AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

ENSURING GOVERNMENT TRANSPARENCY THROUGH FOIA REFORM

HEARING

BEFORE THE

SUBCOMMITTEE ON
GOVERNMENT OPERATIONS

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

FEBRUARY 27, 2015

Serial No. 114–10

Printed for the use of the Committee on Oversight and Government Reform

Available via the World Wide Web: http://www.fdsys.gov
http://www.house.gov/reform

U.S. GOVERNMENT PUBLISHING OFFICE

94–348 PDF WASHINGTON : 2015

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

JASON CHAFFETZ, Utah, *Chairman*

JOHN L. MICA, Florida
MICHAEL R. TURNER, Ohio
JOHN J. DUNCAN, JR., Tennessee
JIM JORDAN, Ohio
TIM WALBERG, Michigan
JUSTIN AMASH, Michigan
PAUL A. GOSAR, Arizona
SCOTT DESJARLAIS, Tennessee
TREY GOWDY, South Carolina
BLAKE FARENTHOLD, Texas
CYNTHIA M. LUMMIS, Wyoming
THOMAS MASSIE, Kentucky
MARK MEADOWS, North Carolina
RON DESANTIS, Florida
MICK MULVANEY, South Carolina
KEN BUCK, Colorado
MARK WALKER, North Carolina
ROD BLUM, Iowa
JODY B. HICE, Georgia
STEVE RUSSELL, Oklahoma
EARL L. "BUDDY" CARTER, Georgia
GLENN GROTHMAN, Wisconsin
WILL HURD, Texas
GARY J. PALMER, Alabama

ELIJAH E. CUMMINGS, Maryland, *Ranking Minority Member*
CAROLYN B. MALONEY, New York
ELEANOR HOLMES NORTON, District of Columbia
WM. LACY CLAY, Missouri
STEPHEN F. LYNCH, Massachusetts
JIM COOPER, Tennessee
GERALD E. CONNOLLY, Virginia
MATT CARTWRIGHT, Pennsylvania
TAMMY DUCKWORTH, Illinois
ROBIN L. KELLY, Illinois
BRENDA L. LAWRENCE, Michigan
TED LIEU, California
BONNIE WATSON COLEMAN, New Jersey
STACEY E. PLASKETT, Virgin Islands
MARK DeSAULNIER, California
BRENDAN F. BOYLE, Pennsylvania
PETER WELCH, Vermont
MICHELLE LUJAN GRISHAM, New Mexico

SEAN MCLAUGHLIN, *Staff Director*
DAVID RAPALLO, *Minority Staff Director*

SUBCOMMITTEE ON GOVERNMENT OPERATIONS

MARK MEADOWS, North Carolina, *Chairman*

JIM JORDAN, Ohio
TIM WALBERG, Michigan, *Vice Chair*
TREY GOWDY, South Carolina
THOMAS MASSEY, Kentucky
MICK MULVANEY, South Carolina
KEN BUCK, Colorado
EARL L. "BUDDY" CARTER, Georgia
GLENN GROTHMAN, Wisconsin

GERALD E. CONNOLLY, Virginia, Ranking Minority Member
CAROLYN B. MALONEY, New York
ELEANOR HOLMES NORTON, District of Columbia
WM. LACY CLAY, Missouri
STACEY E. PLASKETT, Virgin Islands
STEPHEN F. LYNCH, Massachusetts

Jeffrey Post, Deputy Staff Director
Katy Rother, Counsel
Sarah Vance, Clerk

CONTENTS

	Page
Hearing held on February 27, 2015	1

WITNESSES

Ms. Miriam Nisbet, Former Director, Office of Government Information Services, National Archives and Records Administration	
Oral Statement	4
Written Statement	6
Mr. Frederick J. Sadler, Former FOIA Officer, Food and Drug Administration	
Oral Statement	11
Written Statement	14
Mr. Rick Blum, Director, Sunshine in Government Initiative	
Oral Statement	25
Written Statement	27

ENSURING GOVERNMENT TRANSPARENCY THROUGH FOIA REFORM

Friday, February 27, 2015

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT OPERATIONS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:03 a.m., in room 2154, Rayburn House Office Building, Hon. Mark Meadows (chairman of the subcommittee) presiding.

Present: Representatives Meadows, Jordan, Walberg, Massie, Mulvaney, Carter, Grothman, Connolly, Maloney, Lynch, and Cummings.

Mr. MEADOWS. Good morning. The Subcommittee on Government Operations will come to order. And, without objection, the chair is authorized to declare a recess at any time.

Transparency is the lifeblood of democracy, and if a government is truly of the people, by the people, and for the people, the American people need to know what our government is doing on their behalf. Transparency also gives our citizens the opportunity to make informed decisions, to hold accountable those in government that will abuse or perhaps mismanage the public resources.

It is those hardworking American taxpayers that really fund everything that we do. And so we need to keep them in mind. And this particular hearing is really to examine the Freedom of Information Act, the tool that it provides, obviously dating back to 1966, when it was originally put in place as a foundational transparency law.

And as we have seen it come into practice, those presumptions of allowing Federal records to be accessible to the public is a critical component. Americans really have the desire and the need to know. They are looking into the age of the Internet as we start to see information that is coming out. It is critical that that information from our government gets placed in the hands of the American taxpayers. Obviously, sensitive information is something that we need to protect and do that.

But under this particular law, what we have seen over and over again is a lack of compliance, a lack of transparency. And, unfortunately, when that happens, a lack of trust follows it. And what this is all about is looking at reforms. The ranking member and I both agree that, in order to restore trust, you have to have that transparency.

With that said, though, there are over 700,000 requests that get made of the Federal Government each and every year. And so some

of those requests can be very laborious. So what we are looking for from our witnesses are to look at how do we streamline the process, how do we make sure that the American people get what they need, that the Federal Government responds accordingly, and that we put in place a system that truly works. And so we are very thankful for our witnesses that are here today.

Chairman Issa and Ranking Member Cummings addressed some of this in a bill last Congress. And, indeed, they have introduced a similar bill this year, which is H.R. 653, which is the FOIA Oversight and Implementation Act. That particular bill addresses a number of concerns.

But what I am interested to hear from our witnesses today is: Does it go far enough? What do we need to do? What are some other areas that the perhaps the ranking member and I can work on in a bipartisan way to make sure that the American people are informed?

I thank you.

Mr. MEADOWS. And, with that, I would recognize the ranking member for his opening Statement.

Mr. CONNOLLY. Thank you, Mr. Chairman. And thank you for holding this hearing.

Welcome, to our panelists.

I do want to begin, like you, in acknowledging both Darrell Issa and Elijah Cummings for reintroducing the FOIA Act, H.R. 653. As a co-sponsor of that bill, I am pleased we are highlighting the issue so early in this Congress, although we see just how much press interest there is in this very sexy subject.

But it is an important subject. It may not be headline-grabbing, but it is how citizens can access their government. It is how we hold people accountable. I was in local government for 14 years in the Commonwealth of Virginia.

We have very strict FOIA laws in Virginia. And the local government had very limited timelines to respond to requests, and we took it very seriously. And I hope that same spirit will ultimately imbue the Federal Government as well, Mr. Chairman.

This bill would reform a cornerstone of open government law and improve access to government records. One of the important reforms would be to require a single Website for FOIA to submit requests to any agency. I think this provision is important because it will allow the government to use technology to improve the FOIA process both for requests and for the responding agencies.

The bill requires the director of OMB, in consultation with the Attorney General, to ensure the operation of a consolidated on-line request portal. Some agencies, including EPA and GSA, have already been working on such a portal.

Agencies would also be required to post on-line all releasable information that has been requested three or more times and to review their systems of records and post releasable information on-line if it is likely to be in the public interest.

Another key provision of this bill would be to require that agencies notify requesters of their rights to seek assistance from the agency for a public liaison and the Office of Government Information Services. FOIA litigation can be costly and time-consuming.

By emphasizing this right, the bill would encourage requesters to utilize dispute resolution and mediation services as a meaningful alternative to litigation. The bill would require the Government Accountability Office to catalogue the number of statutory exemptions under (b)(3) and agency use of such exemptions.

Individual statutory exemptions are often slipped into legislation without consultation with this committee. We don't even know how many exemptions are on the books. Requiring GAO to catalogue those exemptions will help us identify outdated or inappropriate exemptions.

I look forward to hearing from all of our witnesses today. I especially want to make note we have a former FOIA officer testifying with us this morning. In his written testimony, Mr. Sadler States that many FOIA officers feel that their voices have not been heard. That is a valid point.

We have conducted FOIA hearings in the past, but the previous witness panels were mostly composed of open government interest groups and high-level agency officials or political appointees. I commend the work that both of these important groups do.

However, I also look forward to hearing the perspective of someone who had to perform ground-level implementation of FOIA. Mr. Sadler has more than 40 years of hands-on experience with FOIA that spans from FOIA denials and appeals to directing FOIA staff at the FDA in their efforts to reduce overall FDA backlogs of pending agency FOIA requests by 91 percent over a 5-year period.

Congratulations, Mr. Sadler. Thank you for your service.

I also want to thank Miriam Nisbet for being here today. She has served in government for over 35 years, though she doesn't look it, and is largely responsible for the outstanding reputation of the Office of Government Information Services.

Rick Blum, I don't want to leave you out either because your work with Sunshine in Government has helped give voice to the concerns of reporters, citizens, and other FOIA requesters. Thank you for your diligence and your keeping us accountable to the people we serve.

Thank you, Mr. Chairman.

Mr. MEADOWS. I thank the ranking member for his Statement and, obviously, for his well-prepared opening Statement.

And I would agree with him. As we start to look at this information, it is critical that, regardless of the fact that there are not a number of reporters and cameras here, there is probably no component of transparency that is more critical to the American people than FOIA transparency.

And so your testimony—not only will it be constructive and helpful, but it will be vital in terms of restoring the trust in our government that so many Americans want to have. So thank you.

I will hold the record open for 5 legislative days for any members who would like to submit a written Statement.

We will now recognize our panel of witnesses.

And I am pleased to welcome Ms. Miriam Nisbet, former Director of the Office of Government Information Services at the National Archives and Records Administration—welcome—Mr. Frederick Sadler, former FOIA officer at the Food and Drug Administration;

and Mr. Rick Blum, Director of the Sunshine in Government Initiative. Welcome to you all.

And pursuant to committee rules, all witnesses will be sworn in before they testify. So if you would please rise. If you would raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

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

Please, you may take your seat.

So in order to allow time for discussion, you will be giving your testimony. I would ask that your oral testimony be limited to 5 minutes, if you can. Your entire written Statement, however, will be made part of the record, and we have that.

And so we will first recognize you, Ms. Nisbet, for your 5-minute oral testimony.

WITNESS STATEMENTS

STATEMENT OF MIRIAM NISBET

Ms. NISBET. Thank you. And good morning, Mr. Chairman, ranking member Mr. Connolly, and members of the subcommittee.

I am Miriam Nisbet, founding Director of the Office of Government Information Services at the National Archives and Records Administration. I was privileged to serve in that position from September 2009, when the office opened its doors, until I retired a few months ago, at the end of November 2014.

Today I speak as a private citizen who, like you, cares deeply about the right of my fellow Americans to access government information. I appreciate the opportunity to talk with you about the FOIA Oversight and Implementation Act of 2015. The bill covers a lot of ground; so, I will focus my comments on those portions of H.R. 653 that pertain to the Office of Government Information Services, usually referred to as OGIS or the FOIA ombudsman.

In its first 5 years, the dedicated staff of seven put into action the few words that direct its two-pronged statutory mission: Providing mediation services to resolve FOIA disputes and reviewing agency policies, procedures, and compliance. By any measure, it has been a success.

Why, then, does H.R. 653 have numerous provisions that directly affect OGIS? The co-sponsors of this bill, as you have already mentioned, and the one passed unanimously by the House in the last session has Stated that the purposes include strengthening the FOIA ombudsman's office and increasing its independence and bolstering the use of dispute resolution in the FOIA process.

How would it do that? First, the bill more clearly spells out the responsibility and authority of OGIS to review agency FOIA compliance, to identify ways to improve compliance, and to report broadly on its findings. The changes also would affirm the role of OGIS as a key component in the FOIA ecosystem, as Congress envisioned.

Second, the bill would go a long way to making dispute resolutions an integral part of the FOIA process. Among the critical

changes are that agencies would be required to notify a requester that, while he or she may go to court if dissatisfied with the agency's decision, the requester also has the right to turn to the internal FOIA public liaison and to OGIS. Dispute resolution can conserve scarce resources and it can head off costly and time-consuming lawsuits. Moreover, the availability of dispute resolution at all stages of the FOIA process is just good customer service.

Third, the revisions would guarantee independence of the ombudsman's office. Congress wisely placed OGIS in the National Archives, an agency whose primary mission is to provide access to government information and which does that very well. Nonetheless, under the law now, OGIS is not an independent watchdog or overseer, as I have heard it described. OGIS is a component of the executive branch and must send its proposed recommendations through the intra-and interagency review process that all agencies must follow, unless there is a specific exception by law.

If you want recommendations, reports, and testimony that have not had to be reviewed, changed, and approved by the very agencies that might be affected, then you should change the law. That doesn't mean that OGIS wants to or will be the FOIA police. That role is simply not compatible with the neutral, impartial mediator who brings parties together voluntarily to resolve their differences.

However, the authority to report directly to Congress, as H.R. 653 provides, would be an important reform for an office that hears complaints, resolves disputes, reviews compliance, and is expected to speak truth to power. I might add that, if I were still the Director, I could not say this.

The FOIA ombudsman has demonstrated that it can build strong bridges that make the Freedom of Information Act work more smoothly and move us away from such an adversarial environment. OGIS can take on the additional responsibilities envisioned by H.R. 653, and I hope it will be given the resources to serve both the general public and the Federal agencies even more effectively.

Thank you. I look forward to answering your questions.

Mr. MEADOWS. Thank you, Ms. Nisbet.

[Prepared Statement of Ms. Nisbet follows:]

TESTIMONY

MIRIAM NISBET
Former Director of the Office of Government Information Services,
National Archives and Records Administration

before the Subcommittee on Government Operations,
House Committee on Oversight and Government Reform

February 27, 2015

Good Morning, Mr. Chairman, Ranking Member Mr. Connolly, and members of the Subcommittee. I am Miriam Nisbet, Founding Director of the Office of Government Information Services at the National Archives and Records Administration. It was my privilege to serve in that position from September 2009, when the Office opened its doors, until the end of November 2014, when I retired. Today I speak as a private citizen who, like you, cares deeply about the right of my fellow Americans and others around the globe to access government information.

Thank you for the opportunity to appear before you today regarding H.R. 653, the FOIA Oversight and Implementation Act of 2015. I want to thank you too for your consideration—so early in this Session—of a bill that would significantly reform and improve the Freedom of Information Act. FOIA is, of course, a vital tool in our country for ensuring accountability and transparency in government. Though many take it for granted that we have such a law—next year will be the 50th anniversary of its passage—I commend this Subcommittee for its leadership and determination to make FOIA even more effective.

H.R. 653 proposes a number of wide-ranging revisions to which the other panelists will speak. I want to focus my comments on those portions that pertain to the Office of Government Information Services, usually referred to as OGIS or as the FOIA Ombudsman. Committee Ranking Member Elijah Cummings and Representative Darrell Issa co-sponsored the introduction of this bill and the one passed by the House in the last session. Those gentlemen have stated that among the purposes of this legislation are to strengthen the FOIA Ombudsman's office and increase its independence and to bolster the use of dispute resolution in the FOIA process. I agree that changes to the law are needed if OGIS is to fulfill the vision that Congress had when it created the office.

The OPEN Government Act of 2007 included OGIS as a key reform intended to provide FOIA requestors and Federal agencies with a meaningful alternative to costly litigation. 153 Cong. Rec. S15831 (daily ed. Dec. 18, 2007) (Statement of Sen. Leahy). In the five years that OGIS has been a part of the FOIA landscape, the dedicated staff has worked hard to reach out to agencies and to the public to let them know about its services. The staff of seven developed extensive contacts with FOIA operations across the government to carry out its two-pronged statutory mission: providing mediation services to resolve FOIA disputes, and reviewing agencies' FOIA policies, procedures and compliance. By the end of Fiscal Year 2014, the office had assisted requesters and agencies in more than 3,500 FOIA-related instances, ranging from disputes over the application of a FOIA exemption, to helping requesters find the right place to send requests,

to accessing government records maintained in databases or other electronic formats. The office also regularly provides training in dispute resolution skills for agency FOIA professionals. And last year, OGIS was able to add three additional staff members and to begin to carry out more robustly its review of agency compliance.

These are some of the highlights of the office's work and I refer you to the OGIS Annual Reports for much more information. By any measure, OGIS's achievements and its considerable caseload demonstrate the success of Congress's innovation through the 2007 amendments. Why then does the FOIA bill have more than a dozen provisions—perhaps 18, depending upon how you count—that directly affect OGIS and its responsibilities? I would answer that question by summarizing three areas of reform.

First, the bill would affirm the responsibility of OGIS to review agency FOIA compliance and would solidify the role of OGIS as a key component in the FOIA ecosystem. The Office has worked well and productively with many departments and agencies, but has often encountered resistance as the new kid on the FOIA block.

- The proposed revisions would make clear that Congress expects OGIS not only to review agencies' policies, procedures and compliance, as the law currently states, but also to identify methods that improve compliance, including in specific matters such as timely processing and how agencies assess fees and fee waivers [revision to Subsection (h)(2)]. From early in its existence OGIS has identified ways that agencies can make the FOIA process work better, for example, through publicizing "OGIS Best Practices" for agencies and for requesters; through its Dispute Resolution Skills training for agencies; and through its FOIA Ombudsman blog to reach the requester and agency communities and address substantive issues. But the changes would leave no question that Congress intends that OGIS make the results of its compliance review as broadly useful as possible to the agencies reviewed and to the public.

- The Office of Management and Budget (OMB) would consult with OGIS on guidelines for fees and fee waivers [revision to Subsection (a)(4)(A)(i)]. In addition OGIS would consult with the Department of Justice (DOJ) and OMB on agencies' annual FOIA reports, including on reporting and performance guidelines [revisions to Subsection (e)(1) and (e)(5)].

- There would be a statutory relationship between OGIS and the Chief FOIA Officers [new Subsection (j)(2)(F)]. A Chief FOIA Officers Council would be established and co-chaired by OGIS and the Department of Justice's Office of Information Policy [new Subsection (k)]. Chief FOIA Officers already meet with DOJ as a group, but OGIS has not been included in those meetings. OGIS has had access to Chief FOIA Officers only as it has been able to build relationships one by one. Doing it that way has its advantages; nonetheless, a formal structure would be very helpful and efficient in hearing directly and regularly about agency practices.

- OGIS would report to Congress on agency compliance with new requirements for updating FOIA regulations [new Subsection (k)(1)].

Second, the proposed changes would ensure that requesters are told that dispute resolution is an integral part of the FOIA process. Many requesters, and even some agencies, still do not understand or appreciate that the FOIA Public Liaisons have an important responsibility, currently set out in two different provisions of the FOIA, to assist in preventing and resolving disputes. The bill would amend Subsection (a)(6)(A) to require agencies to notify requesters at two stages that the FOIA Public Liaison is available to assist them: when an agency makes an adverse determination (that is, it denies some aspect of a FOIA request) and when an agency sets out its decision on an administrative appeal [revisions to Subsection (a)(6)(A)(i) and (ii)].

Since 2010, Department of Justice FOIA policy tells agencies that when they respond to administrative appeals, they should not only explain the right to seek judicial review, as required by the statute, but they should also advise requesters that OGIS's services are available as an alternative to litigation. But many agencies do not yet follow the policy, nor do they understand that OGIS is a neutral entity that is available to agencies as well as to requesters to assist in resolving disputes and avoiding unnecessary litigation. The bill would amend Subsection (a)(6)(A)(ii) to codify the DOJ policy so that a FOIA requester must be informed directly by an agency that, while the requester has the right to go to court if dissatisfied with the agency's decision, the agency's FOIA Public Liaison and OGIS are available to assist them with dispute resolution services. Additionally, the bill would direct Chief FOIA Officers to include dispute resolution efforts in their compliance reviews [new Subsection (j)(2)] and to direct agencies to set out in their implementing regulations procedures for engaging in dispute resolution and for engaging with OGIS [new Subsection (j)(1)].

Dispute resolution can help to conserve administrative resources and to head off costly and time-consuming lawsuits. Just as importantly, the availability of dispute resolution at all stages of a FOIA request is good customer service. OGIS's customers are the citizens who pay for and own the records of our government and the FOIA professionals who are responding to requests for access. I commend to you a Report and Recommendation from the Administrative Conference of the United States (ACUS) last year about the critical role that both OGIS and dispute resolution in the agencies' administrative process play in building a better FOIA. ACUS concluded, inter alia, that "[a]ll agencies should take steps to maximize the effectiveness of their FOIA Public Liaisons in fulfilling the dispute resolution function that the Act assigns to Public Liaisons." The Conference also recommended that "all agencies should cooperate fully with OGIS efforts to mediate or otherwise facilitate the resolution of individual FOIA disputes." (Recommendation 2014-1, Adopted on June 5, 2014, at p. 9).

Third, the revisions would guarantee independence as befits an ombudsman. I have heard OGIS variously described as an independent "watchdog" or "overseer." Congress wisely placed OGIS in the National Archives and Records Administration, the only federal agency whose primary mission is to provide access to government information and which does that very well. Nonetheless, as the law currently reads, OGIS is not independent. OGIS is a component of an

Executive Branch agency and it must send its proposed recommendations for policy changes through the intra- and inter-agency review process that all agencies must follow—unless there is a specific exception by law.

I understand that you and your colleagues in the Senate expected to receive unvarnished recommendations for legislative or regulatory change from an independent and impartial ombudsman. If you do want recommendations, reports and testimony that have not had to be reviewed, changed and approved by the very agencies that might be affected, then you should change the statute. Such a change also would accord with the long-established ombudsman model that is followed in the US and in other countries, independence being one of the criteria. One example that comes to mind is the Ombudsman for the US Citizenship and Immigration Services, Department of Homeland Security.

Let me caution that OGIS's firm policy has been to decline to call out publicly agencies that have problems with FOIA implementation or that do not cooperate with OGIS. Being the "FOIA Police" is simply not compatible with being the neutral, impartial mediator who brings parties together voluntarily to resolve their differences. To carry out its mission, OGIS works to engender the trust and confidence of its customers, whether behind the scenes in mediation, or in conducting an agency review, or in public settings as an advocate for a fair FOIA. Still, the authority to report or communicate directly to Congress, as H.R. 653 provides [proposed Subsection (h)(4)(D)], would be an important reform for an office that hears complaints, resolves disputes, reviews compliance—and is expected to speak truth to power.

The United States government receives more than 700,000 FOIA requests each year; less than 2% are appealed and fewer still are litigated. Those figures might tell us the law works reasonably well. But any citizen who requests information from his or her government and cannot receive a response in a reasonable amount of time or who is denied those records and feels that bringing a lawsuit against the government is the only recourse is not being served by FOIA in the way Congress intended.

The Office of Government Information Services, the FOIA Ombudsman, has demonstrated that it can be a strong tool to make the Freedom of Information Act work more smoothly and to move us away from such an adversarial environment. I am confident that OGIS can take on the additional responsibilities envisioned by H.R. 653 to serve both the general public and the Federal agencies even more effectively.

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

Miriam McIntire Nisbet

In September 2009, Miriam Nisbet became the first Director of the Office of Government Information Services (OGIS) at the US National Archives and Records Administration. OGIS is the Freedom of Information Act ombudsman office created by the 2007 FOIA Amendments, charged with providing mediation services to resolve disputes between FOIA requesters and the Executive Branch agencies and with improving the US government's administration of the FOIA. In addition to establishing OGIS, Miriam represented the National Archives at the Administrative Conference of the United States; the International Council on Archives; the International Federation of Library Associations and Institutions; the US National Commission for UNESCO; and the International Conference of Information Commissioners. She was chair of the FOIA Advisory Committee, established by NARA in 2014 as one of the US government's commitments under its National Action Plan for the Open Government Partnership. Miriam retired from NARA in November 2014.

Miriam previously served for two years at the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Paris as Director of the Information Society Division, in UNESCO's Communication and Information Sector. From 1999 to 2007, Miriam was Legislative Counsel for the American Library Association in ALA's Washington Office, working primarily on copyright and other intellectual property issues raised by the digital information environment. She was Special Counsel for Information Policy, National Archives and Records Administration, from 1994 to 1999, where she advised the Archivist of the US, other NARA officials and federal agency officials on legal issues concerning the Federal Records Act, Presidential Records Act, Freedom of Information Act, Privacy Act, Presidential Recordings and Materials Preservation Act, John F. Kennedy Assassination Records Collection Act, and the Executive Order on national security information.

Prior to joining the National Archives, Miriam had served since 1982 as the Deputy Director of the Office of Information and Privacy, US Department of Justice. In that position, Miriam was responsible for final action on initial requests (approximately 800 per year) under the Freedom of Information Act and Privacy Act for records of the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Policy Development and Public Affairs. She also supervised and conducted defense of numerous lawsuits, on behalf of various US government agencies, under the access statutes in federal district court and courts of appeals and provided training and guidance on FOIA interpretation, policy and administration to attorneys and paralegals government wide.

Miriam received a BA degree from the University of North Carolina at Chapel Hill and a JD degree from the University's School of Law. She is a member of the Bars of the District of Columbia and North Carolina and was elected in 2005 to the American Law Institute. She taught as an Adjunct Lecturer at the University of Maryland's College of Information Studies during the academic year 2013-14. Miriam received the Sunshine in Government Award in 2014 and the American Society of Access Professionals President's Award for Distinguished Public Service in 2013.

February 2015

Mr. MEADOWS. And the ranking member and I will certainly have some followup. We were whispering, asking some questions, as you had that.

So the chair would now recognize Mr. Sadler for 5 minutes.

STATEMENT OF FREDERICK J. SADLER

Mr. SADLER. Good morning, Chairman Meadows, Representative Connolly, members of the subcommittee.

It is both a pleasure and a privilege to have been invited to join you this morning to discuss the FOIA program in the Federal Government. And, in particular, Representative Connolly, I appreciate your kind thoughts.

I would like to note at the outset that my testimony solely reflects my own opinion and is not necessarily that of the department or the agency in which I so proudly served for more than 40 years. In the interest of time, I think I need to focus comments on just a few of the aspects of the draft which——

Mr. MEADOWS. Mr. Sadler, could I just ask you to pull that mic up a little bit closer. Thank you.

Mr. SADLER. I am sorry. I was not sure how far it—is that OK?

In the interest of time, I think I need to focus my comments on a few aspects of the draft which are, in my view, the most problematic.

With regard to the foreseeable harm test, if I understand it correctly, the foreseeable harm test would not be applied to those exemptions which are mandatory withholding, such as national security or trade secrets. However, this means, then, that the foreseeable harm test would apply to even those exemptions which have a minimal discretionary component. I think that, as proposed, this has the potential to unintentionally delay the responses issued by Federal Government, increase backlogs, and almost inevitably result in increased disclosure-based litigation.

First, in my opinion, Exemption 2 and Exemption 7 should be exempted from the foreseeable harm test. I believe the statutes themselves in court decisions have subjected those exemptions to the position which basically eliminates the need for foreseeable harm.

That would then focus the foreseeable harm test solely on Exemption 5, which appears to be the real area of concern in the requester community. I think it would be beneficial to both public and private sectors to require a breakout of Exemption 5 similar to what we do in Exemption 7. 7 has six parts, and you must identify the exemption at the site of every redaction.

If you use Exemption 7—I have to say 7(a), 7(b) and 7(c)—we could do the same thing with Exemption 5 and separate out those areas which are of minimal concern to the requester community. 5(a), for example, could be deliberative in process, a predecisional process. 5(b) could be attorney-client communication. And 5(c) could be attorney work product. In my experience, general counsel records are rarely at issue in concerns.

Portion-marking would be new. It would require reprogramming agency internal working and tracking systems and could not be im-

plemented immediately, but it would be both workable, measurable, and enforceable. However, this raises another issue.

If a foreseeable harm analysis would have to be in writing, it creates a record which would, by definition, be releasable under the Freedom of Information Act. And since these are dealing with deliberative matters, by definition, these will probably contain information about pending regulatory issues, public health issues, national security, foreign policy, and trade secrets. And so, if a written analysis were to be required and then subject to release, there is every expectation that the analysis could not be released in its entirety.

That raises another concern, that the requester community will not have full access to the deliberation and, therefore, will initiate litigation based solely on a discrepancy of interpretation or a need for additional information.

Second, the posting of frequently requested records or, indeed, all records requested under the FOIA, as has been proposed in some aspects of the media, is probably the single-most problematic component to implement. There is a fundamental conflict between the FOIA expectation or statutory mandate, if this were enacted, and the Americans with Disabilities Act.

The Americans with Disabilities Act has a requirement within it that requires that all records on Federal agencies be audibly read to those individuals who have visual handicaps. That means that the records must be in a specific software program which would enable this. And most Federal agencies are creating records in that manner, but submitted records or records otherwise obtained are not.

The conversion, which can be done, is called remediation. Remediation is extremely time-consuming and can be extremely expensive. And there is no software program on the market with the capability of remediating records to the extent that a FOIA officer would not have to re-review the document in its entirety line by line, word by word.

I would suggest that the fee structure is unnecessarily complicated and that the basis for this lies in the statute and it needs to be reviewed it its entirety. If there are issues relating to the granting of fee waivers for media, public interest groups, or nonprofits, it seems entirely appropriate to address those issues, but still to review the overall fee schedule.

And then I believe efforts need to be considered which would reduce the impact of disclosure-based litigation. Clearly the establishment of public liaisons in OGIS have been steps in that direction. I have had the pleasure of knowing Ms. Nisbet for an extended time, and I have worked with her closely over the past decade. And I would commend her efforts and those of her staff, but there are insufficient incentives for a requester to participate in the mediation process and all too often they jump directly to litigation.

With regard to having all Federal agencies update their regulations, 180 days, as Stated, is simply insufficient. Double or even triple that amount of time may not be sufficient, depending on the extent of the regulations and the complexity of the records with which the agency deals.

I would suggest that Congress consider amending the language within the statute which is being interpreted as constraining or even preventing Justice Department revision of administrative portions of the FOIA regulations governmentwide.

If DOJ had the authority to revise the administrative components of FOIA regulations, the process could be undertaken once. As it is proposed, 99 Federal agencies, all of whom are subject to FOIA, will have to go through the process of updating their regulations.

The issue of creating a single governmentwide portal for submission of a request is very interesting, but it is replete with concerns because this is not well defined.

In the interest of time, I will make one last comment and then defer to the committee and the panel.

I would strongly support the creation of a FOIA Council, although I would suggest that the chief FOIA officer is not necessarily in the best position to understand the complexities of the statute. Since, by definition, this is an adjunct duty, you might want to consider making it the most knowledgeable individual at the highest level.

I appreciate the opportunity to join you today, and I look forward to answering any questions. Thank you.

Mr. MEADOWS. Thank you, Mr. Sadler.

[Prepared Statement of Mr. Sadler follows:]

Testimony of Frederick J. Sadler

Before the House of Representatives,

Committee on Oversight and Reform, Sub-committee on Government Operations

February 27, 2015

Good morning Chairman Meadows, Rep. Connolly, Rep. Cummings, and members of the Sub-Committee. It's is both a pleasure and a privilege to have been invited to join you this morning to discuss the Freedom of Information (FOI) program in the federal government. As you know from my biographical information which was previously submitted, I have worked with this statute as a federal government manager, for more than 40 years. I have also frequently interacted with the Department of Justice's Office of Information Policy (OIP), the Office of Government Information Services (OGIS), have been invited to provide instruction and training in the implementation of the FOIA in multiple agencies, and have twice served as the national president of the American Society of Access Professionals (ASAP), a non-profit, independent organization comprised primarily of federal employees working with the FOIA and the Privacy Act, focusing on education and training. ASAP was founded as a professional forum to bring government FOIA and Privacy Act personnel together with representatives of the requester community, and I am drawing from my experiences with all of the above referenced offices.

At the outset, I would like to note that this testimony reflects solely my personal opinion, and is not necessarily that of the agency or the department, in which I proudly served.

The Sub-committee's invitation requested that I provide comments on my experience with the FOIA as it is currently functioning, as well as comment on the proposed FOI reform bill, H.R. 653, "*FOIA Oversight and Implementation Act of 2015*." It is difficult to condense 40 years of experience into a single statement, but many of the issues which I would like to raise for your consideration are also reflected in the draft bill. Accordingly, I would like to consider some alternative applications within the draft.

Many of the issues under discussion for reform have existed for years, and I believe it would be unfair to lay these solely at the feet of the present administration, as some critics have done. Many FOI officers feel that their voices have not, historically, been heard.

The FOIA has always been an unfunded mandate, leaving program managers to compete internally for scarce resources. Having said that, if one wishes to determine whether the government takes it role seriously in this process, I would note that 2013 statistics indicate that the overall cost to the taxpayers to implement the FOI approached $450 million, and that government agencies processed more than 675,000 requests. Clearly, the statute is functioning well, in the main. Equally as clear, there are concerns or problems with some requests and the application of policy when addressing these requests, but these have not been quantified and in my opinion, anecdotal data doesn't represent the overall status, or success, of the program. Attempting to pass legislation to fix a problem without fully identifying the causes is akin to a physician prescribing a treatment without examining the patient.

Some additional study on the nature of these problematic requests should be undertaken, to include litigation costs, volume of materials requested, subject matter complexity (particularly when dealing with scientific, medical, or proprietary information that has significant commercial value to a

competitor), the resource levels dedicated to the agency programs and whether those levels are sufficient for its purpose, attempts at mediation or narrowing a request down to a more manageable level, etc. I am aware of agencies which have received multiple requests for records that exceed one million pages, and of at least two cases in which litigation was filed citing, among other issues, non-production within statutory timeframes of 20 working days. Regardless of the number of resources that are dedicated to this effort, it has been, and probably always will be, an impossible task to locate, review, consult, redact and release records within the statutory time frame, for every request. In the agency which I served, we spent more than 120 staff years, at a cost of more than $32 million, to answer 11,000 requests. And, even at that level, we issued final responses to approximately 48 percent of the requests within 20 working days.

There appears to be, in certain cases, an essential misunderstanding on part of some requesters, as to the intent of Congress when the FOIA was enacted. There may not be a full recognition that the FOIA wasn't intended to serve as a replacement for an agency's Office of Public Affairs. The statute, by design, authorizes an agency to respond within one month (or less, if possible, such as when the records were already available or had been previously released), and offers the possibility of an extension in response time, in limited circumstances, such as when records are voluminous or located in multiple locations or agencies.

Complaints need to be tempered with the understanding that a thorough and diligent search for agency records frequently requires desk-to-desk searches, examining multiple databases or field offices around the country, and records which overlap with other federal agencies. Instructions on the complexity of that issue have been issued by the Dept. of Justice. This consultation and referral process can be a critical component of the review process prior to release of a record, since one agency may not have current information on the status of a regulatory process, law enforcement procedure, document classification, or what might have already been released, or withheld, by another agency.

With regard to the reforms proposed in H.R. 653, I would concur that some changes are clearly appropriate, and think that select updates to the Act would be generally helpful. I believe that there are a number of work and program issues which, if appropriately addressed, would benefit both the federal FOIA program, and the requester community. With regard to some of the components of HR 653, I would raise the following for your consideration.

The "foreseeable harm" test, which is included in the draft bill, would be a codification of a policy that has been in place for a number of years, by instruction of the current administration. As I understand the draft bill, those exemptions which mandate withholding (Exemption. 1, for national security; Ex. 3, for records exempted by other statutes; Ex. 4, for trade secret and confidential commercial information; Ex. 6, for unwarranted invasion of personal privacy) would not be required to conduct a separate foreseeable harm examination, meaning that once the statutory or threshold requirements for these Exemptions are met, these records would not require additional review or documentation subject to this test.

However, those exemptions which have even a minimal discretionary component (Ex. 2, personnel rules and practices; Ex. 5, attorney work product, attorney-client communications, and internal deliberative and predecisional information; and some components of Ex. 7, for open investigatory records, privacy of individuals identified in a law enforcement record and information relating to confidential sources, etc.) would be subject to the application of the foreseeable harm test.

I believe the application of this process as proposed has the potential to delay the issuance of responses, unintentionally increase backlogs, and will almost inevitably increase disclosure-based litigation.

First, I believe that the Supreme Court definition of records subject to withholding under Ex. 2 is sufficient in and of itself, to justify withholding. Accordingly, I do not believe that the purposes of the statute, including shedding light on the internal workings of government, would be served by putting personnel records through this type of test. In my opinion, ex. 2 should not be subject to the foreseeable harm test.

Additionally, I believe that the thresholds established by federal courts, and the restrictions contained within Ex. 7 (which addresses law enforcement and open investigatory records), are sufficient to remove this Exemption from the mandatory review for foreseeable harm. Exemption 7 is complicated, in that it encompasses six different categories of law enforcement records. Some of these subparts are considered to require mandatory withholding (e.g., protection of confidential witnesses, and protection of the privacy of individuals identified in a law enforcement record), while other parts of Ex. 7 have an element of discretion. Specifically Ex. 7(a) states that information may be withheld if release could reasonably be expected to interfere with enforcement proceedings. Clearly, by definition, this component of Ex. 7 is temporal – once an enforcement proceeding has been concluded, the protection afforded by 7(a) is no longer applicable, and that Exemption is no longer available to a FOI officer. Therefore, I believe that Ex. 7 should also be exempted from the foreseeable harm test.

This would then focus the foreseeable harm test solely on Ex. 5, which appears to be the real area of concern raised by the requester community. As you are aware, the foreseeable harm test has been policy for all federal FOI officers for the past few years, and I believe that clarification on the use of this Exemption, within certain limits, might benefit the requester community. I would again note that Ex. 5 encompasses covers three distinct categories of records (attorney work product; attorney-client communications; and internal, deliberative, and predecisional records). In my experience, most of the concerns which I have seen raised, dealt with the deliberative and predecisional component of the exemption, and not with general counsel records.

I can appreciate why the test was included in the draft – in many cases, the requester is unable to determine, from the information provided by the FOI official, which of the three categories of Ex. 5 records are in play. I would suggest that it would be beneficial to both the requester community and the federal FOI program to require a breakout of Ex. 5, similar to what has been done for Ex. 7, in 1974. Because the statute already requires insertion of the Exemption number at the site of every redaction made to a record being released, thereby enabling the recipient to determine what justification was used in support of the redaction, it may simplify the process to mark redactions as 5(a) for internal, deliberative and predecisional process; 5(b) for attorney-client communications, and 5(c) for attorney-work product.

The application of this revision would assist in clarifying how the Exemption was used, and since there is traditionally little disagreement on the use of the attorney-client communication, or attorney work-product components of Ex. 5, my expectation is that the requester's interests would be enhanced by designating which category of records was at issue. My expectation is that requester concerns with this exemption are only at issue in select situations – the Annual FOI Report for the Equal Employment Opportunity Commission, for example, indicates that this agency used Ex. 5 nearly 15,000 times in the past year, yet this agency's responses have not been raised as problematic by the requester community.

I would note that portion-marking would be a new application, would require re-programming of every agency's internal tracking system, and therefore could not be implemented immediately. However, it would be both workable, and enforceable since it would enable both sender and recipient to quantify the use of this exemption, something which is not tracked in most agency databases.

Regardless of how the foreseeable harm test is applied, there needs to be some additional clarification with regard to the test's application. Would the analysis need to be prepared in a formal document? Would that determination need to be confirmed by an expert in the subject matter under discussion? Would those analyses be releasable under the FOIA? If the latter were to be the case, as I suspect would be under consideration, there are two potential issues which bear examination. First, the analysis itself could contain information otherwise protected under another Exemption, particularly if the deliberation related to regulatory matters, examination of public health issues, national security, foreign policy, or trade secrets. Therefore, if a written analysis was required, and subject to release, there is every possibility that it could not be released in its entirety.

Second, the redaction and release of these records will almost assuredly result in increased litigation. One expectation is that many requesters will demand to see the analysis of the harm that would result, and then challenge that analysis. I would suggest that this could even result in retro-active litigation for those records previously released, or have a long term impact on records being captured and retained in the National Archives and Records Administration for political appointees and members of the Senior Executive Service, under the new "Capstone" program.

As drafted, it appears that only Ex. 5 would have a 25 year retention period on the use of the Exemption. This appears to function along the same lines as the Presidential Records Act (PRA). While I believe my co-presenters have a greater expertise on the PRA, I understand that this timeframe has only rarely been at issue. This revision would work well with deliberative process material, but has the potential to be problematic if applied to records subject to the attorney-client, and attorney-work product privileges. Those privileges should continue past that timeframe, and any change may be a concern within the legal community.

The issue of posting frequently requested records, or indeed all records released under the FOIA, may be among the most problematic to implement. There is a fundamental conflict between the posting expectation under the FOIA, and the implementation of section 508 of the Americans with Disabilities Act (ADA). In that section of the ADA, federal agencies are required to ensure that any records posted to a federal agency website are in a software form which is capable of being verbalized by program software, enabling visually impaired individuals to access federal records. While most federal agencies create records in a 508 compatible form (although this is an issue that, to the best of my knowledge, has not been studied in across the board), many records are not in a compatible form/format. Specifically, records submitted to the government, or otherwise obtained by an agency, are frequently not in a 508 compliant form. The answer is to "remediate" or convert the records, creating a 508 compliant document, and then to post the records. Most, if not all, agencies do not have the statutory authority to mandate submission of records in a specific form or format.

Remediation of records is extremely time consuming, and can be very expensive. In my former agency, we had a 250,000 page document that was required by statute to be made publicly available. Lacking the time and resources to remediate the record in-house, the agency consulted with contractors who could handle the remediation (note that this is particularly an issue when dealing with graphs, charts,

photographs, foreign languages, etc.). The lowest bid for the remediation was $90,000. This is not a cost that can be sustained given the volume of records at issue, across the government.

I would also note that there is no software program on the market at this time which has the capability of remediating records such that the FOI officer would not have to review the entire record after processing. There are numerous examples of misreading, which can substantially change the context of the record, or the information contained within that record. Using such software is helpful, but doesn't reduce the time needed to review the record prior to release.

One alternative available to an agency FOI officer is to submit a formal request for a waiver to post non-remediated records on a federal website. There are no permanent waivers for FOIA released records, in any agency. In my former office, we were able to obtain temporary authorization to post records, but only for a period of time not to exceed 21 days. On day 21, either the remediated records had to be available on line, or the records had to be removed. Since government records are usually created in a 508 compliant manner, granting a permanent waiver could apply only to the posting of records which had been submitted to the government, and then redacted and released under the FOIA. Without some consensus on how this conflict between posting frequently requested records and 508 compliance should be handled, FOI officers may be faced with having to choose which law to violate.

One other aspect of the bill which bears clarification is that of pro-actively posting categories of records. For the past few years, efforts have successfully been made government-wide, to post databases and certain categories of records. However, without further clarification, this has the potential to require an agency to spend scarce resources on redacting and posting records which are infrequently, if ever, requested. In my former agency, we conducted nearly 22,000 inspections of regulated facilities annually. Roughly 7,000 of these records were requested under the FOIA. Does this now require the agency to review, redact, prepare and post all records in this category, because roughly one-third of the records were requested? I would suggest that clarification is appropriate, so that agencies do not misdirect staff time, and thereby unintentionally increase backlogs, by spending time in pro-active release of records which are of little or no interest to the requester public.

Restoration of Ex. 2 protections which were lost in the Supreme Court ruling, *Milner v. Dep't of the Navy,* 131 S. Ct. 1259 (2011) are not addressed in this bill. This ruling overturned a policy established by the DC Circuit court in 1992.

Essentially, Ex. 2 was divided into separate applications - "low 2" and "high 2," and these distinctions enabled federal agencies to protect information which, if released, could result in the "circumvention" of a statute. It was this case which originally authorized the Internal Revenue Service to withhold from release under the FOIA, the criteria used to determine which income tax filings would be subject to audits. Federal agencies also used this interpretation to protect information such as guard schedules for federal installations, IT security procedures, instructions to counsel, etc. For more than 20 years, this usage was referred to as the "circumvention argument." That usage was voided in the Supreme Court ruling, which restricted the use of Ex. 2 solely to personnel issues (also see the reference to this exemption above, under the discussion on foreseeable harm).

Many federal agencies have been struggling with ways in which to protect critical infrastructure information. Unfortunately, this issue is not addressed in the draft. Some method of protection seems appropriate. The Dept. of Defense proposed statutory reform which would either re-define Ex. 2 to

restore the lost protections, or add the circumvention argument to a new exemption (i.e., exemption 10), after obtaining input from the Dept. of Justice. To the best of my knowledge, that proposal has been under consideration for nearly 2 years, and its current status is unknown.

The application of new policies relating to authorization for a waiver of fees are insufficient to actually correct some of the problems which federal staff must address.

I would suggest that the fee structure is unnecessarily complicated to apply, and believe that it has resulted in lengthy and costly litigation which may not have been the best use of limited resources. However, charging by the GS (grade level) of the employees performing the work, the type of requester (commercial, non-profit, consumer) and then for administrative costs (search, review, reproduction, certification, etc.), is all contained within the statute. To compound that, the 2007 FOIA revisions discount certain fees, when requests aren't processed within the statutory 20 day timeframe.

If there are issues relating to the granting of fee waivers for media, public interest groups or other non-profit organizations, then it seems appropriate to address those issues separately, while reviewing the overall fee schedule in its entirety. In some agencies, nearly all requesters are either consumers (such as Social Security recipients, veterans, etc.), or are commercial users (manufacturers seeking information on other firms working in their field, or contract bids) and waivers are much less of an issue in these agencies. Some federal staff spend excessive time determining the correct charges, and may be involved in litigation when those charges are challenged. This drain on limited resources of both the FOI officer and general counsel, could be simplified.

Efforts should be considered which would reduce the impact of disclosure-based litigation. Litigation may result when an agency is simply unable to identify, locate, copy and review vast numbers of records (see above examples of excessive volume of records at issue) in the statutory timeframes.

Efforts have clearly been made to reduce litigation, through the establishment of Public Liaisons, and more successfully through the creation of the Office of Government Information Services (OGIS). Those efforts have been somewhat successful, and I will address some thoughts on OGIS separately, below. However, I believe that there should be additional steps taken to save resources, expedite the response process and resolve the requester community's concerns.

There are insufficient incentives for a requester to participate in mediation with a federal agency. In my experience, the major national and international media organizations have not been as interested in pursuing litigation as other requester categories. More often, law firms, public interests groups and trade press are the least cognizant of the difficulties that an agency may face when searching, redacting and releasing agency records.

By comparison, the Canadian government's approach to their FOI equivalent statute, the *Access to Information Act* requires mediation prior to litigation. As a result only a minimal number of cases are ever pursued in the courts. I would suggest that the requester community's interests might be better be served by examining the success which our neighbors to the north have experienced.

The additional responsibilities, and expansion of OGIS' functions, are extraordinary. I would defer to my co-panelist, Miriam Nisbet, the founding director of OGIS, to comment on the many proposals. However, I feel strongly that mediation services, with the proper inducements for the requester community, has the potential to save time and taxpayer money. These changes would require

substantial increases in the OGIS budget, but the sooner that dispute resolution is initiated, the more likely it will be that potential litigation is reduced, and that the concerns of the requester community will be addressed.

I would commend OGIS in their efforts, which have in all probability saved the government substantial amounts of money through mediation, such that cases are not pursued in court. As noted, there is little in the way of incentives for the requester communities to work hand-in-hand with the federal sector, or to focus the scope of overly-broad requests. Many requesters are unaware of how agency records are accessed, where they are located, or the form or format in which they are maintained. As a result, agencies receive overly broad or vague requests on a routine basis. This makes it difficult to interpret, and when a FOI officer contacts a requester in an attempt to work through the questions or issues, there is little incentive for a requester to comply. OGIS has fulfilled this function successfully, but not to the extent that it could if additional resources were made available.

I would also suggest that, in my opinion, OGIS' authority be amended to include mediation for cases relating to the Privacy Act. This was considered in the recent past, but the proposal was not forwarded to this body.

This draft would require all federal agencies to update their FOI implementing regulations within 180 days. I would suggest that this is not necessarily the best option, particularly given the resources that such revisions require. This is an insufficient timeframe in which to effectively promulgate a regulation.

Rather, I would suggest that Congress amend the language within the statute which has been interpreted as constraining the Justice Department's Office of Information Policy from revising the administrative portions of the FOI regulations, government wide. Specifically, the statute states that "...each agency must promulgate regulations, pursuant to notice and receipt of public comment..." If this provision is enacted, nearly 100 federal agencies will be required to conduct internal reviews as quickly as possible, draft proposals which meet the standards of general counsel and the Federal Register, schedule the proposed revisions for publication, issue a proposal which must be made subject to notice and public comment, review and address every comment on the proposal, and then finalize the regulations. If DOJ/OIP had the necessary statutory authority, the process could be undertaken and completed once, rather than nearly 100 times.

There is a current effort in OIP/DOJ, to standardize the general administrative components of FOIA implementing regulations. This effort is noteworthy because of the scope of its endeavors and because of its complexity. While it is impossible to establish a single, government wide set of regulations because of the various Exemption 3 statutes, the varying types of records created and maintained, and individual agency charges, this change would clearly resolve issues related to consistency.

The issue of establishing a single, government-wide portal for submission of a FOIA request, is interesting, but will potentially create an entirely new tracking system which may be problematic on several levels. No existing agency office has the capacity to handle the potentially hundreds of thousands of incoming requests. The draft is not sufficiently specific as to where this function would be placed, when the response time frame would begin (i.e., on receipt in the portal, or when received by the correct federal agency), whether this would replace existing tracking systems, how requester confidentiality should be handled (i.e., when a request should be logged as "John Doe" because of the nature of the request or the records at issue), how delays in forwarding a request to multiple agencies

would be handled, or how it would address timeframes if a request was forwarded to the incorrect agency. This is clearly an issue of concern from many perspectives and should be reviewed with an eye towards clarification.

The issue of hiring, retaining and training of qualified FOI officers is not addressed. While this may be beyond the scope of the draft bill, the issue continues to be problematic. The Office of Personnel Management (OPM) created a job series for FOI & Privacy Act officers as mandated by the 2007 FOIA revisions. However, OPM's original position was that job series and promotion potential should be solely the purview of individual agencies, thus assuring inconsistency. The American Society of Access Professionals (ASAP) addressed the issue with OPM and, at least in part as a result, a job series for FOI and Privacy Act officers was created. The job criteria does not provide standards which a FOI or Privacy officer must meet in order to qualify for a promotion, nor has there been an established series of duties for which these federal officers should be responsible.

There continues to be a need for in-depth training on all aspects of the FOIA program implementation. OIP clearly shoulders the primary responsibility for training, and does so with great success (in the spirit of full disclosure, I would note that I have been invited to assist in providing training on behalf of that office, in the past). However, while that office has suffered budget issues along with the rest of the federal government, they remain the only source of training in the full implementation of the FOIA without cost to federal employees. ASAP remains one of the primary alternative organizations which provides training in the implementation of both the FOIA and the Privacy Act.

It should also be noted that in many agencies, the nature of the records with which a FOI officer works are of such complexity, that a background in the field of study may be needed. For example, it may be necessary to utilize the talents of an engineer, to review and correctly redact records that deal with this specialty; and this is only one limited example.

Additionally, correctly applying the exemptions may require 6 to 12 months of internal training and monitoring, before a new FOI officer has been adequately mentored, his/her work given a second level review prior to release, and the employee given authority to directly release records to the requester public. Further, some staff may be assigned responsibility for responding to FOIA requests as a collateral duty, on an infrequent basis, and their skill set may never reach that level of independence. Any allocation of new staffing resources should be expected to slow production in the short run, as the more experienced officers divert their time to mentor and train staff, and conduct second level reviews of records before release. An injection of new resources should not be expected to result in an immediate reduction in backlogs, or expedited processing of pending FOI requests.

One tangential issue relating to retention, is that FOI officers can be named as respondents in FOIA based litigation. I am unaware of any agency which provides professional malpractice insurance and as a result, few (if any) FOI officers have this coverage.

The creation of a FOIA Council, comprised of the Chief FOI Officers, is a laudable concept. I created such a council for my agency more than a decade ago, and meetings were conducted at least quarterly, or on an ad hoc basis when issues arose which needed to be considered as a group. I would strongly support

the creation of such as council with the caveat that in some cases the Chief FOI officer may not be the most knowledgeable person to represent an agency. It would seem appropriate to require agency representation at the highest level possible, when that individual is also the most knowledgeable. Past experience has shown that not every Chief FOI Officer has that skill set since this is, by definition, not necessarily that individual's specialty.

Resources dedicated to the Justice Department's Office of Information Policy (DOJ/OIP) should be reviewed, particularly in light of the number of additional responsibilities that are under consideration for that office. DOJ/OIP has done an outstanding job in providing guidance and training to the federal workforce. Without their efforts, the government's FOI workforce would be functioning inconsistently, and without access to legal interpretation. OIP issues the *FOI Post* internet bulletin, conducts best practices workshops; issues the *FOIA Guide* (colloquially referred to as the FOI Bible, which provides working FOI officers with interpretations on application of the various components of the statute that result from litigation; the Guide exceeds 1,000 pages); is implementing the National Action Plan review to update regulations in federal agencies; maintains the *FOI.Gov* internet page; reviews and requires that Annual Reports submitted under the FOIA are published on the internet, among other outreach opportunities. If this component had the amplified resources to expand training to locations across the country in which there are high concentrations of federal employees, provide guidance and enhance its current presence, it would better assist both the federal and private sectors in understanding and applying the statute.

Certainly, no process is so perfected that it can't be improved, particularly when technology changes, and the needs of the citizenry evolve. FOIA was, as noted previously, an unfunded mandate and must compete for scarce resources, against other mandated programs in federal agencies. The FOIA program, at the federal level, does have a backlog of unanswered requests for a number of reasons, many of which have not been studied.

Finally, I note that in the media discussions relating to this bill, there have been references to increases in the number of times that certain exemptions, particularly those which are discretionary, have been used. I would suggest caution in making determinations based such statements. Increases in the use of certain Exemptions may be simply the outcome of the DOJ focus on backlog reduction, such that responding to more requests than in the previous year would also result in an increased use of Exemptions, although that might not actually reflect an increase in the percentage of times that an agency withheld information.

Thank you for the opportunity to speak with you today, and I look forward to answering any questions that you may have.

Frederick J. Sadler (Fred)

Fred retired from federal service in November 2014, after serving for more than 40 years in the Food and Drug Administration's Freedom of Information program.

During his tenure in that agency, he served as the director of two Agency component Centers (the Center for Devices and Radiological Health; and the Center for Biologics Evaluation and Research); then served as the FDA's FOI Denials and Appeals Officer, before being selected to serve as the Agency's Freedom of Information Officer, and Senior Official for Privacy, in the Office of the Commissioner.

Fred oversaw and directed the work efforts of approximately 132 staff agency-wide, and was instrumental in reducing the overall backlog of pending agency FOI requests by 91%, over a 5 year period. As part of those efforts, Fred created the first agency-wide FOIA tracking system, and established the first agency-wide FOI Council, which was responsible for ensuring consistent application of the statute and the Agency's implementing regulations.

Fred assisted with FOI related litigation (declarations, Vaughn indices, etc.), and served on various agency working groups dealing with disclosure issues to include "Re-engineering" the FOIA process within the agency, which resulted in his receiving the FDA Commendable Service Award. In addition to more than 40 other awards, Fred also received the HHS Secretary's Award for Distinguished Service.

As part of his continuing program improvement efforts, Fred worked directly with the Public Health Service (PHS) and the Dept. of Health and Human Services (HHS), on pending issues, litigation, equities in non-agency offices or departments, with the media, and other members of the requester community.

Throughout his service in FDA, Fred provided extensive training in the theory, process and application of the FOI within his agency, the Department, in more than a dozen other federal agencies (by invitation), and has been a frequent speaker for the Department of Justice's Office of Information Policy, and the American Society of Access Professionals (ASAP). Fred was also elected, twice, to serve as the national president of ASAP.

Fred is also accredited by the International Association of Privacy Professionals (IAPP) as both a Certified Information Privacy Professional for Federal Government privacy programs (CIPP/G) and a Certified Information Privacy Manager (CIPM).

Name: JADICK, FREDERICK J.

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2012. Include the source and amount of each grant or contract.

None - not applicable

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

Not applicable. Testifying solely on my own behalf.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2012, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None - not applicable.

I certify that the above information is true and correct.

Signature: Date: Feb. 24, 2015

Mr. MEADOWS. The chair recognizes Mr. Blum for 5 minutes.

STATEMENT OF RICK BLUM

Mr. BLUM. Thank you, Mr. Chairman, Ranking Member Connolly, and members of the subcommittee. Thank you for the opportunity to testify today.

I am Rick Blum, and I represent the Sunshine in Government Initiative, which is a coalition of media associations promoting open government. And I can assure you at conferences and discussions among journalists, this hearing today and your work on improving FOIA is of great interest to journalists.

Mr. Chairman, we appreciate your attention early this Congress to strengthening FOIA, and we hope Congress will enact the strongest possible reforms soon. I would like to use this time to briefly highlight a few points.

FOIA remains a powerful tool for the public to learn about matters of public interest. However, journalists and other requesters continue to be frustrated that the process involves long delays and avoidable procedural obstacles.

The FOIA legislation addresses these problems with several steps that are very productive, such as strengthening OGIS, all digital processing and tracking, and reining in the secrecy statutes under Exemption (3) that you mentioned, Mr. Chairman. And those laws create anti-disclosure loopholes in the law.

First, despite frustrations, FOIA does remain an important tool to document sometimes uncomfortable facts. Armored vests designed to stop bullets failed the military's own ballistics tests, but were sent to soldiers in harm's way anyway. Faced with a reporter who used FOIA to obtain the test results, the military quickly recalled over 5,000 vests.

And for the Associated Press, a member of our coalition, FOIA helped reveal that local law enforcement in Ferguson, Missouri, set up a no-fly zone around the protest last summer not for safety reasons, but to limit media coverage.

At the same time, FOIA remains for many journalists a frustrating and broken system. The long waits, avoidable obstacles, and many redactions too often allow agencies to put secrecy before disclosure. One reporter even told me that his initial request for records was denied and his appeal was handled by the very same office that denied the request. That should never happen, especially with OGIS.

The FOIA reform bill now before Congress takes important steps to address these problems, and I would like to highlight them now that are of particular importance to our community.

First, Congress should clarify it intends OGIS to speak with an independent, assertive voice. We actively supported the creation of OGIS and support its work today. We even gave an award to the retired Director for her work.

Nonetheless, many news organizations and reporters have stopped taking more serious substantive disputes to OGIS. OGIS has for 5 years ably handled disputes involving miscommunications and procedural problems and other disputes while identifying common problems and commonsense solutions.

OGIS is now positioned to push agencies assertively as appropriate when they refuse to talk or wrongly deny a request. By requiring OGIS to report specifically on its advisory opinions, the bill emphasizes that written opinions from OGIS are an important way OGIS can help correct and prevent agency misdeeds.

In addition, before making its recommendations public, as former Director Nisbet testified, OGIS must get input from other agencies and clearance from the Office of Management and Budget. These reviews limit what OGIS can say, delay its recommendations, undermine learning from past disputes, and should be eliminated. To be effective, OGIS requires an independent voice.

Next, better electronic tools to manage requests and responses should help agencies and requesters alike. While it would be fun to see a drone deliver documents sometime soon, a good digital system that meaningfully manages FOIA's logistics for both requesters and agencies would be a great next step.

In fact, such a system, FOIAonline, is in use by about 11 agencies, and Ms. Nisbet guided its development. The bill's call for a FOIA portal and standards for intraoperability help move more agencies into these kinds of systems that talk to one another and avoid paper processing. And that is very, very helpful.

Finally, I want to say a word about the secrecy statutes under Exemption (3) that you mentioned, Mr. Chairman. They come up way too often in legislation. As you mentioned, the government doesn't have a good count. By our count, we found about 250 to maybe well over 300, depending on how you count them. And, more troubling, we play Whack-A-Mole, locating and finding these unnecessary, unjustified and, at times, overbroad proposals. And this committee has done a great deal of work successfully in knocking these down.

They deal with satellites tracking space junk, reforms of the financial system, and plans for high-speed rail, to name a few. And so we appreciate your work on these Exemption (3) statutes and look forward to continuing to bring these to light.

In conclusion, Mr. Chairman, H.R. 653 and its counterpart bill in the Senate include many bipartisan improvements, and we look forward to celebrating its quick enactment. Again, we appreciate the opportunity to testify, and I look forward to answering your questions.

Mr. MEADOWS. Thank you, Mr. Blum.

[Prepared Statement of Mr. Blum follows:]

Testimony of

Rick Blum

on behalf of

The Sunshine in Government Initiative

Before the

Subcommittee on Government Operations

Committee on Oversight and Government Reform

United States House of Representatives

on

"Ensuring Government Transparency Through FOIA Reform"

February 27, 2015

Chairman Meadows, Ranking Member Connolly, and members of the Subcommittee,

Thank you for the opportunity to testify today about the Freedom of Information Act (FOIA). My name is Rick Blum and today I am testifying on behalf of the Sunshine in Government Initiative (SGI), a coalition of media associations.

The Sunshine in Government Initiative was formed nearly ten years ago to promote policies and practices that ensure our government is open, accessible and accountable. Our coalition is committed to help address FOIA's longstanding frustrations with bipartisan, commonsense ways FOIA can work better for agencies and the public, including media requesters.

SGI members represent many aspects of today's media landscape. Members of SGI include **American Society of News Editors**, **The Associated Press**, **Association of Alternative Newsmedia**, **National Newspaper Association**, **Newspaper Association of America**, **Online News Association**, **Radio-Television Digital News Association**, **Reporters Committee for Freedom of the Press** and **Society of Professional Journalists**.

I have witnessed firsthand that this Committee's legislative and oversight efforts for at least the last decade have prompted agencies to make progress and stopped harmful new exemptions from

becoming law. We appreciate your attention to FOIA early this Congress, Mr. Chairman, and we support your efforts to enact FOIA reform legislation quickly this year.

We would like to use our time today to highlight a few points. First, FOIA remains a powerful, if flawed, tool for the public to learn about matters of public interest. Second, journalists continue to be frustrated that the process involves long delays and avoidable procedural obstacles. Third, the FOIA reform legislation before this Committee, H.R. 653, includes a number of fixes we and others have advocated for many years, and we are particularly supportive of ways to strengthen the Office of Government Information Services, overcome procedural challenges through better use of technology, and rein in secrecy statutes (under Exemption 3) that create anti-disclosure loopholes in the law.

1. FOIA can be an effective tool to bring important stories to the public.

FOIA has helped the public understand some of the challenges our military veterans face, including clinics keeping misleading wait-time statistics[1] and efforts to downplay an outbreak of Legionnaires' disease.[2]

FOIA's impact is not limited to veterans. The government's response to a reporter's FOIA request brought to light that firefighter safety equipment did not work as expected when exposed to heat or moisture--conditions firefighters are, of course, likely to face.

And while transparency alone doesn't stop a bullet, neither did the armored vests the military sent to troops, according to the military's own ballistics tests. Faced with a reporter armed with documents and ready to publish, the responsible official quickly recalled 5,277 vests.[3]

Just in the last few months, The Associated Press, a member of SGI, used FOIA to show that the United States quietly allowed people accused of Nazi war crimes to keep receiving Social Security payments when they left our country.[4]

---

[1] "VA brass knew of false data for 2 years," USA Today, June 24, 2014; http://www.usatoday.com/story/news/nation/2014/06/22/va-brass-knew-of-false-data-for-2-years-/11224899/; accessed February 20, 2015.
[2] "VA official: Don't tell until asked about Legionnaires' outbreak among veterans," Pittsburgh Tribune, May 11, 2014; http://triblive.com/news/allegheny/6069373-74/cdc-outbreak-cowgill#axzz31cRALiQH; accessed February 20, 2015.
[3] Christian Lowe, "Marine Corps Issued Flawed Armor," *Marine Corps Times*, May 9, 2005; version of article published in *USA Today* available at http://usatoday30.usatoday.com/news/nation/2005-05-08-armor-investigation_x.htm; accessed February 20, 2015.
[4] "Expelled Nazis Got Millions In Social Security" (AP, 10/20/14), http://hosted.ap.org/dynamic/stories/E/EU_NAZI_SOCIAL_SECURITY?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2014-10-19-21-17-02; accessed February 20, 2015.

After events in Ferguson, Missouri last summer focused public attention on how and when the police use lethal force, the government disclosed detailed information about the government's program to transfer military equipment to police departments. This data spurred many local stories and contributed to public understanding of police training and preparedness.

FOIA also helps uncover embarrassing conversations. During the coverage in Ferguson, The AP used FOIA to obtain emails showing local law enforcement set up a no-fly zone around the protests not for safety reasons but to limit media coverage.[5] Local officials were quoting large fees to process requests by The AP's Jack Gillum for some requests but he was able to use the federal FOIA to obtain audio recordings of conversations between local law enforcement and representatives from the Federal Aviation Administration.

In short, FOIA remains an important tool for transparency.

2. FOIA still needs action by Congress to address the long waits and push agencies to disclosure information without waiting for a FOIA request.

For many journalists, including those who have only heard the war stories of seasoned FOIA requesters and the FOIA survivors themselves, FOIA is a frustrating and broken system for timely access to information held by federal agencies. Agencies continue to lag behind in adopting modern technology and efficient processing systems, which directly harms their ability to ensure an open, accountable government. Many see a powerful tool beset with long waits and too much opportunity for agencies to put other interests in front of the public's interest in disclosure.

The FOIA process itself does little to dispel reporters of their cynicism. One reporter relayed to me that his initial request for records was denied from an agency's counsel's office, and when he appealed, the appeal was reviewed by the agency's attorney – the very same office that initially denied the request.

3. H.R. 653 takes a number of important steps to make FOIA work better.

H.R. 653 would codify the presumption of openness that many of us see when we read the FOIA statute and push agencies to disclose information proactively without waiting for a FOIA request. These are important measures we support, but I would to focus on three areas where the legislation particularly addresses our concerns with the FOIA process: If enacted, H.R. 653 strengthens OGIS, encourages greater transparency about pending FOIA requests and agency FOIA performance, and takes steps to rein in secrecy statutes under Exemption 3 that create loopholes to disclosure under FOIA.

---

[5] Jack Gillum and Joan Lowy, "Ferguson no-fly zone aimed at media," *The Associated Press*, November 2, 2014. Available at http://bigstory.ap.org/article/674886091e344ffa95e92eb482e02be1/ap-exclusive-ferguson-no-fly-zone-aimed-media; accessed February 20, 2015.

Congress should clarify it intends the Office of Government Information Services to speak with an independent, assertive voice.

As part of the 2007 FOIA Amendments, Congress created the Office of Government Information Services to serve as a mediator of disputes and make recommendations to Congress and the President to improve the FOIA. The idea for OGIS was modeled from many state experiences incubated in this Committee.

In the last five years, OGIS has established itself as an effective handler of routine processing miscommunications and an ombudsman able to explain an agency's obligations and the limits of FOIA. It has started operating as a helpful resource for requesters and agencies.

OGIS was supposed to help pierce FOIA's opacity by resolving problems with specific requests, learning and making unblinking recommendations that Congress and the President could debate and act upon. OGIS recommendations were supposed to help fill in the basic research need to identify and implement improvements.

Instead, OGIS recommendations currently must first go through interagency review and approval by the Office of Management and Budget to ensure that any recommendations are consistent with other agencies and the White House. This step flips the intent of Congress on its head. Not only has this added lengthy delays for OGIS, policies should follow from OGIS recommendations, not the other way around. The FOIA ombudsman's office needs a clear mandate for independence.

At the same time, we hope OGIS will exercise the authority that Congress already provided to push back harder against agencies that have taken hard positions. For instance, Congress provided that OGIS may write an advisory opinion if mediation has failed to resolve a dispute, but OGIS has taken the position for several years that it must first attempt to resolve a particular dispute through formal mediation before writing an advisory opinion. The last we heard, OGIS had not written a single advisory opinion or found agencies willing to engage in formal mediation. This reluctance to push harder may explain why many large news organizations have stopped using OGIS to help resolve substantive disputes.

As you know, the founding OGIS director, Miriam Nisbet, recently retired. We encourage the Archivist to select a new director with a strong belief in strengthening both disclosure and the way FOIA works for both agencies and requesters, and Congress can help by providing oversight to ensure OGIS operates as independently and aggressively as its authority allows and Congress intended.

Agencies should make better use of digital tools for processing requests and communicating with requesters.

One challenge feeding journalists' belief that the process is stacked against disclosure wherever possible is the sheer opacity of FOIA operations. The request goes in and we don't know what happens to it, do not see where the bottlenecks to more efficient processing are, and cannot push effectively for specific changes.

Agencies are not doing enough to ensure their processing systems give the public more information about the status of their request. Thanks to the 2007 amendments, which required that agencies give a tracking number to every request that would take more than ten days to process, some requesters are hearing they are, say, 59th in a line 127 requests long. That says little, however, about how far along the agency is in responding and when the requester can expect the information they requested. Agencies and requesters spar in court when agencies do not provide an estimated completion date as the law requires.

At the same time, new tools are being developed to help requesters and agencies manage their FOIA requests and responses. Within government, for example, a multi-agency team led by the Environmental Protection Agency and OGIS developed FOIAonline, a robust platform that helps agencies and requesters track and manage FOIA requests and responses.[6] In addition, developers in an office building near the White House are building a FOIA request system for the federal government. While it is still under development, it should aim to be at least as robust as FOIAonline in servicing the needs of requesters and agencies through userful search, tracking and reporting features.

With so many digital services helping reporters and agencies, it is perplexing why agencies routinely print out potentially responsive documents created by another agency and mail those documents to other agencies for review, significantly adding to delays.

For all these reasons, we are pleased H.R. 653 would require that OMB develop standards for interoperability between FOIA request systems residing at different agencies across the executive branch.

---

[6] The system also allows reports to be run showing FOIA performance. We encourage these systems to make detailed tracking data available for download in bulk down to the individual request level so anyone can analyze trends, find nodes contributing to delays and make appropriate fixes.

Other FOIA-related websites include FOIA.gov, operated by the Department of Justice's Office of Information Policy, which provides annual performance statistics as reported by agencies; iFOIA, a request generator and tracking tool developed by the Reporters Committee for Freedom of the Press (an SGI member); FOIA Machine, which also helps reporters and others create and manage FOIA requests; and Muckrock, a service for filing and viewing FOIA requests and response. These systems supplement existing agency FOIA processing software developed and managed by private contractors.

Congress could rein in the use of secrecy statutes that carve exemptions to disclosure under Exemption 3

One of the categorical exemptions in the original FOIA statute is Exemption 3, which essentially says that when another part of the law declared information to be exempt from public disclosure while FOIA would otherwise require disclosure, secrecy prevails.

Information falls under Exemption 3 when Congress clearly required that information to be withheld or provided clear criteria for an agency to apply when deciding to withhold or disclose in response to a FOIA request. In other words, Congress, not the agencies, writes the line between secrecy and transparency.

One problem has been that the government does a poor job accounting for these secrecy statutes. Agencies report when they invoke them, but there is no authoritative count. Several years ago we compiled a list and estimate there are 250 of these statutes on the books protecting everything from watermelon growers to the locations of caves. Better tracking these secrecy statutes is a good step toward reining them in.

Better tracking and reining in new Exemption 3 statutes as they are proposed would help reduce the burden on this Committee. This Committee has actively engaged other Committees reviewing proposed exemptions to FOIA in legislation, and successfully worked to narrow or eliminate duplicative, overbroad or unjustified secrecy statutes. Through its legislative vigilance reviewing portions of bills addressing a wide range of issues such as space satellites tracking space junk and cybersecurity to plans for high-speed rail, this Committee has helped protect FOIA from a death by a thousand cuts. This Committee's work reviewing and pushing back as necessary has been important to protect against overbroad secrecy.

Conclusion

In conclusion, Mr. Chairman, FOIA is a vital tool that can get results, but it needs our active support. Congress came very close to improving the FOIA last year. H.R. 653 and its counterpart bill in the Senate include many bipartisan improvements, and we support your efforts to quickly enshrine these improvements in law. We very much appreciate this Committee's attention on FOIA so early in this new Congress and we look forward to continuing to work with the Committee to make FOIA work better for requesters and agencies.

We again appreciate this opportunity to testify today, and I would be happy to answer any of the Committee's questions. Thank you.

Biographical summary for Rick Blum

Rick Blum (pronounced "Bloom") is the director of the Sunshine in Government Initiative, a coalition of media groups committed to promoting policies that ensure the government is accessible, accountable and open. Mr. Blum has testified before Congress several times on issues related to transparency in government. He serves on the Sunlight Foundation's Advisory Committee on Transparency and the board of OpenTheGovernment.org.

Prior to joining the Sunshine in Government Initiative in 2006, Rick served as founding director of OpenTheGovernment.org, and prior to that worked as a policy analyst at OMB Watch. He holds a Master's Degree from Indiana University, where his studies focused on the political transition in post-Soviet Russia, and a Bachelor's degree from the University of California, Berkeley. Rick and his wife live in Silver Spring, Maryland with their two kids.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: Rick Blum

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2012. Include the source and amount of each grant or contract.

None.

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

I am testifying on behalf of a coalition of media entities (the Sunshine in Government Initiative). I am the director of the coalition.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2012, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None.

I certify that the above information is true and correct.
Signature: Rick Blum

Date: 2/25/2015

Mr. MEADOWS. Thank each of you for your testimony.

The chair is going to recognize first the gentleman from Kentucky, Mr. Massie.

Mr. MASSIE. Thank you, Mr. Chairman.

Ms. Nisbet, could you give us an example—a hypothetical is OK, but a real example would be better—of how OGIS is supposed to work and then give us an example of ways that it hasn't been able to function in the way Congress intended, like with a Freedom of Information request, a specific one.

Ms. NISBET. Well, as you know, OGIS does have a two-pronged mission. One is providing mediation services to resolve FOIA disputes. And that is something I would refer you to the annual reports that OGIS has made available that details its work.

By the end of Fiscal Year 2014, it had assisted in something like 3,500 FOIA-related matters. And that spans very simple matters, from people coming to OGIS because they don't know where to make a request or how to make a request, to much more complex matters that involve real mediation, you know, more what you would think of as mediation between the parties, in order to head off litigation.

Mr. MASSIE. So you've had 3,000 successes. But what is an example of where you have been stymied? And I really appreciate you coming here today as a citizen and appreciate the fact that you wouldn't be able to say some of this if you were still there. So give us an example of what you can tell us today that you couldn't have told us.

Ms. NISBET. Well, the other part of the mission is reviewing agencies' policies, procedures, compliance, and making policy recommendations to Congress and the President on ways to improve FOIA. And that is a process, as I mentioned in my oral and written testimony, that did run into problems in that OGIS is part of an executive branch agency.

Agencies do have to go through an intra-and interagency review process. In order to make recommendations, particularly legislative recommendations, those have to be approved through the process, including through the Office of Management and Budget. And I can tell you that, in a number of instances, that was a rather arduous process.

Mr. MASSIE. Do you feel that this legislation can make that less arduous?

Ms. NISBET. Certainly I do. Because the way the bill is written right now would make it quite clear that recommendations, reports, and testimony will be communicated directly to Congress without having to go through those reviews.

And that, Representative Massie, doesn't mean that OGIS would not be regularly conferring and talking with all the different agencies that it works with every day and being sure to include in any recommendations that it makes the concerns of the agencies. It is not that. It is that those agencies would not be reviewing, approving, and possibly changing those recommendations before Congress sees it.

Mr. MASSIE. It certainly defeats the purpose of OGIS if it all has to be filtered in that way before it comes back to Congress, doesn't it, as an independent?

Ms. NISBET. You said that perfectly.

Mr. MASSIE. Thank you very much.

Mr. Blum, could you give us some specific examples. I know you alluded to a few where you have been stymied or where OGIS was stymied in its ability to help you or the media come to a resolution on a FOIA request. I like hearing the specifics.

Mr. BLUM. Specifics, yes. I mean, very much so. I can tell you that—you know, I guess really a great example of where FOIA wasn't really working well and where we would like to see—you know, OGIS could have a role in speaking a little bit more forcefully and knocking things down are—you may remember the "Miracle on the Hudson" landing when the airplane was hit.

Mr. MASSIE. Sure do.

Mr. BLUM. There was a bird strike and the airplane had to make that just amazing landing. Well, in the days and weeks after that landing, reporters wanted to know from the FAA, "How often does this happen? Is this a persistent problem or was this just kind of a one-in-a-million kind of thing?"

And the FAA initially said, "Yes. We have information that airports voluntarily share, and we're going to give that out." And then within a few days they reversed themselves and said, "No. No. No. This would affect transportation security. And there is an Exemption (3) statute that allows us to withhold information if disclosure might harm the ability of us to secure air safety."

Well, there was a lot of public attention. Actually, the news media did write about that and did write about FOIA and the limitations. And, to their credit, the Transportation Secretary overturned that and released the information while safety experts were saying, "Just mandate reporting. Get all this stuff in."

I think that is a role where it doesn't have to get to that level and OGIS can say, "Wait a minute. Do you really mean to say that bird strikes on airplanes, if discussed and disclosed, would encourage someone else to create this kind of accident?"

That is just not going to happen. I think that is where you have—Ms. Nisbet is correct. We don't have a FOIA police, but OGIS is the closest thing that we have. And we would like some rationality and clarity when these kinds of results happen.

Mr. MASSIE. Thank you. I am particularly interested when public safety is the issue at hand.

Thank you, Mr. Chairman, for yielding to me. I yield back.

Mr. MEADOWS. I thank the gentleman from Kentucky.

I now go to the ranking member of the subcommittee which has jurisdiction over this particular area, the gentleman from the 11th District of Virginia, Mr. Connolly.

Mr. CONNOLLY. I thank my friend, the chairman.

And I am going to try to get three questions in, one for each of you. So bear with me and try to be concise, and I will, too.

Exemptions, Mr. Blum. The Constitution does not guarantee access to information. It protects the press, freedom of press, but the dialectic is set up, you know, "Good luck in trying to get access."

It is really this and other statutes that try to codify that gray area in between in terms of, "What do you have access to? What don't you?" It is the natural order of things, I think government

wanting to protect its information and the press wanting to get at it.

Not always is the press motivation as noble as you suggest. Sometimes, actually, their purposes may not necessarily serve the purposes of good government. But, generally, we assume they are truth-tellers and they are trying to get at the truth.

Could you list some egregious exemptions currently allowed that you think we ought to be addressing in the new authorization.

Mr. BLUM. Well, you said you had three questions. So I am not sure I can do that question justice.

Look, FOIA does lay out a really good structure to identify what information the public should have access to and what interests there are to protect that justify withholding. That actually is a very good construct, national security, privacy, trade secrets, those kinds of things.

But the question that reporters always ask is, "Why is it so procedurally difficult? If I am sitting in floodwaters in Katrina and I have requested the test results, why can't I get that quickly?" Because the homeowners, my readers, are asking me, "When can I come back to my home?"

Mr. CONNOLLY. So if I am listening to you correctly, it is not just about exemptions? It is about streamlining the process as well?

Mr. BLUM. Absolutely. It is exemptions and streamlining the process. And I think that is what this bill actually does very well, is it does try to address the process.

Mr. CONNOLLY. Let me invite you, on behalf of myself and the chairman, if I can presume—we'd love to see a list, if you want to develop it, of exemptions you think we ought to be addressing in the law.

Because there may be things that escape us we hadn't thought about that you're dealing with, and this is the time to try to do that. So if there are egregious exemptions we ought to be addressing, I welcome and I know Mr. Meadows welcomes your giving us some guidance in that respect.

Mr. BLUM. I appreciate that very much. And I will.

Mr. CONNOLLY. Thank you.

Mr. BLUM. I will also say just very, very quickly, this bill has been discussed and debated for a very long time and, you know, we really hope that Congress can move on this and get this thing into law.

Mr. CONNOLLY. Great. Thank you.

Mr. Sadler, you made a passing reference to problems with the sort of digital portal provision in the bill, that, yes, it looks like a good idea, but it is going to be fraught with problems, if I heard your testimony correctly.

Could you elaborate just a little bit on that. Because part of our concern is we want to bring the government into the 21st century with respect to technology, especially with younger generations.

They expect that it is going to be done digitally, electronically, it is not a bunch of paperwork. This was seen, I think, as something that would be a youthful reform, bringing us up to date. So your note of caution struck me, and I wonder if you could elaborate.

Mr. SADLER. I would be happy to, sir.

When you have nearly three-quarters of a million requests being submitted, if they are all going to go through a single portal, we are essentially establishing an entire division within an agency. This could require a couple of dozen individuals or more to simply log and disseminate.

What is also not clear is whether or not there would be a certain amount of oversight, when the log would become public, whether or not the requests would be farmed out to the individual agencies responsible for replying.

And then the 20-day time period would start. What happens if requests have to go to one agency and there has been a misunderstanding and the request has gone to another agency? At what point did the clock begin?

Hypothetically, if you have a food-related issue and you came to my former agency, but the information related to the recall of a meat product, it would be misdirected and would have to go over to the USDA. So there are going to be issues like that.

Document size is an issue. Many individuals are using electronic systems which are not capable of either transmitting or submitting sizable documents. That is an issue. There are situations in which individuals request their own records and, in many cases, you need an original signature. So there still needs to be some kind of duplication. And in my situation, particularly when you deal with public health, there are many instances in which the letter itself cannot be made public.

I find this more often with consumers because they feel that they need to justify what they want to ask for and will include medical data, Social Security numbers. That happens a great deal with Social Security and Veterans Administration. And the letters can't be made public.

So there is an issue about when these will be disseminated and how that data base then—if it transmits information to the Federal Government, how it would feed back to a central repository for posting. I am assuming that you would utilize something like foia.gov that is based in the U.S. Department of Justice.

But the concept is laudable. If you want to simplify access for the public, how would we go about doing that and what restrictions need to be applied? And I am more concerned here than anything with protecting individual privacy. It becomes a different issue.

Mr. CONNOLLY. Thank you.

My time is up. And if there is the opportunity, I'll return to Ms. Nisbet. You.

Mr. MEADOWS. I thank the gentleman.

And the chair recognizes the vice chair of this particular subcommittee, the gentleman from Michigan, Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman.

And thanks to the panel for being here.

Ms. Nisbet, thank you for your service with OGIS and thank you for your willingness to be able to share things that, as you said, you couldn't share if you were still in that position with us today.

Let me ask you, when FOIA disputes come to OGIS for resolution, what's the result?

Ms. NISBET. Well, it is varied, depending upon what the dispute is. Often the requester—or sometimes it is the agency that comes

to OGIS—there is simply a lack of communication. There has not been good communication or there has been no communication at all between the requester and the agency.

OGIS is that neutral party that can step in and talk to both to find out what the concerns are and, essentially, broker an agreement about how long it is going to take or what the fees might be, issues like that, or if the case has progressed further, really bring the parties together to talk about specific exemptions or where the problems lie.

The result, one, in the best of all circumstances, both the requester and the agency have agreed on a path forward and the process is streamlined administratively and, hopefully, litigation is averted.

Certainly that is not always the outcome, but more often than not the parties simply having that communication, that conversation, really helps the process.

Mr. WALBERG. Has there been any significant frequency that information that the agency was reluctant to disclose is now disclosed?

Ms. NISBET. Well, sometimes that happens, but that is only one of many outcomes. The issues may not always be about the information being withheld. It is how the request is being handled, questions about fees, the scope of the request, the search for the documents. So all kinds of issues.

Mr. WALBERG. Will the language of H.R. 653 help OGIS get through to agencies, I guess the specific concept that, by "specific identifiable harm," you really mean specific?

Ms. NISBET. Well, the current policy of the government through the Attorney General's memorandum is that agencies are to identify a foreseeable—that they are not to withhold information if they have not been able to identify a foreseeable harm. And that is built in, of course, to the exemption system.

Mr. WALBERG. But this bill will help foster that still further, that specific means specific?

Ms. NISBET. It would codify the current policy.

Mr. WALBERG. Thank you.

Mr. Blum, FOIA contains nine exemptions that allow agencies to withhold records. According to the administration estimates, only 30 percent of FOIA requests resulted in full disclosure in Fiscal Year 2013. This seems low.

Is it a struggle to get full and unredacted responses from the agencies?

Mr. BLUM. Is it a struggle? Well, it absolutely is a struggle. It is also very difficult to know, once you get the documents back and you see those blackouts, are they appropriate.

Thanks to Ms. Maloney, who was very helpful in 2007, agencies now have to say which exemption, which statute, they are using in blacking that out.

But with deliberative process, it is very hard to—you know, how can you challenge something if you don't really understand the logic behind the redaction and oftentimes you don't really see it?

There is an organization in the National Security Archives that actually will request something, you know, a couple times and then they'll compare the redactions, and it turns out that the redactions

don't match. And so you get the whole document and it raises the question what is really——

Mr. WALBERG. So persistence pays off at that point.

Along that line, Mr. Blum, on the President's first full day in office, he issued a memo on FOIA, urging agencies to adopt a presumption of disclosure. Attorney General Holder reaffirmed the President's promise for openness.

Has the administration lived up to this commitment?

Mr. BLUM. I think the administration has worked very hard to live up to the commitment. They have devoted a lot of hours, holding a lot of meetings with agencies, saying, "What are you doing about transparency? And what can you do in setting benchmarks?"

They sent back all the reduction goals. FOIA is just a very, very difficult process. And so, once it gets filtered down and the procedural obstacles, as I was mentioning, you know, get filtered down to really what reporters are experiencing and other requesters are experiencing, it is very difficult to see the changes come to life.

So that is why we think that it is very appropriate for Congress to try to streamline the process, to try to make the procedures work better, so at least you're taking out all those process battles that reporters talk about, you know, "Oh, I finally got them to change my address. So I am actually getting the request to the right place eventually," you know, "I am getting an estimated completion date."

You shouldn't need that. You should be able to look at the statistics and say, "OK. For a request like mine, it takes the FDA 60 days to do this. It will take them 15 days to do that," and I'll call them back and I'll keep tabs on my request.

So I think the procedural fixes in the bill just are real common sense, and I would hope that they would not be perceived as controversial in any way.

Mr. WALBERG. Great. Thank you.

I yield back.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentleman from Massachusetts, Mr. Lynch.

Mr. LYNCH. Thank you, Mr. Chairman.

I think this is your inaugural hearing as chairman. So congratulations. And I think it is a very important topic.

I want to thank the panelists for helping us out.

You know, this committee especially—we're charged with government oversight. And, frankly, the scope of government activity and the complexity of that activity and how it affects the American people requires us, really, to rely on the public through FOIA to almost be almost like a million private inspectors general.

So all these 700,000 requests a year actually amplify what we are struggling to do here on the Oversight Committee. So we really have a keen interest in making sure that we adopt some of the reforms that you've spoken about.

I think it is very, very important to the public trust. And when you get these long delays and sometimes unreasonable obstruction by these agencies to very important requests from our citizens, you know, that is an attack on democracy in a very real way.

Mr. Sadler, you talked about in your testimony a very interesting issue regarding Section 508 of the Americans with Disabilities Act. That provision protects disabled individuals from discrimination when they request information.

As you explained, Section 508 requires agencies to ensure that persons with disabilities have comparable access to data as persons without disabilities. This means that a record posted on an agency Website has to be accessible to blind individuals through text-to-speech software, and you mentioned that we're simply not there yet with some of this software.

Can you explain the process that the agency is engaged in in trying to make sure that the freedoms and rights within the statute are actually being met or at least we're working toward that point.

Mr. SADLER. It is a difficult and complicated question to answer. So I am going to try and keep my responses short because I think that you have honed in on a particular concern.

If the FOIA at the moment for posting is a policy and the ADA is a law and the FOIA officer has to choose because of resource issues which to meet, they will meet the requirements of the law.

If the FOIA requirement for posting frequently requested records or more were to become law and there is no increase in resources, the FOIA officer will have to choose which statute to violate.

I can give you numerous examples. But when you think about it, remediation does not work for anything that is handwritten, foreign languages, computations, graphs, charts, and photographs. So when we look at the concept, it is problematic from a conversion standpoint.

I'll give you two examples, neither of which are intended to be flippant, but may be perceived as such. So if that is the way that it comes across, I will apologize up front.

We had a document that was a quarter of a million pages that was required to be made public. We did not have the resources internally to ensure that that document was posted and made publicly available in a 508-compliant manner within 20 days and went to try and contract it out.

The remediation costs, low bid, was $90,000 for a single document. This is not a sustainable cost level, given the volume of what we are handling.

The other problem is remediation will pick up every little nit and unclear line as part of its optical character recognition. An "A" becomes an "E." An "I" becomes an "L." And, therefore, it is rendered illegible and unusable by the visually handicapped.

Again, not to be flippant, but we issued a letter to a food company for distributing PowerBars, a breakfast bar kind of thing, which did not include specific ingredients that were required to be included by law, specifically, ingredients that were allergy-inducing. And in this case the firm did not put peanuts on the product labeling.

The letter of admonition came to my office for posting. It came to us in Word. At that time, it could not be remediated easily. So we went through the process and posted the letter.

Unfortunately, the phrase "allergy-inducing ingredient" was mistranslated by the optical scanner as "orgy-inducing ingredient," which was publicity that the firm couldn't buy. Everything had to

come down immediately, and all of the documents had to be reread line by line, word by word, to ensure that they are appropriately remediated.

The alternative is to obtain a temporary waiver to post unremediated documents. We have done this on numerous occasions. But on day 21, the document must either be remediated or removed.

We have had three separate lawsuits unrelated for 22,000 pages of pacemaker materials where the pacemaker lead deteriorated in place between the pacemaker and the attachment to the ventricle.

The documents were requested. Litigation ensued in all three cases on day 21, and we agreed to post the documents free of charge on a rolling basis. But on day 21, everything had to come down.

We can redact the document electronically and burn it to a CD. I can keep that in a public reading room, and I can continue to provide that to a requester with a 24-hour turnaround. What I couldn't do is leave it on-line.

Mr. LYNCH. Yes. I understand.

Well, we are certainly open and eager to make sure that handicapped individuals have access to this. I guess it is the aspiration of the legislation. That is our goal. And we need to figure out—like you say, it could be a question of resources in some cases, but we have to make sure that we follow the letter of the law and make progress so that handicapped individuals have this right.

And I thank you. You are very articulate in your response. I appreciate it.

And I yield back. Thank you, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentleman from South Carolina, Mr. Mulvaney.

Mr. MULVANEY. Mr. Sadler, let's stay on that topic because I picked that up during your initial testimony and I want to followup on some of the things Mr. Lynch was asking you about.

Mr. MULVANEY. So are you telling us that every single document that comes into your office has to be remediated at some point?

Mr. SADLER. Yes, sir.

Mr. MULVANEY. And that every single document then needs to be——

Mr. SADLER. When it's posted.

Mr. MULVANEY. OK. When it's posted.

—has to be checked? So someone has to sit and listen to the remediation while they are looking at the document to make sure the remediation is accurate?

Mr. SADLER. You wouldn't necessarily have to listen to it, but you would have to go back and read it to ensure that the remediation correctly interpreted the characters that are on the page. As I say that, mathematical computations, photographs, foreign languages, handwritten comments——

Mr. MULVANEY. I'm not trying to be difficult.

But you would have to listen to it and read it at the same time, wouldn't you, to make sure that it has been remediated accurately?

Mr. SADLER. If it is remediated correctly, it would be read correctly.

Mr. MULVANEY. OK. I'm sorry.

So someone actually reads it out loud? I thought you said before there was a software that does this.

Mr. SADLER. If you're a visually handicapped individual, you need to be able to sit at your computer in your place of work or your home and access any Federal Government Website, look at a particular document, hit it, and then your software will read that document back to someone who is visually handicapped. That's the purpose of 508. I'm not sure if that answers your question.

Mr. MULVANEY. Do you have any idea what you spend on this?

Mr. SADLER. Not a clue. A great deal of it is done internally. The shorter documents are done that way. And at this point, because the Attorney General's Office at DOJ has been monitoring this, beginning in 2007, they did a governmentwide survey and requested a schedule for full remediation, and I have seen Department of Justice, Office of the Attorney General, instructions on continued remediation practice in 2011.

Most government documents are being created in a remediated manner. So what we are talking about under FOIA are submitted documents or records that were otherwise obtained by a Federal agency and then redacted and posted.

So a change in this to permit posting of unremediated documents, by definition, in my opinion, does not need to include anything authored by the government.

Mr. MULVANEY. What percentage of the FOIA requests that you deal with are from folks who are visually handicapped and need to have the documents in an audio fashion?

Mr. SADLER. That is not tracked. And we had a caveat on the Website that, if there was a problem, that they should call the public liaison, which was me, and ask for assistance, and we said that we would make that available. I never received a phone call in 40 years.

Mr. MULVANEY. Mr. Lynch, if I banter into a brief colloquy, what I'm trying to get at is there is a better way do this.

Mr. LYNCH. Right.

Mr. MULVANEY. Because it sounds like it's a logistical nightmare. It may be a financial burden on the folks who are required—it almost sounds like it would be cheaper to have somebody read it out loud to them, actually hire somebody to simply read it to them than to have all the documents available in that particular fashion.

Mr. LYNCH. Right.

Mr. MULVANEY. So that is what I'm trying to get to. I would be curious—I may well followup with you after the hearing as to whether or not—well, I'll ask you now, since I have some time.

Do you have suggestions on how to fix this and make it easier, still meet the goal, which is still provide the document to the folks who are disabled, but do so in a fashion that doesn't cripple your ability to deliver information?

Mr. SADLER. In the absence of additional resources or funding specifically designated to meet the 508 compliance, I don't see how it can be done because, unless you want to—personal opinion, sir.

Mr. MULVANEY. OK.

Mr. SADLER. Unless you want to expand the resources that are available to individual IT programs, securities programs, FOIA pro-

grams, even Privacy Act—and proactive posting becomes a nightmare that way—but unless you want to expand the resources, I don't see how they can keep up, unless they divert those scarce resources from another program.

Mr. MULVANEY. Which will continue to subject you to various lawsuits.

Mr. SADLER. It would, sir.

Mr. MULVANEY. Thank you.

I yield back the balance of my time, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman from South Carolina.

The chair recognizes the gentlewoman from New York, Ms. Maloney.

Mrs. MALONEY. I thank you, Chairman Meadows. And congratulations on your new appointment.

And, Congressman Mulvaney, I think you had some good points about how we can make government work better.

I want to very much congratulate Ms. Nisbet on her service to government, having served as the very first Director of the Office of Government Information Services. Congratulations.

As you mentioned in your testimony, Ms. Nisbet, OGIS is an office that was established in 2009 to act as the FOIA ombudsman by mediating disputes between FOIA requesters and executive branch agencies.

Would strengthening the independence of OGIS also help the agency better carry out its mission as a mediator?

Ms. NISBET. That is a question that I will try to parse through.

The independence of an ombudsman is usually one of the criteria for having an ombudsman because you want an impartial, fair mediator who can convene parties, who can also just hear complaints, systemic complaints, for example, or to be able to hear complaints that come from the range of agencies as well as requesters, and be able to put those pieces together and then to be able to report on and make recommendations for how improvements could be made.

So I believe that the independence issue is helpful both to the review and recommendation portion of the mission as well as to the mediation.

Mrs. MALONEY. And, Mr. Blum, congratulations on your many years of service for sunlight in our government. And I really believe that organizations such as the Sunshine in Government Initiative will take more and more of an important role with the, really, assault on the independence of our newspapers.

So many of them are facing financial challenges. Many have gone out of business. Many are merging. So that strong third wave that was able to really research and comment on government with the changes in the media are becoming weaker. So, therefore, your position is all the more important in what you are working on.

Do you think that there is ever a role, Mr. Blum, for OGIS to issue advisory opinions? As you know, remediation has not resolved the despite. Advisory opinions can be issued. And what is your take on that?

Mr. BLUM. I think it would be very helpful, in fact. I think that, in certain circumstances, if an agency is wrong in its interpretation of FOIA or for requester questions and feels like they are kind of

being jerked around, it's really helpful to get an independent take on the situation.

And that's what OGIS was intended to do. It doesn't guarantee that newspapers or other requesters get what they want every single time, but provide that independent lens to say either the agency was right or the agency was justified or the agency was wrong and they call it out.

Other bodies that deal with ethical issues in the Federal Government do create advisory opinion as an administrative record to help not just requesters, but to help agencies avoid a future dispute. If somebody was working for Mr. Sadler or Mr. Sadler himself has a question about how to interpret something, as a novel or a complicated request, you know, I think it's very helpful to have as much guidance as possible.

There are 700,000 requests that come in every year. Surely an agency has dealt with the same issue in the past, and maybe someone could write up what happened, what's a really good commonsense interpretation of that. You know, it would be good to be able to refer back to that experience. So I certainly think that would be very helpful.

Mrs. MALONEY. The complaint that I hear from—whether it is individuals of the press is often how long it takes. And I believe that you are supposed to respond within 30 days of a request of an agency. Is that correct?

But what happens if the agency doesn't respond? What recourse does an individual or the press have to get this information?

And oftentimes you're on deadlines and you may have votes that might—information might impact your vote or stories that need to be filed. So can any of you—if anyone would like to comment on the timeframe.

I believe it is 30 days you must respond. What happens if you can't respond or they don't respond? What recourse is there for the press or others to get the information?

Ms. NISBET. We're fighting over answering your questions, all three of us.

Mr. SADLER. We're not fighting. We're debating.

Mr. MEADOWS. That's not normally the problem we have here.

Mr. SADLER. I think we all want a piece of that question. Yes, ma'am.

Ms. NISBET. I think I have resolved the dispute, and the gentlemen are very kindly going to let me answer that real quickly.

The statute allows 20 working days. So that is working days in order to respond. And, really, there are a couple of recourses for a requester when the time limit is approaching or has passed.

Certainly filing an administrative appeal doesn't help at that point. And the statute says a requester can go right to court if the statutory time limits have been passed, which is why having an alternative, having the requester be able to go to the FOIA public liaison for assistance in working on the scope of the request, to search any kinds of procedural questions, or coming to OGIS—and the changes in H.R. 653 would allow a requester to resort to a FOIA public liaison and to OGIS in order to avoid having to go to court, which I think most of us would agree would be a very, very, good alternative.

Mr. MEADOWS. Thank you so much.

The chair recognizes the gentleman from Georgia, Mr. Carter.

Mr. CARTER. Thank you, Mr. Chairman.

And thank all three of you for being here today.

I'm going to start off with Mr. Blum and ask you questions. You made a couple of interesting comments earlier that I want to expound upon.

First of all, you talked about Ferguson and about the no-fly zone that was imposed there.

Mr. BLUM. Right.

Mr. CARTER. You said that it was initially thought to be because of one reason, but it turned out to be because they didn't want the media to actually cover the event?

Mr. BLUM. Right. Federal Freedom of Information Act was really critical for The Associated Press to obtain the audio recordings of conversations between FAA officials and local officials.

And I guess the concern, as I understand it, was not with the commercial traffic that was in that area, but, really, you can tell from the audiotapes that it was they just didn't want the media there.

Mr. CARTER. And that was a subjective interpretation that you made of that?

Mr. BLUM. Well, I think the reporter had the audio files and was able to document that.

Mr. CARTER. OK. But, still, it was somewhat subjective in the sense that he interpreted it as being that was the reason.

Mr. BLUM. Yes. And I think it goes to a larger point that we all want to protect the ability of law enforcement to do their jobs and not have disclosure to disrupt that process.

But there are times when we really do want to make sure that law enforcement are doing the right thing. Maybe it was perfectly important to have a safety zone and that's the call, but it has got to be for safety reasons.

Mr. CARTER. OK. And that's just the point I'm trying to get at, is that, you know, it is a fine line. I mean, it is very difficult sometimes to judge that gray matter, if you will.

Mr. BLUM. I completely agree.

Mr. CARTER. OK. And then the other point that you made that I want to touch on was about the "Miracle on the Hudson" and the FAA was slow or hesitant to release the information because of—what reason did you say?

Mr. BLUM. Well, they cited one of these Exemption (3) statutes. Exemption (3) of FOIA says that, if there is some other law on the books somewhere that puts information behind a closed door, that FOIA wouldn't trump that. And that was in the original statute.

And so they cited one of these that gives specific criteria to the agency to use. If disclosure would inhibit the security of aviation and other transportation, they cited that as a reason to not give out the data that they had voluntarily collected from various airports about wildlife strikes.

Mr. CARTER. OK. Well, let me interject at this point now. You know, I'm all in favor of freedom of information, and I want to make that clear.

Mr. Sadler, I want to speak to you and your experiences with the FDA. And I'm assuming that you did more than just food products, that you did medications as well.

Mr. SADLER. Yes, sir.

Mr. CARTER. OK. Well, I'm a pharmacist, and I want to ask you: Were there ever any inquiries that you had that you were hesitant to release some of the information for fear that it might create panic within the citizenry, especially as it relates to medications, that, you know, they might stop taking their medications, that, you know, we struggle with compliance as it is? Did you ever run across that?

Mr. SADLER. No, sir. What I did find was that FOIA functioned well when it worked with our Public Affairs Office and Legislative Affairs Office. And in situations where we thought there might be public concern, we would create individual pages. And as documents were reviewed and redacted, they were automatically uploaded in a manner of proactive disclosure.

And a perfect example would be when the Chinese growers were using a pesticide on wheat products that was banned in North America. That wheat product was then shipped in a contaminated form to Canada and converted into dog food in the United States. There were more than 40 different brands that were impacted.

We issue bulletins, work with Public Affairs, created a page specifically to address that. We've done the same thing on issues of pediatric vaccines as it impacts on autism.

Mr. CARTER. Yes. You're touching on something that is good because vaccines came right to my mind whenever I was thinking this.

Mr. SADLER. We had litigation against the agency that was more than a million pages at issue, which required bringing in multiple attorneys on contract.

Part of the difficulty that we experienced—personal opinion—was that the attorneys were looking for long-term employment in permanent positions rather than as contractors and they bailed as soon as they could find an alternative employment, setting back the agency's ability to respond to litigation in a timely manner.

The volume of requests is a problem. You can't remediate some of these things, particularly when you're dealing with truly old records and they are bad carbon copies.

I think the agency has addressed public health issues quite well, and we do make available individuals to discuss these kinds of problems with the individuals, if they wish to pursue communication.

Mr. CARTER. I think I'm out of time, but thank you very much for——

Mr. SADLER. May I add a parenthetical here?

Mr. CARTER. Sure.

Mr. SADLER. And this is in response to a couple of different questions, and I apologize for going over time.

But I think in the statute I'm hearing a conflict potentially between the functions that are dedicated to OGIS and the functions that are dedicated to the Department of Justice.

I would suggest that there be a clear line in defining the functions and processes of these two groups. The Office of Information

Policy and the Department of Justice is designated by statute as the arbiter of policy and interpretation, and OGIS is there to monitor, look for improvements, and then to work with the requester community for mediation.

I think there is some commingling of these functions that's going on. And, if that happens, a FOIA officer could, in theory, theory, receive different responses to the same question. I would like to see a more definitive break between the two organizations.

They work hand in glove. There is a highly cooperative relationship. They frequently do training together. My friend, Ms. Nisbet, is a long-term friend of the head of the OIP, Ms. Pustay. And we all get along well. But it is confusing sometimes to both the FOIA community and to the requester community as to where you go.

Mr. MEADOWS. I thank the gentleman from Georgia. I thank you for your response. You're drawing the scenario that you all get along well. I want to come back and visit that. That is not what I'm hearing.

So we're going to go to the gentleman from Wisconsin, Mr. Grothman.

Mr. GROTHMAN. Thanks much.

For Mr. Blum, you have these—there are exemptions in Freedom of Information Act under what you call (b)(5).

First of all, can you tell me about how often that that exemption it used.

Mr. BLUM. I'm sorry?

Mr. GROTHMAN. Can you tell me how often that exemption is used, the (b)(5) exemption.

Mr. BLUM. It is used—I believe it's thousands of times every year.

Mr. GROTHMAN. Are there any times where you think it is inappropriate? Like can you give any examples of where you think it is wrongly used?

Mr. BLUM. Well, the VA blocked the names—they declined to name hospitals where 19 veterans had died during delayed medical screening. The Bureau of Prisons refused to release names of companies that it had contracted to have access to prison labor and they used (b)(5).

My understanding is the CIA claimed (b)(5) to withhold the history of the Bay of Pigs invasion. Again, I want to thank the National Security Archive, an independent group, for collecting these examples.

The issue is not do people in government have the right to sit in a room and deliberate policy and come up with something that is good for the country. The issue is do they have the right to abuse that privilege. And we hope that what's in the bill will help stop that.

Mr. GROTHMAN. Ms. Nisbet, just a final comment from you.

When I look at this area of the law, I see, you know, two problems, the one that we just kind of talked about in which agencies are either delaying—or not turning around requests quickly enough or denying requests, and the other problem is somebody who has been in government for a while. People can just pester you forever and you have to spend forever and ever responding to these re-

quests on fishing expeditions and it just takes a tremendous amount of time.

Could you give me, based upon your years of experience here, your suggestions for improvements in both these areas.

Ms. NISBET. Well, I think an improvement has already been introduced into the law with the 2007 amendment, which did create a chief FOIA officer, made statutory the position of FOIA public liaison, and created the FOIA ombudsman's office.

I think with both delays and with problems of—let me just say maybe—frequent FOIA requesters is sometimes how they are referred to, people who just keep coming back and back and, in fact, maybe their issue is really not the FOIA, it is an underlying problem with the agency or with issues that the agency deals with.

In both of those situations and other related procedural matters, having an office such as the FOIA public liaison or OGIS to be that neutral mediator to be able to sort of calm the parties down and bring them to a place where they can actually have a conversation or even a mediated conversation can really make a difference, and we have seen it more.

Mr. GROTHMAN. Thank you.

I yield the rest of my time.

Mr. MEADOWS. I thank the gentleman from Wisconsin.

The chair recognizes the ranking member of the full committee, who over the years has talked about restoring trust, and that's a big item for Mr. Cummings.

And so it is with great admiration that the chair recognizes Mr. Cummings, the gentleman from Maryland.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Mr. Blum, earlier this month Representative Issa and I introduced H.R. 653, the FOIA Oversight and Implementation Act. The bill codifies into law a presumption of openness. The bill does this by creating a legal presumption in favor of disclosure in response to FOIA requests.

When President Obama took office, he issued a memo that directed agencies to administer FOIA with: "a clear presumption, in the face of doubt, openness prevails."

Is that accurate, what I just said?

Mr. BLUM. Yes, sir.

Mr. CUMMINGS. OK. The bill requires that records be disclosed under FOIA unless agencies can demonstrate "specific identifiable harm." In 2009, Attorney General Holder issued a memo instructing agencies that the Department of Justice will defend FOIA denials only if, one, an agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions or, two, disclosure is prohibited by law. Is that right?

Mr. BLUM. Yes.

Mr. CUMMINGS. Now, Mr. Blum, you said in your testimony that you agree with adding these provisions to the FOIA statute.

Let me ask you this: If the agencies are already required to do this under the administration's policy, why is it important for Congress to pass these provisions into law?

Mr. BLUM. Well, I think it is very important to take the 6 years' experience that agencies have had and put them into law to assure that that's the way, going forward—you know, in the next adminis-

tration and in the next administration after that, that's the appropriate starting point.

You start in our democracy with the presumption of openness unless there is a very specific reason for not being transparent. And so it is important, I think, for future generations to have this in law.

Mr. CUMMINGS. Last year the Department of Justice expressed some concern with this provision, suggesting that it might increase litigation and undermine the policy behind the exemptions. Mr. Obama's bill would just codify DOJ's own policy. Is that right?

Mr. BLUM. That is true. Yes. It would just codify the Justice Department's policy.

Mr. CUMMINGS. So I take it that you don't have similar concerns.

Mr. BLUM. I do not. I do know that very, very late in the last Congress some concerns were raised. But the issues that they had raised I just don't understand because there are already broad protections for some kinds of information that they were concerned about.

Mr. CUMMINGS. The committee has also heard from some independent agencies that the presumption of openness standard might impact the ability to withhold certain information.

Specifically, the Office of Comptroller of the Currency, the Consumer Financial Protection Bureau, and the Federal Trade Commission suggested that the bill could impact their ability to obtain information when they conducted exams of institutions they regulate.

They suggested that banks and other regulated-related entities would not have certainty that the information they provided would be protected.

Mr. Blum, how do you respond to those concerns?

Mr. BLUM. Well, I really don't understand those concerns because Exemption (8) is already a category that protects financial information, Exemption (8), and it is very, very broadly interpreted as a very broad protective exemption.

And it was clarified to ensure that the SEC's new authorities under Dodd-Frank, you know, could use Exemption (8). So I really think that there is very, very broad protections for this kind of information.

Mr. CUMMINGS. So is there any reason to believe that the information that an agency is legitimately withholding under Exemption (8) would lose its protection under the bill?

Mr. BLUM. I really don't think this bill would change that or have the kind of damaging impact.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I yield back.

Mr. MEADOWS. I thank the gentlemen.

The chair recognizes himself for a series of questions not to exceed 5 minutes.

And I want to just say thank you. And before I go any further, I want to publicly thank the staff that has worked so diligently. They normally are not the ones that are speaking, but they are always the one who are doing the work. And so I want to recognize them and thank them for the work.

Mr. Sadler, let me come to you. One of the quotations that I wrote down is you said there's a tendency to "jump to litigation" when you were talking about that. Why do you think that would be, Mr. Sadler?

Mr. SADLER. Strictly personal opinion, sir, but I think that there is a belief or an understanding on the part of a small segment of the requester community that FOIA is being given less attention than it is.

I don't think that these individuals necessarily understand the complexity of the implementation and they believe that they can then force production of records within a relatively short time.

And, of course, one of the financial changes that was made is that, if an agency did not respond previously and then did during the course of litigation, the requester could ask the court to award attorney fees, which an agency would have to pay out of its operating fees. This could run into the hundreds of thousands of dollars.

In bygone years, attorney fees would be handled by the Department of the Treasury from the Judgment Fund. That's no longer the case as of 2007. We've lost a couple of cases in my agency usually as a result of timeframes or volume or complexity, but we did have one case where we had to pay $246,000 out of operating funds.

Mr. MEADOWS. So the complaints that we get from folks that Mr. Blum talks to, actually, people that have called me prior to this hearing, say that, on a number of occasions, they feel like they just get stonewalled, that what happens is the Freedom of Information officer may want to comply and all they are doing is coming back and saying, "Well, we can't get the information," "We can't get the information," "We can't get the information."

Would you say that that is an accurate characterization of——

Mr. SADLER. I think it has happened on occasion without question, sir.

Mr. MEADOWS. Mr. Blum, would you agree with that?

Mr. BLUM. I would. The FOIA officer is the one trying to get the records out and having difficulty.

Mr. MEADOWS. So we need to empower the FOIA officers how? I mean, because—are they handicapped?

Mr. BLUM. Well, I think the higher the attention within the agency to these problems, the better.

Mr. MEADOWS. So if there is a problem, a memo needs to be sent to the ranking member so he can justify that?

Mr. BLUM. Well, I think having a performing metrics that an agency head or their deputy can look at to say, "We have got a backlog in this office. Who else can pick up some slack?" or, "Why are we not doing as well as we need to? Let's put some more resources help people like Mr. Sadler."

Those kinds of things can be very effective, and I think the bill tries to do some of that.

Mr. MEADOWS. All right. Ms. Nisbet, how do we go about limiting the scope of a FOIA request where it is saying, you know, "Please send me 100,000 copies so I can go through and do the research" and make it much more—perhaps what I would say is a rapid response—if they will make it a much smaller request, they'd get a

much quicker response, versus saying, "We have this broad brush we're going to stroke it with. And we'll comply with that, but that may take 12 months to comply with. If you will, narrow the scope in terms of your question?" Is that something that's reasonable?

Ms. NISBET. It is very reasonable, and I think it is happening more and more. But that is precisely where you need the FOIA public liaison or OGIS to be able to have that conversation.

In other words, you really need to have the requester and the FOIA office talking about what kind of records there are, what there might be, what could be gotten much more quickly, as you say.

That also, Mr. Chairman, requires trust, and that's often lacking, I think, because, until recently, there has not been an alternative other than litigation. And so the parties become very adversarial.

But as trust builds and as those conversations are held, it should work better. We have certainly seen that it works better.

Mr. MEADOWS. So would you say that the agency that you used to head up as director—would it be better if they were empowered with more autonomy and more decisionmaking instead of having to go through OMB and some of the other areas to give that agency more independence and autonomy?

Ms. NISBET. Well, the ability to convene parties and to conduct mediation I think certainly is something that has worked well for OGIS.

The independence, as one of its criteria or one of its abilities, certainly helps both with the mediation and, also, with the reviewing on compliance and reporting on compliance. So I think it helps in both respects.

Mr. MEADOWS. I have exceeded my time. I'll certainly allow the ranking member to do—they have called votes. He can do a closing Statement, if he'd like. And then we'll finish up.

But I would like to say that, if you have policy recommendations, the ranking member and I were discussing we would love to hear it and we consider this a priority and we will take action on that.

So the chair recognizes the ranking member for a closing Statement.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Actually, I just want to piggyback on the point you were just making because, you know, sometimes when we talk about FOIA, it's good government, it's openness, it's sunshine, and we're just seeking the truth. And we have bureaucrats who are just stonewalling and not cooperating and, "What's wrong with them?" and, "Why can't they get with the program?" Well, it's not that simple.

I was on the receiving end for 14 years of FOIA requests, as an elected official in local government, and often the scope of a FOIA was so broad that we didn't know what to do with it. You know, if I really responded to what you're literally asking for, we'd have to hire huge truckloads of documents to deliver them to you and it would take forever and lots of money.

Can we work together on limiting the scope or being more precise in what it is you are really seeking? And I think that's another aspect of it because it is easy for someone to say, "Well, I think you're stonewalling" when the mistake is mine in not being more precise

in the request. And, actually, it is not because of resistance. It's you trying to figure out what my request is really getting at.

And so trying to narrow those differences I think is very important so that we do avoid unnecessary litigation and that we try to be more precise in the language of the law when it comes to scope.

So thank you for bringing that up because I think that really is another dimension of this.

And thank you to the panel for being here today.

Mr. MEADOWS. So I'd like to thank the witnesses for taking the time to appear today.

If there is no further business, without objection, the subcommittee stands adjourned.

[Whereupon, at 10:32 a.m., the subcommittee was adjourned.]