence and greater resources, OGIS itself must be held accountable to fulfill its mission. It is not enough to force agencies to answer the phone. It is not even enough to bring agencies to the table for occasional mediation. OGIS must be directed to exercise its advisory opinion power so as to build a record that requesters can use to themselves hold agencies accountable in the future. Ideally, these advisory opinions would have some value

should the requester still have to go to court. The existence of an advisory opinion from OGIS could create a rebuttable presumption that the records should be released; or it could ensure some measure of statutory damages or attorney fees if continued agency obstinacy forces litigation.

There must be some form of individual accountability at the agency level when the law is violated. Current enforcement provisions are conducive to excess secrecy: there is little to motivate the individual FOIA officers to fulfill the law's mandate of "disclosure, not secrecy".

Congress should examine whether it can force – or at the very least encourage – agencies to incorporate information disclosure into every federal government employee's overall performance review. These should be independent assessments that assist in identifying those employees who are doing things well and calling out those who do not. The Office of Information Policy's mandate is to "encourage" agency compliance with FOIA, and they do that. But FOIA needs more than encouragement. It needs enforcement and it needs accountability.

Codifying the standard for FOIA withholding laid out by Attorney General Holder in his March 2009 memorandum – that requests should only be disclosed if there is foreseeable harm that would result from their disclosure -- would also help here. We realize this will not suddenly snap agencies into compliance but it might make individuals within government recalibrate their "default setting" to the law's stated goal of "disclosure before secrecy". Plus there would be the added bonus of giving requesters who must go into court some leverage against the tendency of judges to defer to agency decisions to withhold information whenever an exemption applies.

Changes to Enhance Processing.

On the procedural side, Congress should throw the full force of its oversight and its power of the purse behind FOIA Online. This is the future of FOIA processing. Let FOIA

Online adapt as more agencies are integrated. Solutions built for one agency should be used by all agencies. FOIA Online recycles existing taxpayer technology investments. It saves money.

Congress should require agencies to switch to FOIA Online as their existing software contracts expire. Don't let agencies continue their current, wasteful ways. Compel them to do better. If it isn't ready to go all in on FOIA Online, Congress should increase the sample size of the present experiment to confirm that the service really is more efficient. It should specifically target those agencies that most frequently interact with the Department of Commerce, the EPA, the Federal Labor Relations Authority, the Merit Systems Protection Board, the National Archives and Records Administration and the Department of Treasury (the agencies currently using FOIA Online) to see whether inter-agency interaction is enhanced by this system. If, as we expect, these agencies see the benefit, Congress should immediately and fully back FOIA Online and demand that the Administration do the same.

By saving money on FOIA software licenses, diverting some of it to joining FOIA Online and giving the rest back to taxpayers, agencies will likely improve their implementation of FOIA. The Administration and Congress should fully back this effort.

The proposals we suggest are necessary to avoid finding ourselves back here five to six years from now, summing up an unchanged – or perhaps degraded – Freedom of Information Act with the lamentations of one of my personal icons, Bruce Springsteen: “somewhere along the line we slipped off track. Going one step up and two steps back”.

Mr. Chairman, we appreciate working with you to ensure transparency moves *two steps forward* for every single step back. Thank you for the opportunity to testify today before this Committee and I look forward to answering your questions.

PREPARED STATEMENT OF THOMAS BLANTON, DIRECTOR, NATIONAL SECURITY
ARCHIVE, GEORGE WASHINGTON UNIVERSITY, WASHINGTON, DC

Testimony of Thomas Blanton
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www.nsarchive.org

Before the Committee on the Judiciary
United States Senate

Hearing on “We the People: Fulfilling the Promise of Open Government
Five Years After the OPEN Government Act of 2007”

Wednesday, March 13, 2013

Mr. Chairman, the distinguished Senator from Iowa, members of the Committee: thank you very much for your invitation to testify today about open government and the Freedom of Information Act. My name is Tom Blanton and I am the director of the independent non-governmental National Security Archive, based at the George Washington University.

I have a simple headline for you today, based on the latest government-wide Freedom of Information audit that my organization completed in December and updated for publication on the Web today to mark this hearing and celebrate Sunshine Week. The headline is: **The Majority of Federal Agencies Are Just Not Obeying the OPEN Government Act of 2007.**

Our audit shows that **53 out of 100 federal agencies have not changed their Freedom of Information regulations** to meet the requirements Congress put into law with the OPEN Government Act of 2007. As you well know, that legislation prohibited agencies from charging processing fees if they missed the response deadlines, ordered agencies to cooperate with the new FOIA ombuds Office of Government Information Services, and required a number of other reforms and reporting changes.

I am sure it is no consolation to you, but the **agencies are ignoring the President's orders too, not just yours.** Our audit found an even larger number of agencies – **59 out of 100** – failed to update their FOIA regulations after the 2009 Obama-Holder guidance on Freedom of Information. Announced by the President on his first day in office and followed up by the Attorney General in less than 60 days with a new

memorandum intended to overturn restrictive Bush administration practices, that guidance declared a “presumption of disclosure,” encouraged discretionary releases even when the information might technically be covered by an exemption, required a “foreseeable harm” test for withholding, ordered proactive online publication of records of greatest interest to the public, and told agencies to remove “unnecessary bureaucratic hurdles.”

I should point out, however, that the **Holder memo did not order agencies to revise their regulations to comply with the new standards** – a profound failure, as we now know – and neither did the memo order a review of all pending FOIA litigation to apply the new standards, settle cases and disclose records. In this sense, the Holder memo failed even to match the requirements that President Clinton’s Attorney General, Janet Reno, put into her FOIA memorandum in 1993. Instead, Attorney General Holder left a hole big enough for a Hummer to drive through, leaving it up to the career Justice Department litigators to apply the new standards in their cases “if practicable”!

This failure may explain why my organization and the other FOIA litigators I know cannot trace a single case since 2009 in which the Justice Department has changed its litigation posture and refused to defend an agency withholding decision. In fact, you need to know that the **Justice Department is directly litigating against the OPEN Government Act**. Justice has filed an amicus brief in the *CREW v. FEC* (Citizens for Responsibility and Ethics in Washington versus Federal Election Commission) case, taking the position that a agency’s postcard acknowledgement of a FOIA request is enough to qualify as a “determination” under the law. If the courts agree, then the OPEN Government Act’s provision that agencies cannot charge fees if they respond in an untimely fashion turns into a dead letter. This was one of the few actual enforcement procedures in the law, and Justice wants to scuttle it. We requesters will get our postcards but not the government’s documents, and agencies will keep threatening us with fees to make us go away. Not what you intended.

But let me explain our audit, and that headline of non-compliance. My organization, founded in 1985 by journalists and historians who tried to use the FOIA systematically to open national security-related records, has filed more than 50,000 requests of our own over the years. We’ve won the

Peabody, George Polk, and Emmy awards – among others – for our work “piercing self-serving veils of government secrecy” (the Polk citation in April 2000). Our staff and fellows have produced more than 70 books in print, including Pulitzer and Gelber Prize winners, more than 400 electronic books, and a series of massive indexed digital collections of documents for university libraries. Most pertinent to today’s hearing, we have carried out a **dozen government-wide audits of Freedom of Information performance since 2002** – using FOIA requests to test FOIA responsiveness.

For example, we tested whether Attorney General John Ashcroft had succeeded in his efforts to close down FOIA requests with that 2001 memo telling agencies he’d defend them against FOIA claims almost no matter what. We were surprised by what we found. Yes, there were a handful (15%) of agencies that dramatically restricted their FOIA process, but a majority (52%) just passed the Ashcroft memo around to their components without any implementation; and one wrote us back to ask, “What Ashcroft memo? We never got that one. Could you send us a copy?”

Then we saw agency reports to Congress claiming their FOIA backlogs were only about a year old, when we ourselves had requests pending much longer at those very agencies, so we asked for and published the oldest FOIA requests in the government, the ten oldest at each agency – some of them had been hanging for 20 years! Our 2006 audit tested whether agencies were complying with Congress’s intent in the 1996 E-FOIA amendments, and found only a quarter of the agencies met all the criteria for online openness even ten years after Congress passed that law.

Our audits of agency FOIA performance after Obama’s inauguration in 2009 already showed **dismaying inertia in the bureaucracy** to change any of their FOIA processes, whether guidance or training or procedures or regulations; but we gave points for any process reforms that agencies could show us. Even then, only 13 of 90-plus agencies after the first Obama year could show us any FOIA change. That headline woke up the White House, precipitated a “nudge” memo to agency heads in March 2010 signed by the White House Chief of Staff and Counsel, and some real impact.

By the end of the second Obama year, upwards of 49 agencies could show us some FOIA process change, which we reported in our 2011 audit as “Glass Half Full.” Of course, this left a majority of agencies lagging, and one of our key audit supporters, Knight Foundation senior adviser Eric

Newton, commented that at this rate, it would be the end of Obama's first term before the agencies did what he ordered on Day One. As it turns out, the story got worse.

In 2011 the Justice Department proposed new FOIA regulations for its own processing that would have let officials lie to the public about existence of records, and throw up fee barriers to new-media reporters and students, among **many other regressive provisions**. Justice put the rule changes on hold only after the public interest community and some key members of Congress blasted them (the National Security Archive gave the Department our infamous "Rosemary Award" for worst FOIA performance in 2011, named after President Nixon's secretary who erased Watergate tapes).

That Justice Department gambit on regulations made us take a closer look. During sessions of the professional society of government FOIA officers (where we actively participate to give the requester viewpoint), we heard senior agency officials discuss the controversy and point to regulations as the key to the FOIA process. Those senior officials told government FOIA trainees they needed to look to their **agency's own regulations as the most important guidance** on FOIA, not to the President's policy directives. So we started looking at those regulations.

We investigated. We scoured agency Web sites, where by law agencies are required to post their rules, only to find dozens AWOL. We dredged the Code of Federal Regulations, only to find enormous variations even in the formats that agencies used to propose and promulgate their FOIA rules. We interviewed key government officials, only to find that **no one inside government had a complete listing or registry of all the agency FOIA regulations**, even the Office of Government Information Services set up by the 2007 FOIA amendments to be the mediator between agencies and the public.

We filed FOIA requests with every agency that had failed to post its FOIA regulations online. The work took us months, much longer than we originally expected – and I want to give credit here to Nate Jones and Lauren Harper, my ace auditors, for all their hard labor here – but by December 2012 we had created **the first-ever complete listing and posting of all agency FOIA rules**, presented chronologically so that the key legal, statutory and policy changes could be included as the metric against which agencies could be judged.

We even found that one agency, the Federal Trade Commission, had never updated its original 1975 regulations, despite multiple statutory and policy changes in the years since then. Another agency, the U.S. Trade Development Agency, did not have regulations of any kind, much less on FOIA, so even their “no records” response was highly informative.

The color-coded charts in green and red that resulted from our FOIA regulations audit provide excruciating detail on **official inertia over decades** – not just since 2007. These charts present a testament to the resistance of the bureaucracy to transparency, an **indictment of the Justice Department and the Office of Management and Budget for lack of leadership**, and a signal of opportunity right now for real change.

We have updated the numbers that we released on December 4, 2012 – sparking headlines in the *Washington Post* (“Agencies lag on transparency, report says”) and in dozens of other publications ranging from the *Houston Chronicle* to *The Atlantic*. We have added the new Consumer Financial Protection Bureau to the agency list, making the total 100. Three other agencies have updated their FOIA regulations since we published that audit, moving the numbers on the Obama-Holder guidance down from 62 (out of 99) to the 59 (out of 100) we are reporting today. Similarly, on the number of agencies that failed to upgrade their regulations after the OPEN Government Act of 2007, that number went from 56 to 53.

But **new regulations are not necessarily good regulations** (as the Justice Department example itself shows). Of the three agencies that have acted since December, only the Department of Interior followed Congress’s direction and included references to the Office of Government Information Services and its mediation services in the new regulations. Sadly, none of the three agencies (Interior, Federal Communications Commission and Federal Housing Finance Agency) included the “foreseeable harm” standard in their new regulations.

The conclusion we draw from our overall audit and today’s revised results is pretty straightforward. Outdated agency regulations represent a **tremendous opportunity for Congress – and for the Obama administration – to order real change in agency behavior** on Freedom of Information requests. Either Congress or the President could order agencies to update their regulations by a date certain. I was pleased to see yesterday that bipartisan

legislation introduced in the House by the chair and the ranking member of the Oversight and Reform Committee does just that.

But the updated regulations need to follow a “best practices” template, not the sorry example provided by the Justice Department in its unfortunate attempt at new regulations in 2011. At the Archive, we have benefited from advice from a wide range of groups and present and former officials to draft the following **“top ten” suggestions for “best practice” FOIA regulations**, and we would welcome your input and that of all other FOIA advocates to make this list more focused and effective. We believe new FOIA regulations should:

- * Mandate that FOIA officers embrace direct communications with requesters.
- * Require agencies to receive requests by e-mail, post all FOIA responses and released FOIA documents online, in addition to proactively posting documents of likely interest to the public on their website before they are requested via FOIA.
- * Direct agencies to update their FOIA processing software so that it can generate all FOIA data (including responses and documents) in a non-proprietary machine-readable format that can be posted to any online repository, including the government-sponsored FOIAonline portal.
- * Encourage agencies to join the FOIAonline portal to improve FOIA efficiency and save money on expensive processing systems.
- * Include specific language on the availability and importance of mediating FOIA disputes with the Office of Government Information Services to avoid the animosity and costs of litigation.
- * Ameliorate "consultation" and "referral" black holes (where requests are shipped off to other agencies for seemingly countless reviews and re-reviews) by requiring monthly reminders to the receiving agency, and monthly updates to the requester.
- * End the practice of using fees to discourage requests (collected FOIA fees make up just one percent of all FOIA costs, but a large percentage of all FOIA hassles).
- * Follow Attorney General Holder's instruction to reduce dramatically the use of discretionary withholdings, such as the b(5) "deliberative process" exemption.
- * Change the "tolling" provisions that keep requests in purgatory until (unnecessary) fee issues are resolved, and enforce the provision of the 2007 OPEN Government Act that prevents agencies from collecting fees if they

miss their 20-day deadline.

* Provide adequate deadlines for appeal rights (the Federal Reserve System allows requesters just ten days to appeal FOIA denials – including postal transit time).

These recommendations are certainly not the direction the Justice Department is going on FOIA, either with its own regulations or its litigation posture or its implementation role. In fact, that disjuncture ranks as one of the core themes of my testimony today. There is a **profound cognitive dissonance between the rosy view provided by the Justice Department on how FOIA is working, and the actual experience of requesters.**

For example, Justice claims a government-wide FOIA "release rate" of over 90%. This is misleading, to say the least, because it only includes final processed requests. This statistic leaves out 9 of the 11 reasons that Justice turns down requests so they never reach final processing, such as claiming "no records," "fee-related reasons," and referrals to another agency. Counting those, the actual release rate across the government is a more pedestrian (and realistic) number between 50 and 60%.

The point is important because citing the high number disguises some real problems with FOIA. In our experience here at the Archive, the vast **majority of "no records" responses are errors by the agency** involved, and require communications between the requester and the agency (and sometimes OGIS and sometimes litigation) to work out. For example, The FBI until a few years ago (when we gave them the Rosemary Award) had a deliberate "no records" response in two-thirds of their requests, because they only searched a single index that they knew did not include most of the FBI's records. But the FBI strategy worked to make many requesters give up and go away.

The Justice Department also brags about how many cases are being "closed" from the FOIA backlogs. The real question is, how many of those "closed" cases are actually generating substantive responses? In our experience here at the Archive, many **"closed" requests do not actually amount to "responded" requests.** For example, the Treasury Department reduced its backlog by sending letters to requesters after a year or two of waiting, asking whether we were still interested and giving us 10 days to respond or else

they'd close the request. No substantive search or response at all. When we said yes, we still want the request, another year would go by and we'd get another query, are you still interested?

You can see the same dynamics at work when Bloomberg News asks for the travel records of top government officials, and after six months, more than half of President Obama's Cabinet members have not even responded to the FOIA request – including Attorney General Holder. These are **documents that agencies should be posting online** within some short period after the travel takes place, to ensure some basic accountability, along with top officials' calendars and visitor logs, to name just a few. I should note that there are detailed recommendations produced by my colleagues in groups like the Center for Effective Government and the OpenTheGovernment.org coalition, on the subject of proactive disclosure, about the necessity of building routine disclosure into agency procedures. And I would join other witnesses in saying the obvious, that systematic online posting of government information both proactively and in response to requests, is the only way out of the resource trap of FOIA processing – the zero-sum characteristic of the system in which each new request slows down the previous ones.

I've been speaking here today primarily from the viewpoint of an experienced FOIA requester, advocate, and auditor. But this hearing also should remind us to step back and take a long view of our Freedom of Information Act. When it passed in 1966, it did not work. Agencies figured out ways to frustrate requesters, and even members of Congress could not pry loose the information they needed to do their jobs. Not until the amendments of 1974, passed by Congress over President Ford's veto, did the law really begin to work, changing the power relationships in government information and fueling an information industry. Back then, **our law was a model to the world, but today, the world has passed us by.**

Last year, a network of international experts coordinated by advocacy groups based in Canada and Spain analyzed each of the 90 access-to-information laws around the world. According to that Global RTI Rating, our U.S. law now ranks as only the 39th best in the world, as measured against a consensus set of international statutory norms. Right up front I should say that ranking understates the actual transparency levels of the U.S.

government and the actual output of our FOIA law – my own organization publishes thousands of documents every year that would still be secret today without the FOIA. But we FOIA advocates should recognize that international norms are passing our statute by, and look at that Rating as yet another signaling mechanism for changes that we could and should pursue.

Some examples: The U.S. law only scored 14 out of possible 30 points on the “appeals” part of the RTI Rating because we have **no independent appeals body like the ones in Mexico or Chile or Hungary or every state in India**. We have an underfunded, understaffed Office of Government Information Services that – important as it is – only has mediation and policy recommendation authority, not release authority. As a FOIA advocate who works internationally, I tell foreigners not to look at our law as a model, but to Mexico’s, because their information institute has really driven implementation of the law, and has some real power.

Our U.S. law only scored 16 out of a possible 30 points on the international norms for exemptions, because most of ours **lack a harm test** before the government can withhold information. Unlike most of the Latin American access laws, ours lacks a **public interest override** for human rights abuse information. Unlike Japan’s law, ours lacks a public interest override for public health information.

The point is that there is some **serious statutory work that needs to be done** to improve the Freedom of Information Act, and there’s a perfectly reasonable starting point for this, in the form of the administration’s current declaratory policy for FOIA. That policy emphasizes the “presumption of disclosure,” demands “foreseeable harm” before withholding, encourages proactive disclosure, seeks to eliminate “bureaucratic hurdles” among which I would give the whole fee process the top billing, so to speak. If Congress simply put those declaratory policies into the statute, that would be real progress.

Finally, if there’s one lesson I’ve learned from nearly 30 years of watchdogging the federal government on freedom of information issues, it is that paying attention matters. Congress has a lot on its plate these days, but **the kind of attention and focus that this hearing represents is truly indispensable** to making the government more transparent and accountable. So I applaud your initiative today, and I appreciate your invitation to testify.

QUESTIONS

QUESTIONS SUBMITTED BY SENATOR PATRICK LEAHY FOR MELANIE PUSTAY

**Written Questions of Chairman Patrick Leahy, to
Melanie Pustay, Director, Office of Information Policy, Department of Justice
Senate Judiciary Committee Hearing on "We the People: Fulfilling the
Promise of Open Government Five Years After the OPEN Government Act"**

OPEN Government Act Reforms – Tracking of Requests

1. A key reform in the OPEN Government Act requires all Federal agencies to establish a tracking system and a telephone or Internet hotline to help FOIA requesters obtain information about the status of their requests. **How many agencies have FOIA hotlines and a FOIA request tracking system in place?**

Fee Waivers

2. The Freedom of Information Act requires that Federal agencies waive or reduce the search and copying fees for FOIA requests if the disclosure significantly contributes to the public's understanding of government operations and is not primarily in the commercial interest of the requester. The OPEN Government Act also makes clear that independent journalists -- including online bloggers -- are eligible to receive fee waivers. Last year the National Security Archive cited the Department's practice of denying fee waiver requests from students and online bloggers as one of the reasons for awarding the Department its "Rosemary Award" for worst open government performance.
 - (a) **Is the Department of Justice routinely denying fee waiver requests from online journalists and students?**
 - (b) **What guidance is the Department providing to federal agencies on granting fee waivers?**

FOIA Portal

3. The National Archives and Records Administration, the Environmental Protection Agency, the Department of Commerce, the Department of the Treasury, the Federal Labor Relations Authority, and the Merit Systems Protection Board are all participating in a multi-agency FOIA portal that automates and stores FOIA requests and responses in electronic format. The online FOIA portal is making it easier for FOIA requesters to submit requests to the participating agencies. But, unfortunately, only a few Federal agencies are participating in the online FOIA portal program. **Does the Department support expanding the FOIA portal concept government-wide?**

National Security Information /OLC Memos

4. During the March 13 FOIA oversight hearing, I called on the Department of Justice to be more transparent about the legal opinions issued by its Office of Legal Counsel (“OLC”), including legal opinions related to national security. According to a study by the Sunlight Foundation, the Office of Legal Counsel is withholding more than a third (39%) of the legal opinions that this office promulgated between 1998 and 2012. **Please provide the Committee with a list of all OLC memoranda that are currently in force.**

Mug Shot Photographs

5. In December, the Marshals Service announced that it would no longer release these photographs under FOIA, a policy change that appears to be in direct conflict with the Sixth Circuit Court of Appeal’s decision in *Detroit Free Press v. Department of Justice*. In that case, the court held that booking photographs must be disclosed under FOIA when the subject of the photograph has already appeared in open court in connection with an ongoing criminal proceeding. **What is the Department’s policy regarding the disclosure of booking photographs under FOIA?**

QUESTIONS SUBMITTED BY SENATOR PATRICK LEAHY FOR MIRIAM NISBET

**Written Questions of Chairman Patrick Leahy,
To Miriam Nisbet, Director,
Director, Office of Government Information Services
Senate Judiciary Committee Hearing on “We the People:
Fulfilling the Promise of Open Government Five Years After the OPEN Government Act”**

FOIA Portal

I commend the National Archives and Records Administration, the Environmental Protection Agency, the Department of Commerce, the Department of the Treasury, the Federal Labor Relations Authority, and the Merit Systems Protection Board for participating in a multi-agency FOIA portal that automates and stores FOIA requests and responses in electronic format. The online FOIA portal is making it easier for FOIA requesters to submit requests to the participating agencies. But, unfortunately, only a few federal agencies are participating in the online FOIA portal. **Do you recommend expanding the FOIA portal concept government-wide?**

QUESTIONS SUBMITTED BY SENATOR CHARLES GRASSLEY FOR MIRIAM NISBET

**“We the People: Fulfilling the Promise of Open Government
Five Years After the OPEN Government Act”
Questions for the Record submitted by Senator Charles E. Grassley
March 20, 2013**

Questions for Director Nisbet, Office of Government Information Services

1. It is troubling that a majority of federal agencies have not updated their FOIA regulations since Congress passed the OPEN Government Act in 2007. Your office works with agencies in several ways to assist with their FOIA compliance.
 - a. Given the failure of so many agencies to update their regulations, what, if anything, has your office done to assist agencies in updating their FOIA regulations?
 - b. Why is it important for agencies to update their FOIA regulations?
2. At the hearing I expressed my concern with the continued rise in FOIA litigation. Last year, the Transaction Records Access Clearinghouse at Syracuse University released a study finding that there were more FOIA lawsuits during the Obama Administration’s first term as compared to the second George W. Bush term. Your office’s 2013 FOIA policy recommendation includes an expansion of the dispute resolution training program. I encourage this, because when Congress passed the OPEN Government Act we sought to limit costly litigation. Given this, how will the OGIS implement its recommendation to expand the use of dispute resolution in agencies, as an alternative to litigation?
3. Five years after the OPEN Government Act became law and sought to reform the fee assessment process problems remain. At the hearing I cited a recent letter I sent to the Attorney General, along with Senator Vitter and Congressman Issa, questioning whether the Environmental Protection Agency tried to assess a requestor with what could possibly be an illegal fee assessment, among other things. With these concerns in mind, has the OGIS considered examining the problem of fees and fee waivers as a way to improve FOIA administration?

QUESTIONS SUBMITTED BY SENATOR AMY KLOBUCHAR FOR SEAN MOULTON

QUESTIONS FOR THE RECORD

Senate Judiciary Committee

“We the People: Fulfilling the Promise of Open Government
Five Years After The OPEN Government Act”

March 13, 2013

Senator Amy Klobuchar

Questions for Sean Moulton

1. In addition to the improvements that have been made since the OPEN Government Act’s enactment, what two or three other reforms do you believe are most important to fully and effectively promoting open access to government?
2. Generally speaking, how successful have federal agencies been in adhering to statutory requirements for agency action on FOIA requests?

QUESTIONS SUBMITTED BY SENATOR AMY KLOBUCHAR FOR KEVIN GOLDBERG

QUESTIONS FOR THE RECORD

Senate Judiciary Committee

“We the People: Fulfilling the Promise of Open Government

Five Years After The OPEN Government Act”

March 13, 2013

Senator Amy Klobuchar

Questions for Kevin Goldberg

1. In addition to the improvements that have been made since the OPEN Government Act’s enactment, what two or three other reforms do you believe are most important to fully and effectively promoting open access to government?
2. Generally speaking, how successful have federal agencies been in adhering to statutory requirements for agency action on FOIA requests?

ANSWERS

RESPONSES OF MELANIE PUSTAY TO QUESTIONS SUBMITTED BY SENATORS LEAHY AND GRASSLEY



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 19, 2014

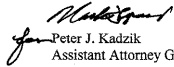
The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Melanie Pustay, Director of the Office of Information Policy, before the Committee on March 13, 2013, at a hearing entitled: "We the People: Fulfilling the Promise of Open Government Five Years After the OPEN Government Act."

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

Sincerely,


Peter J. Kadzik
Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Minority Member

**Written Questions of Chairman Patrick Leahy, to
Melanie Pustay, Director, Office of Information Policy, Department of Justice
Senate Judiciary Committee Hearing on "We the People: Fulfilling the
Promise of Open Government Five Years After the OPEN Government Act"**

OPEN Government Act Reforms – Tracking of Requests

1. A key reform in the OPEN Government Act requires all Federal agencies to establish a tracking system and a telephone or Internet hotline to help FOIA requesters obtain information about the status of their requests. **How many agencies have FOIA hotlines and a FOIA request tracking system in place?**

Response:

On November 18, 2008, the Office of Information Policy (OIP) issued detailed guidance (copy enclosed) specifically addressing the Open Government Act provision requiring agencies to assign and provide to requesters "an individualized tracking number for each request received that will take longer than ten days to process." 5 U.S.C. §552(a)(7)(A) (2006 & Supp. IV 2010). OIP's guidance also addressed the requirement that agencies "establish a telephone line or Internet service that provides information about the status of a request ... using the assigned tracking number." 5 U.S.C. §552(a)(7)(B).

In accordance with the Freedom of Information Act (FOIA) statute and OIP's guidance, every agency should have a system in place to assign individualized tracking numbers to those requests that take longer than ten days to process. Additionally, every agency should have established a telephone line and/or Internet service that allows requesters to obtain status information by using the tracking number assigned to their request.

All ninety-nine agencies subject to the FOIA have established points of contacts that FOIA requesters can use to ask any questions they might have related to their FOIA requests, including the status of the requests. To facilitate the public's ability to contact agency FOIA personnel, OIP has collected detailed contact information for all ninety-nine agencies subject to the FOIA and we then make that information available in a central location on the Department's government-wide FOIA website, FOIA.gov. Each agency is separately listed on the website. When a member of the public clicks on the agency, they can then use a drop-down menu to select a specific component of the agency. Once they do, they are provided the telephone numbers designated by each agency for their FOIA Requester Service Centers and FOIA Public Liaisons, which are places where requesters can call to obtain status information about their requests. Additionally, many agencies can also receive and respond to requests for status updates

through designated e-mail accounts. Some agencies have also established online tracking features that allow users to track the status of their requests through an online portal. The Department also provides live links to those online portals and designated email accounts. This information, as well as other important contact information, such as the names of the agencies' Chief FOIA Officers, is made centrally available to the public by OIP through the [FOIA Contacts](#) page of [FOIA.gov](#).

Fee Waivers

2. The Freedom of Information Act requires that Federal agencies waive or reduce the search and copying fees for FOIA requests if the disclosure significantly contributes to the public's understanding of government operations and is not primarily in the commercial interest of the requester. The OPEN Government Act also makes clear that independent journalists -- including online bloggers -- are eligible to receive fee waivers. Last year the National Security Archive cited the Department's practice of denying fee waiver requests from students and online bloggers as one of the reasons for awarding the Department its "Rosemary Award" for worst open government performance.

(a) Is the Department of Justice routinely denying fee waiver requests from online journalists and students?

Response:

No. The Department evaluates all fee waiver requests on a case-by-case basis using the statutory standard established for such requests. The FOIA provides for a waiver or reduction of fees "if disclosure of the information [requested] is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). In determining whether any requester, including a student or online journalist, has satisfied this statutory standard, the Department evaluates six distinct factors, which are detailed in guidance issued by the Department and which is applicable to all agencies. OIP's guidance entitled "New Fee Waiver Policy Guidance," can be accessed directly from OIP's website at http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm. These six factors are also incorporated into the Department's FOIA regulations. See 28 C.F.R. § 16.11(k). These factors have been referenced and applied by the Court of Appeals for the District of Columbia Circuit. See *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (opining that for "[f]or a request to be in the 'public interest,' four criteria must be satisfied," citing DOJ's multifactor fee waiver regulation).

The first four factors concern the statutory requirement that the disclosure of the requested information be "in the public interest because it is likely to contribute

significantly to public understanding of the operations or activities of the government." These factors include:

1. The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government";
2. The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to the understanding of government operations or activities;
3. The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding"; and
4. The significance of the contribution to public understanding: Whether disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

The final two factors concern the statutory requirement that disclosure of the requested information be "not primarily in the commercial interest of the requester." These factors include:

5. The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
6. The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, so that disclosure is "primarily in the commercial interest of the requester."

The Department makes fee waiver determinations for any requester by applying these six fee waiver factors.

(b) What guidance is the Department providing to federal agencies on granting fee waivers?

Response:

The Department provides agencies with the same guidance that it uses itself, i.e., the Department's published guidance on fee waivers, which establishes six factors to be applied in making fee waiver determinations. As mentioned above, the Department's fee waiver guidance can be accessed directly from OIP's website at http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm. This guidance, and the relevant caselaw on FOIA fee waivers, are referenced and summarized in the Fees and Fee Waivers chapter of the *Department of Justice Guide to the Freedom of Information Act*. This chapter of the *Guide* can be accessed directly from OIP's website at <http://www.justice.gov/oip/foia-guide13/fees-fee waivers.pdf>. The *Guide*

is a comprehensive legal treatise on the FOIA that is published by the Justice Department and is widely relied on by agencies in their administration of the law.

In addition to our written policy guidance on fee waivers, OIP has a designated office expert on the topic who is available to provide individualized guidance and assistance to agency personnel in making fee waiver decisions. OIP also provides extensive training on FOIA fees and fee waivers to thousands of agency personnel across the government each year. In our comprehensive two-day training course held multiple times throughout the year entitled "The Freedom of Information Act for Attorneys and Access Professionals," OIP provides instruction from expert attorneys and FOIA professionals on a wide range of issues, including fee waivers. To bring greater exposure to the topic, OIP has moved what had long been a workshop on fees and fee waivers to a plenary session so that all the students would have the benefit of instruction in this important area. Training on FOIA fees and fee waivers is also part of OIP's "Introduction to the FOIA" course and "Advanced Freedom of Information Act Seminar." Additionally, on May 17, 2011, OIP conducted the first ever FOIA Fee Summit, in which OIP experts provided in-depth instruction to agency personnel on the FOIA's fee and fee waiver provisions. OIP held a second Fee Summit on August 8, 2013. A copy of OIP's training slides for instructing FOIA personnel on fee and fee waivers are available to both the public and agency personnel on the "Training" section of OIP's website at <http://www.justice.gov/oip/training-materials.html>.

FOIA Portal

3. The National Archives and Records Administration, the Environmental Protection Agency, the Department of Commerce, the Department of the Treasury, the Federal Labor Relations Authority, and the Merit Systems Protection Board are all participating in a multi-agency FOIA portal that automates and stores FOIA requests and responses in electronic format. The online FOIA portal is making it easier for FOIA requesters to submit requests to the participating agencies. But, unfortunately, only a few Federal agencies are participating in the online FOIA portal program. **Does the Department support expanding the FOIA portal concept government-wide?**

Response:

The Department supports the concept of a government-wide FOIA portal. We have begun working as part of a task force to determine the best way to establish a service that will allow the public to make a request to any federal agency from a single website and that will include additional tools to improve the customer experience.

We support the efforts of all agencies as they look for ways to improve their administration of the FOIA. To this end, we have provided guidance to the developers of FOIAonline, conducted extensive testing and review of the site's reporting capabilities, and are currently serving on its Governance Board. The agencies using FOIAonline as of March 26, 2014 include those cited above with the exception of the Department of the Treasury, which recently completed the construction of its own system that has been underway for several years and now collects requests via its own web-form. There have also been additions to the agencies using FOIAonline, which now includes U.S. Customs and Border Protection, Department of the Navy, and Pension Benefit Guaranty Corporation. A number of other agencies are also in the process of implementing the FOIAonline service. Based on current activities, a non-mandated approach that allows agencies the ability to determine what solution(s) best address their organization's needs appears to be working.

We are mindful that there are ninety-nine agencies subject to the FOIA across the government with vastly different FOIA demands and needs. There are many variables that these agencies will need to consider before adopting a new FOIA system, foremost of which will be the assurance that the new system will be more effective than the current technology being utilized. In addition, many agencies have cyber security requirements that make it impossible to participate in a multi-agency FOIA portal without increasing costs to those agencies that have lower security requirements. Specifically, not all agencies are on the same network, making it cost prohibitive to connect a multi-agency system to different Internet networks to connect with internal agency systems. Some agencies maintain sensitive, privacy-protected information that must be safeguarded, such as confidential tax return information, and a multi-agency portal must be able to accommodate those privacy interests. Moreover, over one hundred offices across the government already offer the ability to make requests via online request forms and many also offer online tracking. Further, some agencies have developed sophisticated document management systems that include other aspects of FOIA processing, such as features that help with the most time consuming parts of the FOIA process. These other systems represent additional options to be considered by agencies when evaluating the type of tracking system that will best serve their individual agency's particular needs.

As you can see, there are many factors that will need to be considered in establishing a consolidated online FOIA service. We will be employing an interdisciplinary approach to this initiative to seek innovative ways to carry it out. As part of the Administration's Second Open Government National Action Plan, we are serving on a task force that will review current practices, seek public input, and determine the best way to implement such a consolidated FOIA service.

National Security Information /OLC Memos

4. During the March 13 FOIA oversight hearing, I called on the Department of Justice to be more transparent about the legal opinions issued by its Office of Legal Counsel ("OLC"), including legal opinions related to national security. According to a study by the Sunlight Foundation, the Office of Legal Counsel is withholding more than a third (39%) of the legal opinions that this office promulgated between 1998 and 2012. **Please provide the Committee with a list of all OLC memoranda that are currently in force.**

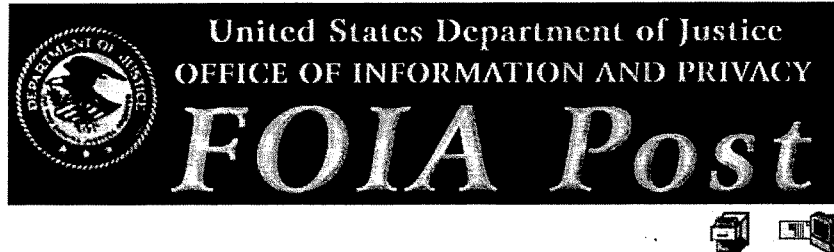
Response: As I indicated at the March 13, 2013 hearing, this request is beyond the purview of my Office, which is focused on the implementation of the FOIA.

Mug Shot Photographs

5. In December, the Marshals Service announced that it would no longer release these photographs under FOIA, a policy change that appears to be in direct conflict with the Sixth Circuit Court of Appeal's decision in *Detroit Free Press v. Department of Justice*. In that case, the court held that booking photographs must be disclosed under FOIA when the subject of the photograph has already appeared in open court in connection with an ongoing criminal proceeding. **What is the Department's policy regarding the disclosure of booking photographs under FOIA?**

Response:

The Department has long believed that the routine release of booking photographs causes an unwarranted invasion of personal privacy. While the Court of Appeals for the Sixth Circuit held that such photographs should be released in certain circumstances, two other Courts of Appeals, specifically the Courts of Appeals for the Tenth, World Pub'g Co. v. DOJ, 672 F.3d 825 (10th Cir. 2012), and Eleventh, Karantalis v. DOJ, 635 F.3d 497 (11th Cir. 2011) (per curiam), cert denied, 132 S. Ct. 1141 (2012), Circuits have since ruled that the photographs should be protected given the privacy interests at stake and the lack of a public interest in disclosure. This issue is currently the subject of litigation within the Sixth Circuit, which we hope will give that circuit an opportunity to re-examine its prior holding. See Detroit Free Press Inc. v. DOJ, No. 13-12939 (E.D. Mich. filed July 6, 2013).



**OIP GUIDANCE:
ASSIGNING TRACKING NUMBERS AND
PROVIDING
STATUS INFORMATION FOR REQUESTS**

Section 7 of the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, imposes two new requirements on agencies connected with tracking the status of FOIA requests. First, Section 7 requires agencies to assign an individualized tracking number to requests that will take longer than ten days to process. Second, it requires agencies to establish a telephone line or Internet service that requesters can use to inquire about the status of their requests using the request's assigned tracking number. This Section is yet another provision of the OPEN Government Act that builds on procedures established by Executive Order 13,392. Like Section 6 of the OPEN Government Act, Section 7 will take effect on December 31, 2008, and will apply to FOIA requests "filed on or after that effective date." § 7(b).

Assigning a Tracking Number

The first requirement imposed by Section 7 requires agencies to establish a system whereby any request that will take more than ten days to process is assigned a tracking number. That number, in turn, must be provided to the requester. The simplest way to provide the number, and the method already employed by many agencies, is to include the tracking number in any acknowledgment letter sent to the requester upon receipt of the request.

As a threshold matter, for those requests where an agency can quickly make a response, i.e., can respond within ten days or less, there is no requirement that a tracking number be assigned. In those circumstances, the agency can simply respond to the requester by providing the responsive records and need not be slowed down by the necessity of assigning a tracking number to the request. Nevertheless even though an individualized tracking number is not required to be

utilized for such requests, agencies should be certain to keep track of all requests they handle so that all the information required to be included in agency Annual FOIA Reports is compiled and reported.

Question: What if an agency can respond to a request within ten days, but it still would prefer to assign the request a tracking number. Is that permissible?

Answer: Yes. Agencies are free to assign all requests tracking numbers if they find it efficient to do so. As mentioned above, because agencies need to keep track of all FOIA requests they receive and process so that they may be included in the agency Annual FOIA Report, the use of a tracking number for all requests can be beneficial.

Question: What if an agency does not use tracking numbers, but instead keeps track of requests by some other method, such as by the name of the requester. Is that still allowed?

Answer: No. Section 7 mandates that agencies assign "an individualized tracking number for each request that will take longer than ten days to process." § 7(a). Thus, if the request will take longer than ten days to process, agencies will now be required to assign tracking numbers to each such request and to provide that number to the requester.

Providing a Telephone Line or Internet Service

Section 7 also requires agencies to establish a phone number or an Internet site that will provide information to the requester "using the assigned tracking number." § 7(a). The information required to be provided to the requester includes the date the request was received by the agency and an estimated date by which the agency will finish the processing of the request. These requirements are similar to those imposed by Executive Order 13,392, which addressed the need to provide requesters with information about the status of their request.

Agencies have two alternatives for providing this information to requesters. They can establish an Internet service which can be accessed by the requester using his or her tracking number. Alternatively, agencies can establish a telephone line where requesters can contact the agency by phone to inquire about the status of their request. Agencies have already established FOIA Requester Service Centers for the purpose of providing status information to requesters and that system can easily continue to be used. Whatever method is utilized to provide status information concerning a given request, Section 7 mandates that both the date of receipt and the estimated date of completion for the request be provided to the requester.

Question: What if the agency does not know when the processing of the request will be completed, because, for example, it is still searching for records and does not know yet how many will be found to be responsive, or whether there will be a need to conduct consultations. How does the agency respond?

Answer: Section 7 requires agencies to provide an "estimated date" by which processing will be complete. Agencies should make a reasonable judgment as to when they believe processing will be complete, based upon what remains to be done in a given case and in light of the agency's experience with processing similar requests. The important point is that the agency and the requester are able to communicate easily regarding the status of a request.

Conclusion

Beginning with requests received on December 31, 2008, the OPEN Government Act will require agencies to assign individual tracking numbers to requests that will take more than ten days to process. It will also require agencies to establish a telephone line or Internet service that requesters can use to access information about the status of their requests. These provisions are designed to ensure that FOIA requesters can readily learn from the agency when they can expect a response to their FOIA request. *(posted 11/18/2008)*

Go to: **Main FOIA Post Page**

**U.S. Department of Justice**

Office of Information Policy

Telephone: (202) 514-3642

March 21, 2013

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

Dear Mr. Chairman:

We would like to follow up on the Committee's hearing on March 13, 2013, regarding review of the OPEN Government Act of 2007, with particular reference to our testimony about the many ways in which agencies are implementing the Attorney General's Freedom of Information Act (FOIA) Guidelines and increasing transparency. Unfortunately, it appears that certain statements made during the second panel have caused confusion about the meaning of my testimony. While there were multiple statements with which we respectfully, but strongly, disagree, there were two topics in particular that we believe should be addressed promptly in order to complete the hearing record. The fact that a subsequent witness questioned the veracity of my testimony and, by implication, the Department's bona fides renders this supplemental statement especially important. Accordingly, we request that you include this letter in the Committee's hearing record.

Agency Release Rates

As I testified, we are very proud that both the Department and the government overall have maintained a high release rate, releasing records in over 93% of requests processed for disclosure during Fiscal Year 2012. Indeed, during the past four years, the government has maintained a release rate of over 92%. We believe that this sustained high release rate, coupled with significant reductions in backlogs and improvements in average processing times, illustrates the achievements agencies have made over the past four years in implementing the Attorney General's FOIA Guidelines. Because the validity of this calculation and the truthfulness of our reliance on it were questioned during testimony by the second panel, we want to clarify for the record precisely how a "release rate" is calculated.

The Department began calculating release rates in 2009. We did so by comparing the number of requests resulting in disclosure to the total number of requests in which

agencies either released or denied access to records based on exemptions. These figures are readily available in agency Annual FOIA Reports, where the Department requires agencies to publicly report, inter alia, 1) the number of requests resulting in a full grant of the requested information, 2) the number resulting in a partial grant, and 3) the number resulting in a full denial of the requested information based on the FOIA's exemptions. These figures are included in the first three columns of the chart located in Section V.(B)(1) of agencies' Annual FOIA Reports.

To determine the release rate for Fiscal Year 2012, the Department added the numbers of requests where agencies reported that they released records in whole or in part, which totaled 434,258 requests. We then compared that number to the total number of requests that were processed for disclosure, which is the sum of the requests where records were released in full, released in part, and withheld in full. That number totaled 464,985. By comparing these two figures, the Department determined that in Fiscal Year 2012, agencies released information, either in full or in part, in response to over 93% of requests processed for exemption applicability. The release rate is straightforward: among the total number of FOIA requests which were processed for disclosure, it is the percentage of requests where a release was actually made, either in whole or in part.

This calculation does not include those requests that are closed for procedural reasons, unconnected to the application of FOIA exemptions. The Department requires agencies to publicly report on those procedural reasons in the same section of the Annual FOIA Report where they include dispositions based on exemptions. There are eight procedural reasons listed, and agencies are given a column to include any additional procedural reasons. These procedural dispositions do not involve the application of exemptions, and include, for example requests in which no records were located, requests that were withdrawn, and requests where all the records located originated with another agency and thus were properly referred to that agency for processing. Because the agencies never make decisions about whether to release or withhold records in these nine disposition categories, it would make little sense to include them in calculating the release rate.

These procedural dispositions, just like the dispositions based on exemptions, are clearly set forth in each agency's Annual FOIA Report. Those reports in turn are posted by agencies and are available at a single site on the Department's website under the Office of Information Policy (OIP), as well as on FOIA.gov. The full summary of these Annual FOIA Reports, which OIP issues every year, also discusses all of these statistics. These summaries can be accessed from the Department's website under OIP at <http://www.justice.gov/oip/reports.html>. Under these circumstances, we were surprised as well as concerned that the testimony of another hearing witness ignored the government's published information about both the calculation of release rates and the nine categories of procedural dispositions that are distinctly and separately reported.

FOIA Regulations

Our hearing testimony also indicated that neither the OPEN Government Act nor the Attorney General's FOIA Guidelines require implementing regulations. This statement was challenged by a witness on the second panel without any legal citation or authority supporting the claim that implementing regulations were required. A review of the OPEN Government Act reveals that Congress did not find it necessary to require agencies to modify their regulations in order to implement the statute, and we are aware of no judicial opinion to the contrary.

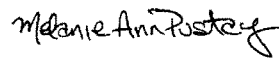
We are very concerned by the confusion that may result from the false notion that agencies are not in compliance with the law or the Administration's policies merely because they have not issued new FOIA regulations since the enactment of the OPEN Government Act or issuance of the President's FOIA Memoranda and Attorney General's FOIA Guidelines. As with any regulation, agencies issue FOIA regulations to facilitate procedural implementation of statutory provisions that are not fully detailed in the statute, such as where and how to make FOIA requests and what fees are involved in such requests. In some areas of the statute, Congress clearly directed agencies to issue implementing regulations, but for other provisions, Congress left it up to the agencies to determine if additional regulations are necessary. As indicated in my testimony, we believe that agencies should regularly review their FOIA regulations to assess whether they require updating, and we encourage this practice. However, as I testified, neither the provisions of the OPEN Government Act nor the Attorney General's FOIA Guidelines require implementing regulations.

Regardless of whether an agency has issued new FOIA regulations, the amendments to the law became effective either immediately upon the enactment of the OPEN Government Act, or, for certain provisions, one year following enactment. Similarly, the provisions of the President's FOIA Memorandum and the Attorney General's FOIA Guidelines became effective upon issuance. For this reason, OIP's focus, as for any change in FOIA law and policy, has been to ensure that agencies fully understand their FOIA obligations and promptly change their practices as needed. Accordingly, OIP issued detailed guidance explaining each of the provisions of the OPEN Government Act and the key areas addressed in the Attorney General's Guidelines. We revised the *Department of Justice Guide to the Freedom of Information Act* to fully incorporate these changes and have provided comprehensive training on this material to thousands of FOIA professionals across the government. Many agencies, such as the Department of Defense, have also distributed their own directives to ensure compliance with both the OPEN Government Act and the Attorney General's Guidelines. See DOD FOIA Directive 5400.07, available at <http://www.dtic.mil/whs/directives/corres/pdf/540007p.pdf>, and DOD memoranda dated December 3, 2008 and July 20, 2010, available at http://www.dod.mil/pubs/foi/dfoipo/foia_guidance.html.

We hope that this information is helpful. The suggestion by any witness that the Department's testimony before this or any Committee is untruthful is a very serious

concern and we appreciate the opportunity to clarify the record of this hearing. We also hope that the foregoing information resolves any outstanding questions and uncertainties about the Department's dedication to fulfilling the letter and spirit of the OPEN Government Act. Please do not hesitate to contact the Department if we may provide additional assistance in this matter.

Sincerely,



Melanie Ann Pustay
Director
Office of Information Policy

cc:

The Honorable Charles E. Grassley
Ranking Member

RESPONSES OF MIRIAM NISBET TO QUESTIONS SUBMITTED BY SENATORS LEAHY AND GRASSLEY

Written Questions of Chairman Patrick Leahy,
To Miriam Nisbet, Director,
Director, Office of Government Information Services
Senate Judiciary Committee Hearing on "We the People:
Fulfilling the Promise of Open Government Five Years After the OPEN Government Act"

FOIA Portal

I commend the National Archives and Records Administration, the Environmental Protection Agency, the Department of Commerce, the Department of the Treasury, the Federal Labor Relations Authority, and the Merit Systems Protection Board for participating in a multi-agency FOIA portal that automates and stores FOIA requests and responses in electronic format. The online FOIA portal is making it easier for FOIA requesters to submit requests to the participating agencies. But, unfortunately, only a few federal agencies are participating in the online FOIA portal. **Do you recommend expanding the FOIA portal concept government-wide?**

Answer

The partners to *FOIAonline* constructed the system with the expectation that it could be a cost-effective solution for a much larger number of agencies than the initial partners. At the same time, bringing additional agencies onboard would need to be done in stages to accommodate each agency's needs and to ensure that agency users are fully trained. There are 100 departments and agencies (with sub-agencies) subject to the FOIA which all have very different FOIA needs and resources. As with any effort to integrate a single technology across agencies, there are a number of challenges such as integration with their existing IT, meeting current information security requirements, and having an agreed upon governance and management structures, among other issues. The current agency partners will continue to monitor and evaluate *FOIAonline*'s potential to serve additional agencies, as well as to improve its capabilities for making the FOIA process easier for both its governmental and public users.

OGIS Best Practices for Agency FOIA Regulations

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INFORMATION SERVICES

- Let the Freedom of Information Act (FOIA) itself be your guide. Many of the public comments OGIS submits pertaining to FOIA regulations relate directly to requirements of the FOIA amendments of 2007 (and sometimes the e-FOIA amendments of 1996). For example, OGIS frequently recommends that agencies specifically address the new requirements in 5 U.S.C. § 552 (b) that agencies shall (1) indicate, if technically feasible, the precise amount of information deleted and the exemption under which the deletion is made at the place in the record where the deletion is made, and (2) indicate the exemption under which a deletion is made on the released portion of the record, unless including that indication would harm an interest protected by the exemption.
- Tackle any updates or complete revisions of FOIA regulations as a team. Bring attorneys, FOIA processors, records managers and IT professionals to the table. Each will bring a different perspective — plus, a well-organized team can lighten the load for a single person on a tedious but important task.
- Don't forget plain writing. Although the Plain Writing Act of 2010 does not cover regulations, two executive Orders emphasize the need for plain language: E.O. 12866 says that regulations must be “simple and easy to understand, with the goal of minimizing uncertainty and litigation...” and E.O. 12988 says that each agency must specify its effect “in plain language.” Remember, FOIA regulations endure and are there for both agency FOIA professionals and the public.
- Many requesters confuse FOIA and Privacy Act requests. Consider clarifying in plain language that FOIA applies to requests for any agency records. By comparison, the Privacy Act of 1974 permits only a U.S. citizen or an individual lawfully admitted for permanent residence to seek access to only his or her own “record,” and only if that record is retrieved by that individual requester's name or personal identifier. As a matter of policy, agencies process requests in accordance with both laws, which provides the greatest degree of lawful access.



Best Practices for Agency FOIA Regulations

- If your regulation includes a glossary, consider adding several terms, including requester category and fee waiver. OGIS has found that even experienced requesters can still confuse those terms. We also suggest including in a glossary FOIA Public Liaison, the definition of which is at 5 U.S.C. § 552 (f). We suggest including it to reflect the position's statutorily enhanced role in the 2007 FOIA amendments. Check out the OGIS Library at <https://ogis.archives.gov/the-ogis-library.htm> for definitions of FOIA terms.
- With regard to referrals, OGIS suggests that the referring agency notify requesters of the name of the agency to which the request has been referred and the part of the request that has been referred. OGIS suggests that the agency also provide the requester with a point of contact within the receiving agency to whom the requester can speak regarding the referral. This is an OGIS recommendation (<http://blogs.archives.gov/foiablog/2011/05/11/ogistance-what%20%80%99s-up-with-referrals-these-days/>) and reflects guidance issued by the Department of Justice's Office of Information Policy (<http://www.justice.gov/oip/foiapist/2011foiapist42.html>).
- OGIS suggests that agencies provide requesters with an estimated amount of fees, including a breakdown of fees for search, review or duplication. This is an OGIS recommendation (<http://blogs.archives.gov/foiablog/2012/12/13/dont-shut-your-eyes-to-the-importance-of-foia-regulations/>) and reflects guidance issued by the Department of Justice's Office of Information Policy (<http://www.justice.gov/oip/foiapist/2013foiapist06.html>).
- OGIS suggests agencies include in their FOIA regulations information about the preservation of records and records management. OGIS has observed that good records management is essential to the FOIA administrative process. One Cabinet-level department FOIA regulation spells out that each component must preserve all correspondence pertaining to the requests that it receives as well as copies of all requested records, until disposition or destruction is authorized by the General Records Schedules of the National Archives and Records Administration (NARA) or other NARA-approved

OGIS Best Practices for Agency FOIA Regulations

OFFICE of GOVERNMENT
INFORMATION SERVICES

agency records schedule. The regulation also states that materials that are identified as responsive to a FOIA request will not be disposed of or destroyed while the request or a related appeal or lawsuit is pending. This policy applies even if the records would otherwise be authorized for disposition or destruction under the agency's General Records Schedule or other NARA-approved records schedule.

- OGIS suggests agencies include in their regulations that they will work with the Office of Government Information Services (OGIS) to resolve disputes between FOIA requesters and the agency in accordance with FOIA and any agency policy memoranda. Also, that the agency, in its final appeal determinations, will alert FOIA requesters to OGIS's services, as recommended by the Department of Justice's Office of Information Policy (<http://www.justice.gov/oip/foiapist/2010foiapist21.htm>). In addition, OGIS recommends that agencies add language, in accordance with the 2007 amendments to FOIA (5 U.S.C. § 552 (h)), that direct agencies and their components to work with OGIS to resolve disputes between FOIA requesters and the agency as a non-exclusive alternative to litigation.

Specifically, OGIS suggests the following language:

A response to an appeal will advise the requester that the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. A requester may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road—OGIS
College Park, MD 20740
ogis.nara.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

- At an impasse on updating your FOIA regulations? Need feedback? Call OGIS. We're here to help.

**“We the People: Fulfilling the Promise of Open Government
Five Years After the OPEN Government Act”
Questions for the Record submitted by Senator Charles E. Grassley
March 20, 2013**

Questions for Director Nisbet, Office of Government Information Services

1. It is troubling that a majority of federal agencies have not updated their FOIA regulations since Congress passed the OPEN Government Act in 2007. Your office works with agencies in several ways to assist with their FOIA compliance.
 - a. Given the failure of so many agencies to update their regulations, what, if anything, has your office done to assist agencies in updating their FOIA regulations?

OGIS, through our parent agency, the National Archives and Records Administration (NARA), submits public comments in response to notices of proposed FOIA-related rulemaking published in the *Federal Register*. Since the fall of 2010, OGIS has commented on:

*** Fourteen proposed department and agency FOIA regulations;**

*** Proposed FOIA/Privacy Act request forms used by U.S. Citizenship and Immigration Services and the Federal Investigative Service of the Office of Personnel Management; and**

*** In conjunction with NARA’s Information Security Oversight Office (ISOO), a Department of Defense Federal Acquisition Regulation about safeguarding unclassified information.**

OGIS also has worked with two Cabinet-level departments and an agency to review their FOIA regulations before the *Federal Register* comment period; several other agencies, including NARA, are updating their FOIA regulations and have asked OGIS to review them before *Federal Register* publication.

We are pleased that agencies have incorporated many of OGIS’s suggestions.

In some cases, where pre-publication OGIS review was not possible (for instance, where the public comment period pre-dated OGIS’s regulation review program, or even OGIS’s existence), we have sent letters to agency FOIA Public Liaisons and Chief FOIA Officers commenting on the regulations and alerting them to OGIS’s services.

OGIS review of agency FOIA regulations sparked the creation of our “Best Practices for Agency FOIA Regulations” handout, a copy of which is attached to this response and which also is posted on OGIS’s website:

<https://ogis.archives.gov/for-federal-agencies/agency-best-practices/agency-best-practices--agency-foia-regulations.htm>. It is important to note that some of the best practices are ones we observed at particular agencies during our review of FOIA regulations.

Why is it important for agencies to update their FOIA regulations?

The Open Government Act did not require implementing regulations for any of its provisions. Two preexisting provisions of the FOIA state that agencies “shall” have regulations:

- Specifying a fee schedule that conforms to OMB guidelines and limiting those fees to reasonable standard charges, 5 U.S.C. § 552(a)(4)(A)(i)–(ii); and
- Providing for expedited processing, 5 U.S.C. § 552(a)(6)(E)(i);

The FOIA also says that agencies “may” have regulations:

- Providing for the aggregation of certain requests by the same requester or group of requesters acting together, 5 U.S.C. § 552(a)(6)(B)(iv); and
- Designating agency components to receive requests, 5 U.S.C. § 552(a)(6)(A)(i); and
- Providing for multi-track processing and an opportunity for requesters who do not qualify for the fastest track an opportunity to limit the scope of the request in order to qualify for faster processing, 5 U.S.C. § 552(a)(6)(D)(i)–(ii).

Agencies should update these provisions of their regulations as they find necessary for the proper administration of their FOIA caseloads. Although FOIA itself does not mandate that regulations address other parts of the FOIA administrative process, OGIS believes that updating FOIA regulations can be helpful in having an effective, efficient, and fair agency FOIA process.

FOIA professionals use agency regulations as one of several resources when processing FOIA requests. Updating regulations also allows agencies to continue to refine their unique FOIA administrative processes. There is no single “right”

way to administer the FOIA. Indeed, the 100 departments and agencies that are subject to the Act display a diversity of sizes and of areas of expertise, missions, and records-management programs. Thus, updating regulations allows agencies to tailor their FOIA implementation to their own structures and functions, while at the same time complying with the statute.

OGIS has written about the importance of FOIA regulations on our blog (<http://blogs.archives.gov/foiablog/2012/12/13/dont-shut-your-eyes-to-the-importance-of-foia-regulations/>) and has discussed the importance of FOIA regulations in public presentations and seminars, including those of the American Society of Access Professionals (ASAP) in December 2012 and the Collaboration on Government Secrecy at American University Washington College of Law in January 2013.

2. At the hearing I expressed my concern with the continued rise in FOIA litigation. Last year, the Transaction Records Access Clearinghouse at Syracuse University released a study finding that there were more FOIA lawsuits during the Obama Administration's first term as compared to the second George W. Bush term. Your office's 2013 FOIA policy recommendation includes an expansion of the dispute resolution training program. I encourage this, because when Congress passed the OPEN Government Act we sought to limit costly litigation. Given this, how will the OGIS implement its recommendation to expand the use of dispute resolution in agencies, as an alternative to litigation?

OGIS recognizes the importance of developing a dispute-resolution mindset within agencies – not only to augment the efforts of our limited staff, but to resolve conflicts as early as possible. OGIS also appreciates the value of harnessing existing agency resources, particularly agency dispute-resolution professionals, who operate under the Administrative Dispute Resolution Act of 1996 (ADRA), 5 U.S.C. §§ 571-584, and agency FOIA professionals, chiefly FOIA Public Liaisons, which FOIA itself says shall assist in resolving disputes between the agency and the requester, 5 U.S.C. § 552(a)(6)(B)(ii) and 5 U.S.C. § 552(l). To this end, OGIS is expanding its dispute resolution skills training program, which it has offered to agency FOIA professionals for more than three years. (The Department of Justice's Office of Information Policy regularly participates in training personnel at these inter-agency offerings.) The expansion will emphasize tailored, agency-specific training programs for both FOIA professionals and agency dispute-resolution professionals.

Our goals in bringing together agency dispute-resolution professionals with FOIA professionals for these new day-long trainings will be to:

- start a conversation between agency professionals in these two fields—FOIA and dispute resolution—who may never have worked together;
- familiarize each type of professional with the others' roles and processes;
- identify issues and areas that are ripe for partnership.

OGIS also is available to work with an agency's Chief FOIA Officer along with the agency dispute resolution programs, the general counsel's office, and FOIA offices to develop an approach that would allow an agency to benefit from the expertise of its own employees to prevent and resolve disputes. OGIS already has initiated discussions with several agencies to explore how we might collaborate in this way. Our goal is to conserve administrative resources, improve customer service, and short-circuit costly and time-consuming litigation.

3. Five years after the OPEN Government Act became law and sought to reform the fee assessment process problems remain. At the hearing I cited a recent letter I sent to the Attorney General, along with Senator Vitter and Congressman Issa, questioning whether the Environmental Protection Agency tried to assess a requestor with what could possibly be an illegal fee assessment, among other things. With these concerns in mind, has the OGIS considered examining the problem of fees and fee waivers as a way to improve FOIA administration?

As you are aware, fees are addressed in the Office of Management and Budget fee guidance published in 1987 and in the amendments to FOIA in 1996 and 2007. During this time, agencies have moved toward digitizing records, have established online FOIA Libraries, and may now be providing records through *FOIAonline*. Through our work providing mediation services, we have observed that fees and fee waivers issues can be a point of contention.

Resources permitting, OGIS plans to work with stakeholders from both inside and outside government to review the myriad issues surrounding FOIA fees. We anticipate this will take some time, and may or may not result in recommendations for legislative or executive action, but we hope to come away with consensus support for some options for improvement.



Best Practices for Agency FOIA Regulations

- Let the Freedom of Information Act (FOIA) itself be your guide. Many of the public comments OGIS submits pertaining to FOIA regulations relate directly to requirements of the FOIA amendments of 2007 (and sometimes the e-FOIA amendments of 1996). For example, OGIS frequently recommends that agencies specifically address the new requirements in 5 U.S.C. § 552 (b) that agencies shall (1) indicate, if technically feasible, the precise amount of information deleted and the exemption under which the deletion is made at the place in the record where the deletion is made, and (2) indicate the exemption under which a deletion is made on the released portion of the record, unless including that indication would harm an interest protected by the exemption.
- Tackle any updates or complete revisions of FOIA regulations as a team. Bring attorneys, FOIA processors, records managers and IT professionals to the table. Each will bring a different perspective — plus, a well-organized team can lighten the load for a single person on a tedious but important task.
- Don't forget plain writing. Although the Plain Writing Act of 2010 does not cover regulations, two executive Orders emphasize the need for plain language: E.O. 12866 says that regulations must be “simple and easy to understand, with the goal of minimizing uncertainty and litigation...” and E.O. 12988 says that each agency must specify its effect “in plain language.” Remember, FOIA regulations endure and are there for both agency FOIA professionals and the public.
- Many requesters confuse FOIA and Privacy Act requests. Consider clarifying in plain language that FOIA applies to requests for any agency records. By comparison, the Privacy Act of 1974 permits only a U.S. citizen or an individual lawfully admitted for permanent residence to seek access to only his or her own “record,” and only if that record is retrieved by that individual requester’s name or personal identifier. As a matter of policy, agencies process requests in accordance with both laws, which provides the greatest degree of lawful access.



Best Practices for Agency FOIA Regulations

- If your regulation includes a glossary, consider adding several terms, including requester category and fee waiver. OGIS has found that even experienced requesters can still confuse those terms. We also suggest including in a glossary FOIA Public Liaison, the definition of which is at 5 U.S.C. § 552 (f). We suggest including it to reflect the position's statutorily enhanced role in the 2007 FOIA amendments. Check out the OGIS Library at <https://ogis.archives.gov/the-ogis-library.htm> for definitions of FOIA terms.
- With regard to referrals, OGIS suggests that the referring agency notify requesters of the name of the agency to which the request has been referred and the part of the request that has been referred. OGIS suggests that the agency also provide the requester with a point of contact within the receiving agency to whom the requester can speak regarding the referral. This is an OGIS recommendation (<http://blogs.archives.gov/foiablog/2011/05/11/ogistance-what%e2%80%99s-up-with-referrals-these-days/>) and reflects guidance issued by the Department of Justice's Office of Information Policy (<http://www.justice.gov/oip/foiapist/2011foiapist42.html>).
- OGIS suggests that agencies provide requesters with an estimated amount of fees, including a breakdown of fees for search, review or duplication. This is an OGIS recommendation (<http://blogs.archives.gov/foiablog/2012/12/13/dont-shut-your-eyes-to-the-importance-of-foia-regulations/>) and reflects guidance issued by the Department of Justice's Office of Information Policy (<http://www.justice.gov/oip/foiapist/2013foiapist06.html>).
- OGIS suggests agencies include in their FOIA regulations information about the preservation of records and records management. OGIS has observed that good records management is essential to the FOIA administrative process. One Cabinet-level department FOIA regulation spells out that each component must preserve all correspondence pertaining to the requests that it receives as well as copies of all requested records, until disposition or destruction is authorized by the General Records Schedules of the National Archives and Records Administration (NARA) or other NARA-approved



Best Practices for Agency FOIA Regulations

agency records schedule. The regulation also states that materials that are identified as responsive to a FOIA request will not be disposed of or destroyed while the request or a related appeal or lawsuit is pending. This policy applies even if the records would otherwise be authorized for disposition or destruction under the agency's General Records Schedule or other NARA-approved records schedule.

- OGIS suggests agencies include in their regulations that they will work with the Office of Government Information Services (OGIS) to resolve disputes between FOIA requesters and the agency in accordance with FOIA and any agency policy memoranda. Also, that the agency, in its final appeal determinations, will alert FOIA requesters to OGIS's services, as recommended by the Department of Justice's Office of Information Policy (<http://www.justice.gov/oip/foiapist/2010foiapist21.htm>). In addition, OGIS recommends that agencies add language, in accordance with the 2007 amendments to FOIA (5 U.S.C. § 552 (h)), that direct agencies and their components to work with OGIS to resolve disputes between FOIA requesters and the agency as a non-exclusive alternative to litigation.

Specifically, OGIS suggests the following language:

A response to an appeal will advise the requester that the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. A requester may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road—OGIS
College Park, MD 20740
ogis.nara.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

- At an impasse on updating your FOIA regulations? Need feedback? Call OGIS. We're here to help.

RESPONSES OF SEAN MOULTON TO QUESTIONS SUBMITTED BY SENATOR KLOBUCHAR

QUESTIONS FOR THE RECORD

Senate Judiciary Committee

“We the People: Fulfilling the Promise of Open Government

Five Years After The OPEN Government Act”

March 13, 2013

Senator Amy Klobuchar

Questions for Sean Moulton

1. In addition to the improvements that have been made since the OPEN Government Act’s enactment, what two or three other reforms do you believe are most important to fully and effectively promoting open access to government?

The top three FOIA reforms I would recommend are:

- (1) Establish Proactive Disclosure – A 21st century framework for public access should start with agencies posting much more information online to avoid the need for FOIA requests. The law should require all agencies to proactively post online communications with Congress (reports, testimony, formal communication), all FOIA requests and released documents, all contract and grant award documents, agency visitor logs, employee directories, calendars of senior officials, and information about agency advisory panels. Agencies and the Office of Government Information Services should also be tasked with identifying new categories of records to be posted to avoid FOIA requests. Judges should also have the power to order agencies to publish information if they fail to do so.
- (2) Improve Enforcement – While FOIA performance is monitored, there is no real effort to ensure compliance and improvements from agencies. The Justice Department should be given clear responsibility to engage in aggressive enforcement of FOIA – regularly listing agencies as non-compliant or poor performers, demanding compliance plans with specific measurable milestones from lagging agencies, and instituting administrative penalties. The law should also include stronger penalties, such as mandatory fines and automatic attorney fees recovery, for agencies that force requestors to pursue lawsuits and then settle or lose in court.
- (3) Strengthen the Office of Government Information Services (OGIS), the FOIA ombudsmen. OGIS is already having a positive impact on FOIA but needs expanded authority and resources to get the full benefit of an independent ombudsman on FOIA. OGIS should have the authority to research systemic FOIA implementation problems (slow responses, expanded use of key exemptions, and increased use of partial releases) and share its recommendations with Congress and the public without having to get approval from the NARA administrator. Agencies should be required to cooperate with OGIS investigations and provide the office with any requested information. Finally, OGIS should have a budget that would allow this expanded role.

H.R. 1211, which has been reported in the House, takes some initial steps to address these issues, but we believe broader legislation is needed to achieve lasting reform.

Beyond FOIA, I would emphasize two broader open government reforms;

- (1) *Open Government Enforcement*: Inconsistent agency implementation applies not just to FOIA, but to open government activities overall. Agencies need to have a senior-level locus of authority and responsibility for transparency issues. Agencies should also issue public implementation plans for key transparency and accountability policies, including whistleblower protections, scientific integrity, and controlled unclassified information, or be required to include these plans within their Open Government Plans. There also needs to be real incentives, such as awards or public acknowledgement of leadership, for robust implementation and real penalties, such as increased oversight or required reporting on shortcomings, for failure to comply.
- (2) *Codify Open Government Reforms*: Congress should advance open government legislation to lock into statute improvements made by the Obama administration and address problems that have eluded administrative solutions. Agencies should be required to produce and regularly update plans for open government, as is currently done under the Open Government Directive. Spending transparency could be strengthened by passing legislation like the DATA Act. Agencies should also be required to proactively disclose information about rulemaking and enforcement, reports and testimony to Congress, and lobbying and special interest influence. And declassification should be simplified and streamlined to speed processing and reduce costs.

2. Generally speaking, how successful have federal agencies been in adhering to statutory requirements for agency action on FOIA requests?

Unfortunately, federal agencies have not been consistently successful in complying with the statutory requirements. In FY 2012, one third of agencies had average processing times for simple requests longer than the statutory 20-day deadline. This list of slow processing agencies included USAID (163 days), the State Department (88 days), and the Department of Homeland Security (72 days). Given that DHS receives a significantly larger number of FOIA requests than any other agency, their slow processing is particularly troubling.

Additionally, FOIA litigation has increased in the last few years. While the improved ability to recover attorney's fees under the OPEN Government Act of 2007 may have influenced this, it is likely also an indicator that agency compliance remains a problem and that requestors feel the need to take matters to court to enforce agency compliance.

Agencies have had mixed success in complying with administrative FOIA goals. The 2009 Open Government Directive instructed agencies with significant FOIA backlogs reduce their backlogs by 10 percent each year. But of the 11 cabinet agencies with more than 500 backlogged requests in fiscal year (FY) 2009, only three met the 10 percent reduction goal each year: the Departments of Health and Human Services, the Interior, and the Treasury. Three other agencies met the goal in two years out of three, while the remaining five

agencies met their goal in only one year. There was no year in which every agency met the assigned goal. As of the end of FY 2012, nearly 60,000 backlogged requests remained in these 11 agencies – a total reduction of 8.8 percent compared to FY 2009. This is a significant reduction, but markedly less than the administration’s goals, and still considerably short of full compliance with the law.

RESPONSES OF KEVIN M. GOLDBERG TO QUESTIONS SUBMITTED BY SENATOR
KLOBUCHAR

Response of Kevin M. Goldberg, Esq.

On behalf of

Sunshine in Government Initiative
American Society of News Editors

to

QUESTIONS FOR THE RECORD

Asked by Senator Amy Klobuchar

Senate Judiciary Committee
“We the People: Fulfilling the Promise of Open Government
Five Years After The OPEN Government Act”
March 13, 2013

1. In addition to the improvements that have been made since the OPEN Government Act's enactment, what two or three other reforms do you believe are most important to fully and effectively promoting open access to government?

Because there are so many reforms needed to both strengthen and promote open government, I am identifying only those reforms that offer the best opportunity for effectively and efficiently moving government toward greater openness while protecting important exemptions. This is not an exhaustive list.

These recommendations are: (1) strengthening dispute resolution when FOIA denials occur, (2) increasing leadership on FOIA issues at the agency level and (3) fully committing to technology – specifically the new FOIA Online system – as a means of improving FOIA processing.

(1) Strengthening dispute resolution when FOIA denials occur.

Several Members of the Committee expressed concern that the amount of litigation has risen since 2007 despite certain changes in the OPEN Government Act designed to reduce FOIA litigation. We continue to believe that increased litigation is positive in one respect. It is evidence that the 2007 amendments which made it easier for requesters to recover legal fees when an agency improperly denies a FOIA request have emboldened requesters to go to court to pursue their rights. But we agree that avoiding litigation is of prime importance. Litigation is expensive for both individual requesters and the government. It should be a last resort when FOIA disputes arise. It is no longer a last resort, but could be relegated to that status once again. The Office of Government Information Services (OGIS), created in the OPEN Government Act and housed within the National Archive and Records Administration, is the key. This office should be given more authority, a bigger mandate and sufficient resources to carry out both.

When it enacted the 2007 FOIA amendments, Congress told OGIS to offer mediation services to resolve disputes. Furthermore, Congress gave OGIS the power to issue advisory opinions if mediation does not resolve the dispute.¹ Increasing the frequency of each would make OGIS a more attractive option for FOIA requesters.

Our experience is that OGIS' success primarily lies on the procedural side. OGIS can get agencies to communicate with requesters when they otherwise would not do so; but it has not had much success in forcing agencies to adhere to the letter of the law when it comes to substantive FOIA compliance and record disclosure. This is due, in part, to the same lack of an enforcement power that exists in other areas of the law. Agencies have no real incentive to fully engage in mediation.

OGIS should be required to exercise its power to issue advisory opinions. Those advisory opinions should have some impact if the requester still needs to go to court to enforce the law.

One possibility would be to create a rebuttable presumption that the records must be disclosed if OGIS has issued an advisory opinion in the requester's favor. This would likely result in agencies taking mediation more seriously. They would have a real reason to disclose records: to avoid an advisory opinion which would effectively take negate the deference agencies receive from federal court judges regarding the applicability of an exemption. This would take away a key incentive agencies have for waiting on litigation. We realize this might require augmenting OGIS' annual budget but we believe the increased expense would more than be offset by a reduction in litigation.

¹ "The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute." 5 U.S.C. § 552 (h)(3).

(2) Increasing leadership on FOIA issues at the agency level.

There must also be a commitment to FOIA at the highest levels of government, including the highest levels of each agency. Members of this Committee have previously backed the idea of a FOIA Commission – such an exemption would have been created in the “Faster FOIA” act introduced by Senator Leahy in 2011 and passed by the Senate later that year.² While Faster FOIA itself may not be the perfect vehicle, there needs to be a thorough, independent and powerful review of FOIA to determine what works and what does not, and to offer persuasive recommendations for change.

The centralized commitment to, and leadership on, FOIA could also be achieved by giving greater authority to the Chief FOIA Officers that were also created by the OPEN Government Act. The potential of these Chief FOIA Officers simply hasn’t been realized. A change offered by the House Committee on Oversight and Government Reform would help: create a Chief FOIA Officers council which will regularly meet to discuss FOIA and implement best practices across government.³

(3) Fully committing to technology – specifically the new FOIA Online system -- as a means of improving FOIA processing.

Finally, we continue to press for better and more efficient use of technology. My written and oral testimony discussed the FOIA Online system that is being used by six agencies (the Department of Commerce, the Environmental Protection Agency, the Federal Labor Relations

² Faster FOIA Act of 2011, S. 627, 112th Cong, 1st Session (2011).

³ FOIA Oversight and Implementation Act of 2013, H.B. 1211, 113th Cong., 1st Session (2011). The bill proposes a new section (k)(1) of FOIA which creates the Chief FOIA Officer Council and tells the Council to: “(A) Develop recommendations for increasing compliance and efficiency under this section. (B) Disseminate information about agency experiences, ideas, best practices, and innovative approaches related to this section. (C) Identify, develop, and coordinate initiatives to increase transparency and compliance with this section. (D) Promote the development and use of common performance measures for agency compliance with this section.”

Authority, the Merit Systems Protection Board, the National Archives and Records Administration and the Department of Treasury).

As I noted in my earlier testimony, this system could revolutionize FOIA processing by automating basic functions like logging and confirming requests, referring requests to other agencies, and even engaging in the proactive disclosure of frequently requested records (something which is already required under FOIA but rarely exercised by agencies). We calculated that FOIA Online could potentially save over 325,000 hours in processing time with regard to the first function (logging and confirming requests) alone.

Imagine if all records already requested were instantly searchable by other potential requesters. The increase in FOIA requests we have seen over the past several years – cited in the testimony of the Department of Justice’s Melanie Pustay with the implication that it is a major obstacle to reducing FOIA backlogs⁴ – would be significantly reduced. Requests do not have to be filed when the records are already publicly available.

2. Generally speaking, how successful have federal agencies been in adhering to statutory requirements for agency action on FOIA requests?

Agencies continue to routinely miss the twenty-day deadline for responding to a FOIA request. Sadly it takes significantly longer – an almost untenable amount of time for a reporter -- to actually receive records.

Yet, there are many requesters who would prefer the “untenable” delay to the “impossible” situation they face – not receiving the records at all despite the fact that they are fully entitled to those records. . As my fellow panelists Thomas Blanton and Sean Moulton

⁴ Pustay, Melanie. Statement to Senate Judiciary Committee. “We the People: Fulfilling the Promise of Open Government Five Years After The OPEN Government Act”, Hearing, March 13, 2013 at pages 3,5. <http://www.judiciary.senate.gov/pdf/3-13-13PustayTestimony.pdf>

explained, a significant number of FOIA requests are denied in whole or in part despite the fact that the law requires that an agency specifically demonstrate the need for an exemption. This despite the Attorney General's admonition to heads of Executive Branch agencies and departments that records should be disclosed unless foreseeable harm would result from their disclosure, and despite the testimony of Melanie Pustay indicating a high release of records (she stated that the Department of Justice releases records pursuant to 94% of requests made with that agency).⁵

I urge you to closely review Mr. Blanton's oral testimony refuting Ms. Pustay's claim to a high rate of disclosure. His testimony, which notes that the Office of Information Policy includes any record disclosure – no matter how insignificant with regard to number of pages or percentage of records requested – as a “release”, clearly itemizes the regularity with which the government does not completely fulfill a requester's needs, but also does not consider that failure to be a “denial” of the request.

Two suggestions may be helpful here: (1) as I stated in response to the question posed by Senator Franken to our panel, this Committee should closely review Ms. Pustay's testimony, identify the successes claimed by the Office of Information Policy and the further reforms promised out of that office, and engage in the oversight required to confirm that the proffered claims of success are accurate and the promised reforms come to fruition; (2) Congress should codify the “foreseeable harm” standard enunciated by Attorney General Holder that rightfully tips the scales in favor of the requester, making disclosure, not secrecy, the norm under FOIA.

March 29, 2013

⁵Id. at page 5.

MISCELLANEOUS SUBMISSIONS FOR THE RECORD

“TEXAS GETS HIGH MARKS REGARDING TRANSPARENCY IN LEGISLATIVE MATTERS BUT STILL NEEDS MORE SUNSHINE,” EDITORIAL, *Austin American-Statesman*

Texas gets high marks regarding transparency in legislative matters but still needs more sunshine

By Editorial Board

Special to the American-Statesman

Texas got some good news this week regarding open government: The Lone Star state was one of just eight states that got an “A” in government transparency from the Sunlight Foundation. That is terrific. Keep in mind that the grade covers a specific set of criteria, so let’s be clear that more improvement in other areas still is needed.

The news comes during the annual Sunshine Week, which offers a good time to assess how well Texas is doing regarding the public’s right to know how its government is conducting public business, spending taxpayer dollars and making information readily available to residents. It’s also a good time to reflect on the areas that still need improvement. Texas earned high marks for legislative transparency on the national assessment.

The Sunlight Foundation’s Open Legislative Data Report Card came up with grades by evaluating each of 50 state legislatures on six criteria – completeness of information on bills, timeliness, ease of access, machine readability, use of commonly owned standards and whether information was preserved for future viewing. The nonprofit, nonpartisan foundation is known for its Open States website and mobile app, online tools that help the public find information about individual state legislatures.

By that criteria, Texas is ahead of most other states, with sites that are easy to use and navigate. But it lags in making roll call votes easily accessible, which the report card noted are not published but extractable from the legislative journal. Those votes should be available online. Consider that Texas fared better than California, which got a D, Massachusetts, which got an F, and Arizona, with a C.

State Sen. Kirk Watson, D-Austin, has filed legislation to help adapt the Texas Open Meetings Act to the electronic age. Senate Bill 1297 would allow government officials to communicate through an online message board posted on their government entity’s website. Watson said the idea is to give officials a way to communicate and allow the public to listen in on the conversation without running afoul of open meetings laws.

It has bipartisan support, drawing praise from Texas Attorney General Greg Abbott, a Republican and champion of state open government laws. It’s one thing to have laws on the books, but they don’t mean much if they are ignored. Abbott has prioritized open government issues during his tenure as attorney general, and the state is better for his actions to put teeth in open government laws. Watson’s bill is a good one that will help keep Texas moving in the right direction, especially when it comes to technology.

But there is room for improvement in other areas regarding open records and meetings. Last month, we noted the legal cloak over legislative pensions financed by Texas taxpayers in a case that ended up in state district court.

Travis County State District Judge Lora Livingston ruled against Texans for Public Justice, a government watchdog group that wanted to know how much the state pays out in legislative pensions. The group wasn't seeking individual pension amounts; it just wanted to know the grand total in retirement benefits taxpayers fund for the 103 lawmakers who are now lobbyists.

Livingston ruled the information is secret by law. It seems lawmakers had choked off public disclosure bite by bite over the past decade with anti-disclosure laws they passed. As we stated, there is no justification for keeping the public in the dark about the amount of money being spent on legislative pensions. It is, after all, public money. We urge the Legislature to shed sunlight on those pensions and to do that this session. State Rep. Chris Turner, D-Arlington, has filed a series of bills to overhaul portions of the state's financial disclosure laws, including requirements to report incomes from pensions.

Another bill worth noting has been filed by state Rep. Donna Howard, D-Austin, which would broaden financial disclosure requirements for legislators and legislative candidates. Her bill would require lawmakers and candidates to report all sources of earned and unearned income. Current law requires disclosure of just job or professional income. It also would require the Texas Ethics Commission to post disclosures online.

Sunshine week ends Saturday, but the job of keeping government open requires daily diligence by all of us. A government for the people and by the people can't be sustained without an informed public that has unfettered access to information regarding government decisions, be they made by local school boards, cities, the Legislature, Congress or the White House. That right to know is essential to sustaining a healthy democracy.

FREEDOM OF INFORMATION ACT (FOIA), STUDY BY ASSOCIATED PRESS (AP), MARCH 11, 2013

AP, March 11, 2013

WASHINGTON — The U.S. government, led by the Pentagon and CIA, censored or withheld for reasons of national security the files that the public requested last year under the Freedom of Information Act more often than at any time since President Barack Obama took office, according to a new analysis by The Associated Press.

Overall, the Obama administration last year answered its highest number of requests so far for copies of government documents, emails, photographs and more, and it slightly reduced its backlog of requests from previous years. But it more often cited legal provisions allowing the government to keep records or parts of its records secret, especially a rule intended to protect national security.

The AP's analysis showed the government released all or portions of the information that citizens, journalists, businesses and others sought at about the same rate as the previous three years. It turned over all or parts of the records in about 65 percent of requests. It fully rejected more than one-third of requests, a slight increase over 2011, including cases when it couldn't find records, a person refused to pay for copies or the request was determined to be improper.

The government's responsiveness under the FOIA is widely viewed as a barometer of the federal offices' transparency. Under the law, citizens and foreigners can compel the government to turn over copies of federal records for zero or little cost. Anyone who seeks information through the law is generally supposed to get it unless disclosure would hurt national security, violate personal privacy or expose business secrets or confidential decision-making in certain areas.

The AP's review comes at the start of the second term for Obama, who promised during his first week in office that the nation's signature open-records law would be "administered with a clear presumption: In the face of doubt, openness prevails." The review examined figures from the largest federal departments and agencies. Sunday was the start of Sunshine Week, when news organizations promote open government and freedom of information.

White House spokesman Eric Schultz said in a statement that during the past year, the government "processed more requests, decreased the backlog, improved average processing times and disclosed more information pro-actively." Schultz said the improvements "represent the efforts of agencies across the government to meet the president's commitment to openness. While there is more work to be done, this past year demonstrates that agencies are responding to the president's call for greater transparency."

The administration cited exceptions built into the law to avoid turning over materials more than 479,000 times, a roughly 22 percent increase over the previous year. In many cases, more than one of the law's exceptions was cited in each request for information.

In a year of intense public interest over deadly U.S. drones, the raid that killed Osama bin Laden, terror threats and more, the government cited national security to withhold information at least 5,223 times — a jump over 4,243 such cases in 2011 and 3,805 cases in Obama's first year in

office. The secretive CIA last year became even more secretive: Nearly 60 percent of 3,586 requests for files were withheld or censored for that reason last year, compared with 49 percent a year earlier.

Other federal agencies that invoked the national security exception included the Pentagon, Director of National Intelligence, NASA, Office of Management and Budget, Federal Deposit Insurance Corporation, Federal Communications Commission and the departments of Agriculture, Commerce, Energy, Homeland Security, Justice, State, Transportation, Treasury and Veterans Affairs

U.S. courts are loath to overrule the administration whenever it cites national security. A federal judge, Colleen McMahon of New York, in January ruled against The New York Times and the American Civil Liberties Union to see records about the government's legal justification for drone attacks and other methods it has used to kill terrorism suspects overseas, including American citizens. She cited an "Alice in Wonderland" predicament in which she was expected to determine what information should be revealed but unable to challenge the government's secrecy claim. Part of her ruling was sealed and made available only to the government's lawyers.

"I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules – a veritable Catch-22," the judge wrote. "I can find no way around the thicket of laws and precedents that effectively allow the executive branch of our government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret."

The AP could not determine whether the administration was abusing the national security exemption or whether the public was asking for more documents about sensitive subjects. Nearly half the Pentagon's 2,390 denials last year under that clause came from its National Security Agency, which monitors Internet traffic and phone calls worldwide.

"FOIA is an imperfect law, and I don't think that's changed over the last four years since Obama took office," said Alexander Abdo, an ACLU staff attorney for its national security project. "We've seen a meteoric rise in the number of claims to protect secret law, the government's interpretations of laws or its understanding of its own authority. In some ways, the Obama administration is actually even more aggressive on secrecy than the Bush administration."

The Obama administration also more frequently invoked the law's "deliberative process" exception to withhold records describing decision-making behind the scenes. Obama had directed agencies to use it less often, but the number of such cases had surged after his first year in office to more than 71,000. After back-to-back years when figures steadily declined, as agencies followed the president's instructions, the government cited that reason 66,353 times last year to keep records or parts of records secret.

Even as the Obama administration continued increasing its efforts answering FOIA requests, people submitted more than 590,000 requests for information in fiscal 2012 – an increase of less than 1 percent over the previous year. Including leftover requests from previous years, the

government responded to more requests than ever in 2012 – more than 603,000 – a 5 percent increase for the second consecutive year.

The Homeland Security Department, which includes offices that deal with immigration files, received more than twice as many requests for records – 190,589 new requests last year – as any other agency, and it answered significantly more requests than it did in 2011. Other agencies, including the State Department, National Transportation Safety Board and Nuclear Regulatory Commission performed worse last year. The State Department, for example, answered only 57 percent of its requests, down from 75 percent a year earlier.

U.S. Citizenship and Immigration Services drove a dramatic increase in the number of times DHS censored immigration records under exceptions to police files containing personal information and law enforcement techniques. The agency invoked those exemptions more than 136,000 times in 2012, compared with more than 75,000 a year earlier. Even though USCIS is not a law-enforcement agency, officials used the exceptions specifically reserved for law enforcement.

The AP's analysis also found that the government generally took longer to answer requests. Some agencies, such as the Health and Human Services Department, took less time than the previous year to turn over files. But at the State Department, for example, even urgent requests submitted under a fast-track system covering breaking news or events when a person's life was at stake took an average two years to wait for files.

Journalists and others who need information quickly to report breaking news, for example, fared worse last year. The rate at which the government granted so-called expedited processing, which moves an urgent request to the front of the line for a speedy answer, fell from 24 percent in 2011 to 17 percent last year. The CIA denied every such request last year.

Under increased budget pressure across the government, agencies more often insisted that people pay search and copying fees. It waived costs in 59 percent of requests, generally when the amount was negligible or the release of the information is in the public interest, a decline from 64 percent of cases a year earlier. At the Treasury Department, which faced questions about its role in auto bailouts and stimulus programs during Obama's first term, only one in five requests were processed at no charge. A year earlier, it granted more than 75 percent of fee waivers. The CIA denied every request last year to waive fees.

The 33 agencies that AP examined were: Agency for International Development, CIA, Agriculture Department, Commerce Department, Consumer Product Safety Commission, Defense Department, Education Department, Energy Department, Department of Health and Human Services, Department of Homeland Security, Department of Housing and Urban Development, Interior Department, Justice Department, Labor Department, State Department, Transportation Department, Treasury Department, Department of Veterans Affairs, Environmental Protection Agency, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Election Commission, Federal Trade Commission, NASA, National Science Foundation, National Transportation Safety Board, Nuclear Regulatory Commission, Office of Management and Budget, Office of the Director of National Intelligence,

Securities and Exchange Commission, Small Business Administration, the Social Security Administration and the U.S. Postal Service.

Four agencies that were included in AP's previous analysis of FOIA performance did not publicly release their 2012 reports. They included the Office of National Drug Control Policy, the Office of Science and Technology Policy, the Council on Environmental Quality and the Office of Personnel Management.

ANNE L. WEISMANN, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,
TESTIMONY, MARCH 13, 2013

SENATE COMMITTEE ON THE JUDICIARY

Hearing On
“We the People: Fulfilling the Promise of Open Government Five Years
After The OPEN Government Act”

March 13, 2013

Statement of Anne L. Weismann,
Citizens for Responsibility and Ethics in Washington

Five years ago, the access community welcomed the changes to the Freedom of Information Act (“FOIA”) made by the OPEN Government Act of 2007. From its vantage point as a frequent user of and litigant under the FOIA, Citizens for Responsibility and Ethics in Washington (“CREW”) saw the OPEN Government Act as an opportunity to reduce unnecessary litigation so that requesters and agencies alike could focus on achieving faster and more comprehensive responses to requests. Unfortunately, the experience of the past five years has not lived up to the promise of the 2007 FOIA amendments, primarily because of the refusal of the federal government to implement the changes as enacted.

The OPEN Government Act made a number of changes to the FOIA, including five key provisions that promised to effect a significant change in “business as usual” at the agency level. First, it put in place a definition of “representative of the news media” that incorporated the growing and changing nature of this medium. Specifically, the Act made clear newly emerging alternative media such as bloggers qualify as representatives of the news media, as do freelance journalists. 5 U.S.C. § 552(a)(4)(A)(ii). The amendments also directed agencies to promulgate regulations implementing these changes.

Second, the OPEN Government Act dictated that attorney fees incurred in litigation are to be paid from the defendant agency’s own appropriations, rather than the Judgment Fund, when a FOIA requester can show it substantially prevailed in the litigation. 5 U.S.C. § 552(a)(4)(E)(i). The amendments also defined the term “substantially prevailed” as including relief either through a judicial order or enforceable written agreement, or through a voluntary or unilateral change in the agency’s position in response to a claim that is “not insubstantial.” *Id.* at (E)(ii)(i) and (ii). These changes were intended to act as an incentive for agencies to avoid unnecessary litigation and to clarify the meaning of “substantially prevailed” under the FOIA.

Third, the OPEN Government Act prohibited agencies from assessing certain processing fees if they fail to comply with the FOIA’s deadlines, absent unusual or exceptional circumstances. 5 U.S.C. § 552(a)(4)(A)(viii). This provision was added as an incentive to agencies to process requests within 20 days, as the FOIA requires.

Fourth, the amendments established the Office of Government Information Services (“OGIS”) to review agency FOIA policies, procedures, and compliance with the FOIA; to recommend policy changes to Congress and the president; and to mediate and resolve disputes between requesters and agencies. 5 U.S.C. § 552(a)(7)(N)(2)(h)(2). No other change promised as significant a reform as the creation of OGIS.

Fifth, the Open Government Act imposed on agencies a number of procedural requirements designed to allow requesters to better track the status of their requests and communicate more easily with the agencies to which their requests were directed. 5 U.S.C. § 552(a)(7). These changes were intended to streamline the process, a response to complaints from requesters that all too often FOIA requests fell into a black hole.

With five years of experience under our belt, now is an appropriate time to assess the

effectiveness of the Open Government Act. Unfortunately, a review reveals a stubborn refusal on the part of the federal government, especially the Department of Justice (“DOJ”), to conform its actions to the amendments. Strikingly, the number of new FOIA lawsuits has actually increased during the Obama administration. According to a study done by the Transactional Records Access Clearinghouse’s (“TRAC”) FOIA Project, six percent more FOIA lawsuits were filed in President Obama’s first term than in the preceding term of the Bush administration. A comparison of the first two years of each administration shows an overall increase in FOIA complaints under President Obama of 28 percent. And the agency-by-agency breakdown is no less startling. Despite the pro disclosure policy issued in March 2009 by Attorney General Eric Holder, 50 percent more FOIA lawsuits were filed against DOJ.¹

For those of us who litigate frequently, these statistics, while disturbing, are not surprising as they reflect our experiences. Litigation has increased in part because agencies refuse to implement the amended definition of news media requester, and a significant number of agencies have not amended their regulations to reflect this and other statutory changes over the last decade. According to a study performed recently by the National Security Archive, 62 out of 99 government agencies have not updated their FOIA regulations since the passage of the OPEN Government Act, despite its mandate to do so.² Included within this group is DOJ, which last updated its FOIA regulations on January 31, 2003. *Id.* To be fair, DOJ attempted to implement new regulations last year. They had to be withdrawn, however, in the face of a large public outcry against proposals to permit lying to FOIA requesters, disqualifying online publications as news media requesters, and disqualifying most students from fee waivers.³ DOJ has not since proposed other regulations.

In the absence of updated fee regulations reflecting the changes Congress made in 2007, agencies are continuing to apply incorrect standards in determining who qualifies as a media requester. In every FOIA request, CREW demonstrates its status as a news media requester, explaining how it routinely and systematically disseminates information to the public in a number of ways, including through its frequently visited website, which last month had over 44,000 page views; publicly posting all FOIA documents it receives on www.scribd.com, a site that has received nearly two and one-half million visits to CREW’s documents since April 2010; publishing an online newsletter with well over 15,000 subscribers; publishing a blog that last month had over 4,000 page views; and publishing numerous reports to educate the public about government ethics and corruption. Despite this evidence, which clearly satisfies the FOIA requirements for news media status, agencies deny CREW news media status again and again.

¹ See <http://foiaproject.org/2012/12/20/increase-in-foia-lawsuits-during-obama-administration/>.

² See <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB405/>.

³ These extreme regulations led the National Security Archive to award DOJ its annual “Rosemary Award,” named after Rosemary Woods, for the worst open government performance by a federal agency.

Just as troubling, agencies that have previously granted CREW news media status refuse to recognize that status on an ongoing basis. As a result, CREW has had to expend additional resources litigating its fee status, especially at the administrative level. Courts regularly have recognized CREW's entitlement to a fee waiver. Indeed, CREW has never lost a court case litigating this issue.

CREW has successfully recovered attorney fees relying on the standard set forth in the OPEN Government Act. Nevertheless, agencies persist in taking the same flawed approaches to CREW's requests. Agencies flout their FOIA responsibilities even in the face of adverse court rulings, undeterred by their likely liability for attorney fees. For example, in a series of lawsuits against DOJ, CREW seeks to learn why the agency refused to indict numerous members and former members of Congress, despite the abundant public evidence of criminal conduct. Notwithstanding the voluminous record in each case, which typically includes a public acknowledgment from the member that he or she was criminally investigated, DOJ has categorically denied CREW's requests for closed investigative records, arguing privacy must be protected. Two district court judges have ruled this categorical approach does not comply with DOJ's obligations under the FOIA, yet the agency continues to make the exact same argument in other pending cases. Apparently, even liability for attorney fees does not sufficiently ensure compliance with the FOIA.

In the past five years, agencies also have found an easy work-around to avoid forfeiting the ability to assess fees for failing to process requests within 20 working days. Specifically, agencies routinely and reflexively claim "unusual" or "exceptional" circumstances regardless of the scope of the request. In our experience, it is the rare case that an agency fails to claim "unusual circumstances," usually justified by a claimed need to search more than one office. Thus, a provision intended to push agencies to process requests more quickly has proven to be a minor obstacle, easily overcome.

Agencies have found many other ways to avoid processing requests within 20 business days. For example, agencies claim to need clarification on the meaning or scope of even simple requests. In CREW's experience, agencies require clarification when the request is likely to encompass a large number of responsive documents, or pertains to a subject that may prove embarrassing for the agency. Thus, it appears the need for clarification is merely a ruse to prevent the 20-day clock from commencing. Similarly, for very old requests, many agencies have adopted the practice of advising the requester the agency is closing the request unless the requester notifies the agency of its continued interest in maintaining its FOIA request. This practice places a burden on the requester that runs counter to the FOIA's structure and substance.

The creation of OGIS offered the most promise for improving the FOIA process and narrowing or eliminating issues for litigation. Yet since its creation, OGIS has had to fight to be heard. Rather than welcoming OGIS to the FOIA process, DOJ has fought it at every turn. This ugly turf battle began when DOJ maneuvered to have OGIS housed at DOJ, despite Congress' intent that OGIS be part of the National Archives and Records Administration ("NARA"). Unsuccessful in that effort, DOJ has contrived to crowd OGIS out of the FOIA space. For

example, DOJ not only has refused to participate in the FOIA module that OGIS supports, but has actively lobbied behind the scenes against the portal. But the biggest obstacle to OGIS's success is the severe lack of funding. With a tiny staff, OGIS cannot fulfill all of its obligations and has focused the majority of its time and attention on mediating disputes, rather than studying how the FOIA can better be implemented throughout the executive branch.

Nevertheless, under the strong leadership of Miriam Nisbet, OGIS already has made a mark, offering valuable mediation training to agencies to implement in their relationships with requesters. CREW has used OGIS to mediate two disputes. In one, the mediation resolved a threshold issue of CREW's entitlement to a fee waiver, avoiding costly litigation. The other dispute, which involved DOJ's Office of Information Policy ("OIP"), failed because DOJ declined to participate further in the mediation process.

The procedural requirements implemented by the OPEN Government Act have improved the FOIA process in many agencies, but at others it remains impossible to even make telephone contact with anyone processing the request. New technologies, such as the FOIA module developed by EPA, with help from the Department of Commerce and NARA, offer the most promise, perhaps because requesters are not dependent on agency personnel to learn the status of their requests.

The last five years have been disappointing on many fronts, and the promise of the OPEN Government Act has not been fully realized. The fault, however, lies not with the legislation, which pinpointed many of the problem areas in FOIA processing, but with agencies that have successfully resisted complying fully with the meaning and intent of the Act. The Federal Election Commission ("FEC"), for example, has essentially rewritten the FOIA by construing the 20-day processing period as nothing more than a requirement to notify requesters the agency is in receipt of their requests and will comply, in some fashion and at some unidentified time. Notably, when requested to weigh in on the issue by the U.S. Court of Appeals for the D.C. Circuit, DOJ filed a brief supporting the FEC in an interpretation that disregards and undermines congressional intent in enacting the FOIA.

These experiences highlight a fundamental underlying problem: there is no effective oversight of FOIA compliance within the executive branch. DOJ's Office of Information Policy issues guidance, but has no teeth. This is not to suggest OIP should be given greater authority. It has little credibility in the access community, given its demonstrated inclination to always align with agency interests, rather than the interests of the public. OGIS has no authority to tell agencies what they should be doing under the FOIA, and can offer only guidance on best practices. And while the federal courts remain available to resolve FOIA disputes, the burden and expense of litigation severely narrows the number of cases that proceed to court. Even once a lawsuit has been filed, the courts – at least here in the District of Columbia – are so burdened with FOIA and other lawsuits that resolution is a long way off. Often, by the time a court orders an agency to produce documents unlawfully withheld, the need for the documents has lessened or public attention has waned.

Congress needs to step into this breach and demand more accountability under the FOIA. Congress should give OGIS, an entity in which requesters are willing to place their trust, more authority to make recommendations, issue guidance, and play a more active role in how agencies implement the statute. Congress should hold DOJ accountable for the ever-widening gap between its stated FOIA policy, supposedly based on a presumption of disclosure, and its actual practices, which reflect no change from the no-holds barred litigation posture DOJ displayed under President George W. Bush. Congress took an important step toward a more open government when it enacted the OPEN Government Act. Now it must follow through with oversight to ensure the promise of that legislation becomes a reality.

The goals of transparency and accountability the OPEN Government Act was enacted to advance also are thwarted by the growing trend of holding secret the legal justifications for questionable government actions set forth in memoranda from DOJ's Office of Legal Counsel ("OLC"). Public debate over the use of torture on detainees was severely hampered by the refusal of the Bush administration to disclose the highly controversial analyses done by OLC that concluded such torture was consistent with U.S. laws and treaty obligations. Although the OLC torture memos addressed fundamental questions of national policy, they were off limits to the public until President Obama ordered their release in April 2009.

Unfortunately, the current administration has followed the Bush administration's lead, refusing to disclose OLC memos explaining the government's rationale for killing Americans abroad through the use of deadly U.S. drones. Beyond classification issues, DOJ has justified withholding these opinions as deliberative, protected by the attorney-client privilege, and therefore within the scope of FOIA Exemption 5. This justification does not pass muster. Historically, OLC opinions have been viewed both within and outside the executive branch as final, binding legal analyses agencies are not free to ignore. As such, they clearly fall outside of the protection of Exemption 5.

Keeping these pivotal OLC opinions secret not only deprives the public of vital information, but threatens the rule of law on which our democracy is based. Citizens cannot know if the president is executing the laws faithfully, as the Constitution commands, if the laws the president executes are shielded from public view. Such secrecy in government also threatens our constitutionally established system of checks and balances. Particularly where the government keeps secret an OLC opinion concluding the executive branch need not comply with a federal statute, both the courts and Congress are deprived of their oversight roles. Congress specifically cannot legislate effectively if it does not know how the executive branch interprets existing laws. Our tripartite system of government works only when all three branches and American citizens know what the law is.

According to a recently released analysis by the *Associated Press*, during the past year, the government has increased its reliance on Exemptions 1 and 5 to withhold government

records from the public.⁴ This signals a dangerous trend toward more secrecy, a trend that cannot be reconciled with the underlying purpose of the FOIA and the president's stated commitment to becoming the most transparent administration. Through its oversight role, Congress should examine the reasons for this greater secrecy and whether legislation is needed to curb this trend and better align the implementation of the FOIA with its intent to provide the public a window on what its government is up to and why.

⁴ See Jack Gillum and Ted Bridis, FOIA Requests Being Denied More Due To Security Reasons Than Any Time Since Obama Took Office, *Associated Press*, March 11, 2013, available at http://hosted.ap.org/dynamic/stories/U/US_SUNSHINE_WEEK?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2013-03-11-09-51-17.

OFFICE OF GOVERNMENT INFORMATION SERVICES (OGIS), 2013 RECOMMENDATIONS,
MARCH 13, 2013



2013 Recommendations

OGIS Policy Recommendations for Improving Freedom of Information Act Procedures March 13, 2013

The National Archives and Records Administration's (NARA) Office of Government Information Services (OGIS) has identified a number of areas where the Freedom of Information Act (FOIA) process could be improved, as well as areas where OGIS's role can be made more effective. These policy recommendations, prepared in accordance with Title 5 of United States Code, Section 552 (b)(2)(C), are based on OGIS's ongoing work with Federal agencies and with members of the public.

Issue 1: Implementing Dispute Resolution for FOIA Conflicts

Challenge:

Although dispute resolution has been a fixture within Federal agencies since the mid-1990s, it is relatively new to the FOIA administrative context. (The OPEN Government Act of 2007 established OGIS and for the first time offered dispute resolution in handling conflicts arising from FOIA requests.)¹ OGIS has observed that FOIA litigation is still accepted by many agencies and requesters as a foregone conclusion when a dispute or conflict arises. Connecting FOIA professionals, legal counsel and dispute resolution professionals to embed dispute resolution firmly into an agency's FOIA process would help to prevent and resolve disputes administratively as well as avoid litigation.

Recommendation and Action Step:

OGIS will expand its dispute resolution training program to help agency FOIA and dispute resolution professionals identify issues that are ripe for partnership and explore ways to work together. To aid that effort, OGIS recommends that agencies encourage and support the use of dispute resolution in the FOIA process. OGIS is available to work with an agency's Chief FOIA Officer along with the agency dispute resolution programs, general counsel's office and FOIA offices to develop an approach that would allow an agency to benefit from the expertise of its own employees to prevent and resolve disputes. Such an approach could help to conserve administrative resources, improve customer service, and avert costly and time-consuming litigation.

Issue 2: Reiterating the importance of FOIA

Challenge:

We continue to observe that agency FOIA professionals face challenges working with colleagues within their own agencies to obtain responsive records and recognize FOIA as a priority. While FOIA touches nearly all aspects of an agency's activities, many agency employees may be unfamiliar with their own responsibilities under the law.

Recommendation and Action Step:

¹ 5 U.S.C. §§ 552(h)(1) and (3); (l); and (a)(6)(B)(ii).

OGIS encourages agencies to remind their staff members of the importance of FOIA and that “FOIA is everyone’s responsibility.”² FOIA professionals are leaders in delivering that message in their everyday work, but other agency professionals who may work on more mission-specific aspects of an agency’s function can generally benefit from a refresher on the law and its applicability to their own work. For example, OGIS worked with our parent agency, NARA, to write a message to be distributed to the NARA staff this Sunshine Week. The Archivist of the United States, David Ferriero, agrees this is an important message and intends to send an annual announcement to this effect. We have attached the National Archives’ memo as an exhibit and posted it on the OGIS website (in our agency FOIA toolkit) so that anyone may use it as a model.

Issue 3: Examination of FOIA fees

Challenge:

The Office of Management and Budget issued FOIA fee guidance in 1987.³ Since then, agencies have moved toward digitizing records, have established online FOIA Libraries, and may now be providing records through *FOIAonline*. Additionally, amendments to the law in 1996 and 2007 have addressed fees. OGIS has observed that fees and fee waivers remain a persistent point of contention administratively and in litigation.

Recommendation and Action Step:

OGIS would like to work with stakeholders from both inside and outside government to review the myriad issues surrounding FOIA fees. We anticipate this will take some time, and may or may not result in recommendations for legislative or executive action, but we hope to come away with consensus support for some options for improvement.

Issue 4: Immigration records and FOIA

Challenge:

Individuals who are not U.S. citizens or lawful permanent residents access immigration-related records from various agencies through FOIA requests. OGIS has observed a large increase in our own cases related to these requests and has learned from the agencies that maintain these records that it is difficult to keep up with such requests. For example, U.S. Citizenship and Immigration Services, the agency that maintains Alien files, reported that it averaged nearly 10,000 requests per month in Fiscal Year 2011.⁴

Recommendation and Action Step:

OGIS has already communicated with agency officials who receive these types of requests, as well as some of the requester organizations and representatives who file them. We began in May 2012 with a preliminary examination of the records and issues. We now recommend that OGIS continue to work with the agency to develop possible methods to streamline the process. We do not anticipate that this effort will lead to a change in the FOIA itself, but we hope that it will improve FOIA administration.

² Attorney General Memorandum on the Freedom of Information Act, March 19, 2009, <http://www.justice.gov/ag/foia-memo-march2009.pdf>

³ Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012, available at: http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/foia_fee_schedule_1987.pdf

⁴ Department of Homeland Security 2012 Freedom of Information Act Report to the Attorney General of the United States at page 3, available at: <http://www.dhs.gov/sites/default/files/publications/foia/privacy-foia-annual-report-fy-2012-dhs.pdf>.

OFFICE OF GOVERNMENT INFORMATION SERVICES (OGIS), COVER LETTER, MARCH 12, 2013



OFFICE of GOVERNMENT INFORMATION SERVICES

March 12, 2013

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toll-free: 1-877-684-6418
fax: 202-741-5769The Honorable Patrick J. Leahy
Chairman
The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley,

Thank you for your continuing interest in improving the administration of the Freedom of Information Act (FOIA). Enclosed please find a report that describes, in accordance with Title 5 of United States Code, Section 552 (b)(2)(C), policy recommendations and other matters that the National Archives and Records Administration's (NARA) Office of Government Information Services' (OGIS) has identified that could be addressed to make further improvements in the administration of FOIA. To provide you with additional background regarding OGIS, which as you know, opened in September 2009, I also have enclosed a report of OGIS' third year of operations, through Fiscal Year 2012. This report provides a description of the types of requests and issues that OGIS has handled. An identical letter and report have been sent to the House Committee on Oversight and Government Reform.



This report, as well as the reports on our first and second years, highlights agency Best Practices and other strategies for making FOIA work better. OGIS also regularly posts on its blog suggestions to improve the FOIA process administratively, such as the importance of updating FOIA regulations, the benefits from coordinating communication for FOIA requests received across the government, and the importance of plain writing with FOIA correspondence.

We appreciate your continued support as OGIS has been transformed from statutory language to reality. Our office is an important symbol of Congress's vision of a better FOIA.

Chairman Leahy and Ranking Member Grassley
March 12, 2012
Page 2

I hope that you find this information helpful as you examine agencies' implementation of FOIA. If you have any further questions, please do not hesitate to call NARA's Office of Congressional Affairs at 202-357-5100.

Sincerely,



Miriam Nisbet, Director
Office of Government Information Services

Enclosures:

OGIS Policy Recommendations for Improving Freedom of Information Act
Procedures and the Administration of the Office of Government Information
Services, March 2013
OGIS Report: Building A Bridge, March 2013

cc:

The Honorable Thomas Carper, Chairman, United States Senate, Committee on
Homeland Security and Governmental Affairs
The Honorable Tom Coburn, Ranking Member, United States Senate, Committee on
Homeland Security and Governmental Affairs

LETTER FROM SENATOR AL FRANKEN TO MELANIE A. PUSTAY, DIRECTOR, OFFICE OF
INFORMATION POLICY, WASHINGTON, DC, OCTOBER 9, 2012

AL FRANKEN
MINNESOTA

SUITE
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United States Senate

WASHINGTON, DC 20510-2309

October 9, 2012

Melanie Ann Pustay
Director, Office of Information Policy
United States Department of Justice
1425 New York Avenue, N.W., Suite 11050
Washington, D.C. 20530

Dear Director Pustay,

I recently met with members of the Minnesota Building and Construction Trades Council, a group that represents trade unions. They told me that they were dissatisfied with the timeliness and usefulness of documents they had been provided in response to certain Freedom of Information Act (FOIA) requests. I am writing to make you aware of those complaints.

Trade union representatives sometimes use FOIA to request federal documents – like payroll records and sign-in sheets – from which they can determine whether government contractors are complying with the Davis-Bacon Act and other wage and hour laws applicable to federally-funded projects. The unions' oversight activities complement those of the Labor Department's Wage and Hour Division, which has limited resources and capacity.

The Minnesota Building and Construction Trades Council's representatives informed me that they often experience long delays between the time they submit their FOIA requests and the time they receive documents. They also informed me that the documents they receive often are redacted extensively, making it impossible to assess the contractors' compliance with applicable laws. For example, instead of redacting only personally identifying information – like names, addresses, and Social Security numbers – the agencies sometimes also redact job titles, hours worked, and rates of pay.

Delayed and excessively redacted responses to FOIA requests may hinder the unions' ability to hold contractors' accountable when they violate the law. I encourage your office to take any appropriate steps that may be necessary to improve the promptness and completeness of agencies' FOIA responses in this regard. I appreciate the initial conversations that you have had with my staff about this issue, and I ask that you continue to keep them apprised of any actions being taken to address these concerns.

Sincerely,



Al Franken
United States Senator

cc: Nancy J. Leppink
Administrator, Wage and Hour Division
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ADDITIONAL SUBMISSIONS FOR THE RECORD

Submissions for the record not printed due to voluminous nature, previously printed by an agency of the Federal Government or other criteria determined by the Committee, list:

OGIS 2013 Report for FY 2012: Building a Bridge Between
FOIA Requesters & Federal Agencies; [https://](https://ogis.archives.gov/Assets/OGIS+Reports/OGIS+Report+March+2013.pdf)
[ogis.archives.gov/Assets/OGIS+Reports/](https://ogis.archives.gov/Assets/OGIS+Reports/OGIS+Report+March+2013.pdf)
[OGIS+Report+March+2013.pdf](https://ogis.archives.gov/Assets/OGIS+Reports/OGIS+Report+March+2013.pdf)

