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IMPLEMENTATION OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES

HEARING

BEFORE THE

SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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IMPLEMENTATION OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES

WEDNESDAY, SEPTEMBER 17, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m. in room 2154, Rayburn House Office Building, Hon. Wm. Lacy Clay (chairman of the subcommittee) presiding.

Present: Representatives Clay and Yarmuth.

Staff present: Darryl Piggee, staff director/counsel; Jean Gosa, clerk; Alissa Bonner and Michelle Mitchell, professional staff members; Charisma Williams, staff assistant; Leneal Scott, information officer; and Charles Phillips, minority senior counsel.

Mr. CLAY. The Information Policy, Census, and National Archives Subcommittee of the Oversight and Government Reform Committee will come to order.

Yes, we are experiencing some technical difficulty with the sound system, and we will try to fight through it.

Without objection, the chair and ranking minority member will have 5 minutes to make opening statements, followed by opening statements not to exceed 3 minutes by any other Member who seeks recognition.

Without objection, Members and witnesses may have 5 legislative days in which to revise and extend their remarks.

Let me start with the opening statement.

Today the committee will examine the structure and function of the Office of Government Information Services [OGIS], established by the Open Government Act of 2007. Congress passed the Open Government Act to help citizens obtain timely responses to FOIA requests. OGIS is charged with reviewing FOIA policies and procedures of administrative agencies to make sure they are in compliance with the law.

Congress placed OGIS within the National Archives and Records Administration to serve as an impartial mediator to resolve disputes between FOIA requestors and administrative agencies. Prior to the act, when an agency failed to provide information requested under FOIA, a requester was forced to sue an agency to get the information. For average citizens who comply, a significant percentage of the FOIA requestor community, the cost of litigation is prohibitive.

It has been 9 months since the President signed the Open Government Act into law, but there has been no movement on establishing OGIS. Congress has appropriated $1 million to fund the planning for OGIS; however, the funds will not likely be available until 2009.

Members are concerned that delays in structuring the office will increase the backlog on FOIA requests and undermine the purpose of establishing OGIS.

Today's hearing will provide the U.S. Archivist with an opportunity to share his strategic plan to implement the law and establish OGIS. We will also hear from the open government community about how to structure a highly functional office that will make FOIA work more effectively.

I thank all of our witnesses for appearing today and look forward to their testimony.

[The prepared statement of Hon. Wm. Lacy Clay follows:]

Opening Statement
Of
Wm. Lacy Clay, Chairman
Information Policy, Census and National Archives Subcommittee

Wednesday, September 17, 2008
2154 Rayburn House Office Building
2:00 p.m.

"Implementation of the Office of Government Information Services"

GOOD AFTERNOON. TODAY THE COMMITTEE WILL EXAMINE THE STRUCTURE AND FUNCTION OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES (OR OGIS) ESTABLISHED BY THE "OPEN GOVERNMENT ACT" OF 2007.

CONGRESS PASSED THE "OPEN GOVERNMENT ACT" TO HELP CITIZENS OBTAIN TIMELY RESPONSES TO FOIA REQUESTS. OGIS IS CHARGED WITH REVIEWING FOIA POLICIES AND PROCEDURES OF ADMINISTRATIVE AGENCIES TO MAKE SURE THEY ARE IN COMPLIANCE WITH THE LAW.

CONGRESS PLACED OGIS WITHIN THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION TO SERVE AS AN IMPARTIAL MEDIATOR TO RESOLVE DISPUTES BETWEEN FOIA REQUESTORS AND ADMINISTRATIVE AGENCIES.

PRIOR TO THE ACT, WHEN AN AGENCY FAILED TO PROVIDE INFORMATION REQUESTED UNDER FOIA, A REQUESTER WAS FORCED TO SUE AN AGENCY TO GET THE INFORMATION. FOR AVERAGE CITIZENS, WHO COMPRISE A SIGNIFICANT PERCENTAGE OF THE FOIA REQUESTOR COMMUNITY, THE COST OF LITIGATION IS PROHIBITIVE.

IT HAS BEEN NINE MONTHS SINCE THE PRESIDENT SIGNED THE "OPEN GOVERNMENT ACT" INTO LAW, BUT THERE HAS BEEN NO MOVEMENT ON ESTABLISHING OGIS.

CONGRESS HAS APPROPRIATED $1 MILLION TO FUND THE PLANNING FOR OGIS, HOWEVER THE

FUNDS WILL NOT LIKELY BE AVAILABLE UNTIL 2009. MEMBERS ARE CONCERNED THAT DELAYS IN STRUCTURING THE OFFICE WILL INCREASE THE BACKLOG OF FOIA REQUESTS AND UNDERMINE THE PURPOSE OF ESTABLISHING OGIS.

TODAY'S HEARING WILL PROVIDE THE U.S. ARCHIVIST WITH AN OPPORTUNITY TO SHARE HIS STRATEGIC PLAN TO IMPLEMENT THE LAW AND ESTABLISH OGIS.

WE WILL ALSO HEAR FROM THE OPEN GOVERNMENT COMMUNITY ABOUT HOW TO STRUCTURE A HIGHLY FUNCTIONAL OFFICE THAT WILL MAKE FOIA WORK MORE EFFECTIVELY.

I THANK ALL OF OUR WITNESSES FOR APPEARING TODAY AND LOOK FORWARD TO THEIR TESTIMONIES.

Mr. CLAY. I now yield to my friend from Kentucky, Mr. Yarmuth. You may have up to 5 minutes.

Mr. YARMUTH. Thank you, Mr. Chairman. And thank you for holding this hearing. I want to thank all the witnesses for appearing today.

I have two very personal reasons for my interest in this hearing. One is, as someone who spent most of the last 25 years before entering Congress in journalism, I understand how critical FOIA is to the functioning of a free society and free democracy, so I am very concerned that what we do here in Congress to make sure that FOIA functions effectively in the Federal Government is very important to me.

Second, this is Constitution Day, 221st anniversary of the Constitution. I wear Article 1 buttons to show my respect for not just the Constitution but specifically for the establishment of the Congress and the idea, as expressed in the Constitution, that the people decide the law of the land through their representatives in Congress. The Founding Fathers vested all legislative authority in Congress, and it seems to me that what we have seen here is possibly another example in which Congress' authority is being undermined by the executive branch, not being respected by the executive branch, that the checks and balances that the Founding Fathers contemplated are not being respected throughout Government, and therefore I look forward to the testimony and exploring these questions so that the American people understand what is at stake when Government doesn't function as the Constitution anticipated it would.

So thank you, again, Mr. Chairman, for holding this hearing. I look forward to the testimony.

Mr. CLAY. Thank you, Mr. Yarmuth.

We will now take testimony from the witnesses. We are fortunate to have several FOIA experts to offer their insight on what OGIS should look like and how it can best achieve its mission.

We welcome the Honorable Allen Weinstein, Archivist of the National Archives and Records Administration. He is accompanied by Deputy Archivist Adrienne Thomas. Welcome to you both.

We also have with us Thomas Blanton, director of the National Security Archive at the George Washington University. And Patrice McDermott, Director of openthegovernment.org, and Rick Blum, coordinator for Sunshine in Government Initiative, as well as Terry Mutchler, executive director of Pennsylvania's Office of Open Records.

Let me thank all of you for appearing today before the committee.

It is the policy of this subcommittee to swear in all witnesses before they testify. Would you all please stand and raise your right hands.

[Witnesses sworn.]

Mr. CLAY. Let the record reflect that the witnesses answered in the affirmative.

I would ask that each witness now give a brief summary of their testimony. Please limit your summary to 5 minutes. Your complete written statement will be included in the hearing record.

Mr. Weinstein, we will begin with you.

STATEMENTS OF ALLEN WEINSTEIN, ARCHIVIST OF THE UNITED STATES, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, ACCOMPANIED BY ADRIENNE THOMAS, DEPUTY ARCHIVIST, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; THOMAS BLANTON, DIRECTOR, NATIONAL SECURITY ARCHIVE AT GEORGE WASHINGTON UNIVERSITY; PATRICE McDERMOTT, OPENTHEGOVERNMENT.ORG; RICK BLUM, COORDINATOR, SUNSHINE IN GOVERNMENT INITIATIVE; AND TERRY MUTCHLER, EXECUTIVE DIRECTOR, PENNSYLVANIA'S OFFICE OF OPEN RECORDS

STATEMENT OF ALLEN WEINSTEIN

Mr. WEINSTEIN. Good afternoon, Chairman Clay. I am Allen Weinstein, Archivist of the United States. I am accompanied by Deputy Archivist Adrienne Thomas.

In preparing the testimony which I am about to deliver to this congressional committee, I treated with utmost seriousness my own obligations as a member of this administration to subordinate any personal views on the matter at hand, to stick to the facts, and to recognize the deep concerns felt by this administration regarding the matters at hand.

As you know, in the fiscal year 2009 budget submission to Congress, the administration requested that Congress transfer responsibilities for the Office of Government Information Services [OGIS], from the National Archives to the Justice Department, the administration's lead agency on FOIA issues. Both House and Senate Appropriations Subcommittees have indicated their disagreement with locating OGIS in the Justice Department. We should keep in mind the final fiscal year 2009 Appropriations Act resolving the issue has not yet become law and the issue remains unsettled.

The Archives' position on the matter can be stated simply we have not sought ownership of the tasks involved. Indeed, we are not far from Lincoln's famous comment, Mr. Chairman, of the gentleman being run out of office on a rail who told an onlooker, "Were it not for the honor of the thing, he would just as well have walked."

Can we do the job if assigned it? There is little question that we can. Should we do so remains a more complicated manner and, candidly, without adequate funding, a downright impossible one.

Make no mistake: should NARA be funded by Congress for the OGIS and that agreement signed into budgetary law by the President, we will respond to the challenge and the intent of both Congress and the administration in shaping an Office of Government Information Services devoted to maintaining the dialog and working closely with the Justice Department, as well as with every agency of the Government to improve public access to Government information. I cannot imagine that the President and Vice President, agency heads, and bipartisan commission leaders would expect any less of us.

The world of Freedom of Information requests is a complex one. I know from personal experience on both sides of the fence, Mr. Chairman. I was one of the first Americans to file with success a Freedom of Information Act lawsuit following passage of the 1974 amendments, and today I oversee an agency that receives over 1

million requests a year from the public for information. Not all are Freedom of Information requests, but they often require that the public's right to information be balanced with the need to protect certain kinds of information.

The Freedom of Information Act recognizes this balancing act by providing nine exemptions for withholding information. It is a testament to the quality of that legislation that these exemptions still serve us well today. In the intervening years since the passage of the Freedom of Information Act, both the public awareness of this right of access and the bureaucracy necessary to service that right have grown significantly. Many of the issues addressed by your bill, Mr. Chairman, and by public law 110–175 are a direct result of that growth.

My pledge to you, Mr. Chairman and members of the committee, is that if called upon I will set up the Office of Government Information Services as a fair and independent voice in the continuing push and pull between maximum public access, on the one hand, and the necessity on the other to withhold information under the FOIA exemptions.

I thank the committee for listening to this brief statement, and I will try to respond to any questions you might have.

[The prepared statement of Mr. Weinstein follows:]

STATEMENT
OF
THE HONORABLE ALLEN WEINSTEIN
INFORMATION POLICY, THE CENSUS, AND THE NATIONAL ARCHIVES SUBCOMMITTEE
VERSIGHT AND GOVERNMENT REFORM COMMITTEE

WEDNESDAY, SEPTEMBER 17, 2008
2154 RAYBURN HOB
2:00 P.M.

Good morning, Mr. Chairman and Representative Turner, I am Allen Weinstein, the Archivist of the United States. I am pleased to appear before you today to discuss the proposed Office of Government Information Services. The Office of Government Information Services was established by the Open Government Act of 2007 (P.L. 110-175), which is similar to H.R. 1309, introduced by Chairman Clay, and which passed the House on March 14, 2007 by a vote of 308 to 117.

The Open Government Act of 2007 (P. L. 110-175) which amended Title 5 of the United States Code, and the House bill are quite similar in the provisions for the Office of Government Information Services, and I will limit my comments today to the responsibilities of that office. As you know, in the FY 2008 Budget Submission to Congress, the Administration requested that Congress transfer the responsibilities of the Office of Government Information Services to the Justice Department. The Administration strongly supports measures to ensure the timely and fair resolution of Freedom of Information Act (FOIA) requests. However, as you know, in its FY 2009 budget submission to Congress, the Administration has taken the position that most of the proposed functions of the Office of Government Information Services (OGIS) are duplicative of activities within the Department of Justice (DOJ), and therefore believes that only DOJ, as the Government's lead on FOIA issues and mediation in legal matters, is better-situated to successfully mediate issues between requestors and the Federal Government. House and Senate Appropriations Subcommittees have indicated

disagreement with that request, although none of those bills has become law, and the issue remains unsettled for the moment.

As you may also know, Archives officials met with Senator Cornyn's staff and others during the drafting process of Open Government Act, including discussing whether the National Archives was the appropriate agency to house the Office of Government Information Services. We candidly explained our resistance to being given a new mission we are not well positioned to fulfill and do not directly relate to our core mission. Moreover, we made clear that should we nonetheless be given this responsibility, we would not be able to commence until we had received specific funding for it.

Should it be resolved that the responsibility of this office falls to the National Archives and Records Administration, we will do everything we can to follow the letter of the law and the intent of Congress to create an office that would assist in seeking to resolve disputes between agencies and individuals requesting information from their government.

The world of Freedom of Information requests can be a complex one. I know from personal experience on both sides of the fence. I was one of the first Americans to file a Freedom of Information Act lawsuit following passage of the 1974 amendments, and today I oversee the National Archives' responsibility for responding to well over one million requests a year from the public for information from my agency. Some of those requests require that the public's right to information must be balanced with the need to protect certain kinds of information.

The Freedom of Information Act recognizes this balancing act by providing nine exemptions for withholding information. It is a testament to the quality of that legislation that those exemptions still serve us well today. In the intervening years since the passage of the Freedom of Information Act the public awareness of its right to access, and the bureaucracy necessary to service that right have grown significantly. Many of the issues addressed by your bill, Mr. Chairman, and Public law 110-175 are a direct result of that growth.

Public understanding of how government records are organized and maintained is not strong, even in a government savvy town like Washington DC. That lack of understanding can result in requests that are overly broad, or which lack the specificity to allow the agency to readily search for the records. Similarly, the volume of request, the sensitivity of the records, and the need to consult with other affected agencies all significantly impact the ability of agency FOIA officers to respond in a timely manner. The combination of these pressures can result in misunderstandings.

The easy cases can be resolved with a letter or phone call. Requests can be narrowed and sharpened, and the search process can be made more efficient. The more complicated cases, often involving one or more exemptions, are more difficult to resolve. Agencies handling hundreds of thousands of Freedom of Information requests each year often stub their toes on these more difficult decisions. Sometimes these difficult cases end up in litigation, which is time consuming and expensive both for the government and for the requestor. However, many of these cases are resolved before reaching the courtroom without resort to further litigation because the dialogue between the agency and the requestor in preparation for litigation provides sufficient understanding to allow compromise.

The length of time between a Freedom of Information request received by an agency and documents in the hand of the requestor is also a serious concern both at agencies and within the requestor community. At my own agency, a number of factors complicates this response time.

Freedom of Information Act requests for military records take considerably longer than the 20-day standard if the request is for a record that was lost in the 1973 fire at the National Personnel Records Center and the data must be reconstructed from other sources, or if the record has been borrowed by another agency.

The National Archives has very limited authority to declassify information. The response time to a Freedom of Information request can therefore be lengthy if the records must be referred to another agency for declassification review.

When Freedom of Information requests are submitted to those Presidential Libraries subject to the Presidential Records Act and the Freedom of Information Act, the National Archives must inform both the current and the former Presidents of the records we propose to open and then allow the Presidents an opportunity to review the records prior to release.

Despite these obstacles in fiscal year 2007 we answered 86 percent of our 12,185 Freedom of Information requests in 20 days or less. This result exceeded NARA's performance goal. However, Freedom of Information requests make up only a small proportion of the information requests we receive each year. In FY07 the National Archives answered 1,226,954 written reference requests for access to records among our holdings. These requests seek records that are publicly available and have no restrictions to access. Of the over 1.2 million requests processed, the National Archives and Records Administration answered 820,144 requests within 10 working days.

The number of requests for open archival records does not include the 519,625 items furnished to researchers in the National Archives' reading rooms or the far greater number of telephone inquiries and other matters handled for researchers visiting National Archives facilities.

As you know, Mr. Chairman, I have not begun the task of setting up the formal processes for the Office of Government Information Services. The 2009 President's Budget, which is still pending before Congress, would transfer the functions of the Office of Government Information Services to the Justice Department. The Administration believes that the proposed functions for the new Office of Government Information Services are mostly duplicative of activities already being performed by the Department of Justice, and that the Department of Justice, as the Government's current lead on FOIA

issues and mediation in legal matters, is best situated and empowered to successfully mediate issues between requestors and the Federal Government. Moreover, the President's Executive Order of 2005 is already working to create more efficient FOIA processes and fair resolution of FOIA processes.

Today's hearing will further our efforts to maintain a dialogue. I am committed to working with all relevant parties to help ensure efficient, timely, and fair resolutions to information requests from the public.

ORAL STATEMENT OF
DR. ALLEN WEINSTEIN
ARCHIVIST OF THE UNITED STATES
SEPTEMBER 17, 2008

Good afternoon Chairman Clay, I am Allen Weinstein, Archivist of the United States. I am accompanied by Deputy Archivist Adrienne Thomas.

In preparing the testimony which I am about to deliver to this Congressional committee, I treated with utmost seriousness my obligations as a member of this Administration to subordinate any personal views on the matters at hand, stick to the facts, and recognize the deep concerns felt by this Administration regarding the matters at hand. As you know, in the FY2009 budget submission to Congress which is still pending, the Administration requested that Congress transfer the responsibilities for the Office of Government Information Services (OGIS) from the National Archives to the Justice Department, the Administration's lead agency on FOIA issues.

Both House and Senate appropriations subcommittees have indicated their disagreement with locating OGIS in the Justice Department, although we should keep in mind that a final FY 2009 appropriations act resolving the issue has not yet become law, and the issue remains unsettled. The

Archives' position on the matter can be stated simply. We have not sought "ownership" of the tasks involved. Indeed, we are not far from Lincoln's famous comment on the gentleman being run out of town on a rail who told an onlooker "Were it not for the honor of the thing, he would just as well have walked." Can we do the job if assigned it? There is little question that we can. Should we do so, remains a more complicated matter and, without adequate funding, a downright impossible one.

Should NARA be funded by Congress for the OGIS, and that bill signed into the law by the President, we will respond to the challenge and the intent of both Congress and the Administration in shaping an Office of Government Information Services devoted to maintaining the dialogue and working closely with the Justice Department as well as with every agency of the government to improve public access to government information. I cannot imagine that the President and Vice President, agency heads, and Congressional leaders would expect any less of us.

The world of Freedom of Information requests is a complex one. I know from personal experience on both sides of the fence. I was one of the first Americans to file a Freedom of Information Act lawsuit following passage

of the 1974 amendments, and today I oversee an agency that receives over one million requests a year from the public for information. Not all are FOI requests, but they often require that the public's right to information be balanced with the need to protect certain kinds of information.

The Freedom of Information Act recognizes this balancing act by providing nine exemptions for withholding information. It is a testament to the quality of that legislation that those exemptions still serve us well today. In the intervening years since the passage of the Freedom of Information Act the public awareness of this right of access, and the bureaucracy necessary to service that right have grown significantly. Many of the issues addressed by your bill, Mr. Chairman, and Public Law 110-175 are a direct result of that growth.

My pledge to you, Mr. Chairman and members of the Committee, is that if called upon, I will set up the Office of Government Information Services to be a fair and independent voice in the continuing push and pull between public access and the necessity of withholding information under the FOIA exemptions.

I thank the Committee for listening to my testimony, and I will try to respond to any questions posed you might have.

Mr. CLAY. Thank you so much, Mr. Weinstein.

Mr. Blanton, we will proceed with you.

STATEMENT OF THOMAS BLANTON

Mr. BLANTON. Thank you, Mr. Chairman, Congressman Yarmuth.

This hearing is an essential part of the process. There is nothing like a hearing to clarify the mind or get the executive branch to give us some answers. Frankly, I was shocked to see the written testimony that came to this subcommittee just yesterday because that is not what we have been hearing and it is completely unrealistic as an approach to setting up a successful Office of Government Information Services. To shuck and jive and run still from the task, which is what the administration is doing, by still saying this belongs at the Justice Department is just wrong. The fate of a statute, the intent of Congress, the unanimous opinion of the requester community, and the unanimous approval of the Congress actually hangs in the balance here.

I can tell you this function does not belong at the Department of Justice. There is an inherent conflict of interest there that was recognized by the requester community and by this committee and by this Congress that said no. Those are the folks that defend agencies against requesters. They can't mediate. And in fact, they don't mediate. Contrary to the prepared testimony presented by the Government, the Office of Information Policy at the Justice Department does not mediate. Just last year we approached them and said CIA is breaking the law on fees on the Freedom of Information Act and we are going to have to go to court unless you step in and tell them. Justice Department said, well, we think you are right. They are breaking the law. There is established case law. But no, we can't really step in. We had to go to court.

The CIA has just sent an apology letter to our General Counsel saying, we were wrong. Sorry about that. We take it back. But meanwhile hundreds of hours of our time, our pro bono lawyers' time, and taxpayers' time was taken up by a dispute that should never have gone so far. The Office of Information Policy is not doing this job, won't do this job, can't do this job, and shouldn't do this job. That is why this legislation, this statute, set up the Office of Government Information Services precisely at an independent agency, respected agency.

I must say that, on behalf of most of the requester community, we were hoping that agency would run out and embrace it and take it and take that vote of confidence and go do great things with it, because that is what I really hoped to see during this hearing today, Mr. Chairman, was a discussion of some of the practical steps that we all need to participate in, the stakeholders, the Congress, the National Archives, and the rest of the executive branch, frankly, to make this new function work.

The United States is falling behind. It used to be a leader on the Freedom of Information Act. Now the backlogs are mounting. Now the restrictions are mounting. The secrecy stamps are flying at record pace. Around the world, other countries are doing this kind of function—mediation function, ombudsman function—very successfully. There are great lessons also at the State level. We are

going to hear one of those later in the prepared testimony here. There are lessons we should take from all those to make this work. There are a bunch of practical steps that we need to focus on.

I think you will see in the statements a lot of consensus among the stakeholders on the need for leadership, the need for a commitment to open Government, the fact that the decision about who is going to be the director of this office is maybe the most important single one, and we had better get ready for that because that person and that person's commitment to open government is what is going to make this work.

There is consensus, I think, among your witnesses here about the necessity for transparency in the office's functions, the way in which the Web and the Internet can help build a body of advice and opinion and guidance that is good for agencies, good for the efficiency of Government, and good for requesters to figure out how to make their own requests better and bring less of a burden on the agencies.

I think there is consensus about the necessity to get started now. I do hope that after this hearing the National Archives will continue the process that it has started. I must give the credit to you, Mr. Chairman, and to this subcommittee for setting a date for a hearing, because that tends to drive some dialog that might not otherwise take place. I hope to see that dialog continue, because we all have to be ready. This is going to be a mandate. There will be an office in March 2009. National Archives is going to have to carry it out, we need to have a job description already written. We need to have some ideas about the guidance and the regulations that office is going to put out. We need to have some very practical steps that you are going to hear from Pennsylvania and Illinois' experience about what that office can do to make things work.

We need to be ready to go, because already just the realities, having a director in place some time the spring of 2009, staffing up the other five or six people that budget will support maybe by the end of the summer, some guidance and regulations by the end of the year. We are talking 2 years after Congress put this function into law before we are going to see real benefit to the public, to the requester.

Finally, I just want to say my No. 1 recommendation for making this office work is that if it becomes just a complaint bureau it will fail. The experience in Great Britain when they established an Information Commission, it would be this kind of appeal and mediation office, he set up essentially a first in/first out complaint line. Right now he has a 2,000 case backlog because it just built up.

The only way, when you are talking about 21.8 million Freedom of Information requests every year to the Government, when you are talking about a minimum of 8,000 administrative appeals into the Federal Government, you are talking about a potential caseload level that could overwhelm this office. It has to be proactive. It has to take preventive measures. It has to use the Government Accountability Office provision that is in the law, do those audits of agencies, find the problem agencies, define them, figure out how to fix them, use those other resources.

Then once you have an idea of how to fix it, and that is what OGIS should produce, use the Freedom of Information Act public

liaison officers who were originally in President Bush's Executive order, adopted into statute, have statutory role in assisting in mediating disputes. Those folks should be your front-line people for the office to empower. Every one of those people should have a job description that says you are going to carry out the advisory opinions of the office. That is what is going to make it work.

I really thank you for your attention to this, Mr. Chairman, because without that attention I don't even think we would have the progress that we do have to date.

[The prepared statement of Mr. Blanton follows:]

Testimony of Thomas Blanton, Executive Director
National Security Archive, George Washington University
www.nsarchive.org, tblanton@gwu.edu

To the Information Policy, Census, and National Archives Subcommittee,
Oversight and Government Reform Committee,
U.S. House of Representatives

Hearing on the structure and function of the Office of Government Information Services established by the "Openness Promotes Effectiveness in Our National Government Act of 2007" (P.L. 110-175)

September 17, 2008

Thank you very much, Chairman Clay, and members of the Subcommittee, for inviting this testimony today. This hearing is timely indeed. Congress's intent and the plain language of a statute hang in the balance. Congress's attention to this issue is the only guarantee that the law will be carried out. So I applaud the Subcommittee for its follow-through, and encourage you to include in your plans for 2009 another hearing to assess progress at that time. Regrettably, we are not likely to have much progress until late in 2009, because of the administration's obstruction to date.

I'll come back to this point, but let me first introduce myself and my organization, the National Security Archive at George Washington University. We are an independent research institute and journalism center founded by journalists and historians in 1985. We receive no government funding. We have filed more than 35,000 Freedom of Information Act and declassification review requests over 23 years, and in April 2000 won the George Polk Award for "piercing self-serving veils of government secrecy." Over the past six years, we have carried out seven government-wide audits of agency FOIA performance that generated national headlines and directly changed agency behavior on backlogs, tracking, Web site structure and content, and communication with requesters. Detailed reports on each of these audits are posted on the Archive's Web site at http://www.gwu.edu/~nsarchiv/nsa/foia/audits.htm.

We were the only outside organization cited in the Attorney General's 2007 report to the President on FOIA improvement, and the metric we developed of asking agencies for their "10 oldest requests" has now been adopted by many federal agencies in their improvement plans to help identify backlogs. Multiple committees of the Congress, including this distinguished panel, have requested our formal testimony based on our audit experiences, and the Open Government Act of 2007 included a series of reforms and new requirements for agency reporting that were based on our audit findings. We have also become a leader of the international movement for freedom of information, and assisted in drafting and campaigning for FOI laws in more than 40 countries, many of which feature ombudsman offices or information commissioners whose experiences offer some lessons for today's hearing on OGIS.

The provision of the OPEN Government Act of 2007 that is the subject of today's hearing has the distinction of having been signed into law by President Bush in December 2007, only to be rejected by the President's staff almost before the ink was dry on the law. In January 2008, the administration's proposed budget shifted the responsibility for the Office of Government Information Services (OGIS) away from Congress's designated sponsor, the National Archives and Records Administration, and over to the Department of Justice. I do not have to belabor for this Subcommittee the inherent conflict of interest in giving FOIA dispute resolution responsibilities to the very department that defends federal agencies in court against FOIA requesters. This retrenchment flew in the face of the direct recommendations for the Office from the requester community, the clear intent of the distinguished co-sponsors of the legislation from both parties, and the overwhelming – indeed, unanimous – approval of the Congress for OGIS to reside at the National Archives. Thankfully, the Congress has already indicated that it will appropriate one million dollars for the Office and has specified that the Office will remain at the National Archives.

The amount and timing of this appropriation will determine some of the structural questions about OGIS that we are addressing in this hearing. Since the budget with this new appropriation is not likely to be enacted until March 2009, only then can the National Archives begin the formal hiring process for a director of the new Office. The new director would not likely be in place until the early summer of 2009, and would require some months to complete the staffing of the Office – probably a maximum of six people given the overall budget level. Then the Office will need to produce

regulations and guidelines for its operations, all of which means that a fully functioning OGIS is not likely before the end of 2009. In other words, nearly two years will have elapsed between Congress's mandate and the actual beginning of Freedom of Information mediation and dispute resolution.

That delay and the administration's attempt at obstruction make even more essential continuing Congressional oversight of the proposed Office. This hearing already has encouraged the National Archives to reach out to stakeholders such as my own organization and begin the dialogue about the initial challenge of defining the OGIS Director's job description and desired qualifications. I applaud the National Archives' initiative. A follow-up hearing at this time next year will give the new Director the opportunity for public dialogue with stakeholders and the Congress about the structure and functioning of the Office, as well as providing an impetus for the Office's planning and implementation process.

As we think about how to structure OGIS to ensure its success, there is a great deal of experience that we can draw on from countries around the world as well as from several American states. For example, Scandinavian countries had freedom of information laws long before the U.S. did (Sweden in 1766 and Finland in 1919), and also invented the concept of the ombudsman, a governmental office designated to receive, investigate and resolve complaints against the government. While Congress considered but did not include an ombudsman in either the original 1966 Freedom of Information Act or in the 1974 amendments that form the core of the law today, this role has been central to many FOI laws enacted subsequently around the world. The most prominent example may be found in the New Zealand Official Information Act of 1982, which specifically empowered the existing public ombudsman to carry out the new law, because of his independence and standing as a respected institution (one of the few at the time in the country). A number of American states over the years have adopted similar enforcement or implementation mechanisms for state-level freedom of information statutes, with varying degrees of advisory or binding legal powers, some in the form of information commissions (such as Connecticut) and others housed in the state attorney-general's office (as in Texas).

Strongly influenced by the Scandinavian model, the global wave of FOI laws since the end of the Cold War in 1989 have almost all featured

information commissioners or ombuds officials in core implementation and monitoring roles, starting with the Hungarian law of 1992, which combined a FOI and Privacy ombuds function in the same office. The Mexican access law, which over the past six years arguably has been implemented more effectively than any other FOI law in history, including our own, depends for its success on the information commission (known as IFAI, its Spanish acronym) that goes well beyond ombuds functions to those of a quasi-judicial tribunal as well as information disseminator and public educator. Information commissioners are now so numerous around the world that their association's semi-annual conference has become a major event not only for government officials but also for NGOs, policy analysts, and journalists (for news from the most recent conference, see http://www.freedominfo.org/news/20071212.htm).

Each of the international as well as state-level experiences with information commissioners and similar ombuds offices has been different, depending on the specific political circumstances, bureaucratic cultures, governmental structures, and constituent demands. But there are some common lessons from all these experiences that I believe do apply to the structure and function of OGIS.

It is instructive to look, for example, at the single model that most directly parallels the statutory language that Congress approved for OGIS – the New York approach with an advisory body that renders non-binding opinion in disputes over access to state-held information. The New York Committee on Open Government (www.dos.state.ny.us/coog/) has only four full-time employees and an annual budget of $350,000 or so (as of 2006), and does not have the power to enforce its opinions or even to go to court, merely to report and mediate. Yet this New York office, headed for many years by Robert Freeman, has become so well-respected that when disputes do end up in court, judges cite the office's opinions as the key legal authority, and state agencies by and large take the office's advice, while requesters get relatively rapid responses. The New York office has created a body of administrative opinions available online for requesters and officials to consult, thus heading off disputes before they can fester or lead to litigation. There are real lessons here for OGIS. Legitimacy and effectiveness in FOI dispute resolution do not depend on having binding legal power, but rather increase over time when the office demonstrates leadership, expertise, and transparency in its own process, and when it produces constructive solutions

that help both requesters and the government to improve the FOI process on both sides of the exchange.

Leadership:

The very first decision that the government makes about OGIS is likely to be the most important, that is, the appointment of the Director. The National Archives and Records Administration has already reached out to us and other stakeholders about working together on the position description and recruitment process for what will be a senior civil servant position reporting directly to the Archivist of the United States. The model here should be the sterling example of success and leadership in a similar position and structure at the National Archives: the Information Security Oversight Office (ISOO). This very small agency dedicated to oversight of the security classification system has achieved credibility inside and outside government because of the quality of its leadership over several decades (Steven Garfinkel, William Leonard, Jay Bosanko), and the transparency of its own process (annual report to the President, audits as well as training for agencies, frequent meetings with stakeholders). ISOO's leaders have long recognized that they best protect the government's internal interests and real national security secrets by achieving the maximum possible release of information. Similarly, the OGIS Director will need to be sensitive to official interests while recognizing the mandate of the law for the presumption that government information belongs to the public.

The Director of OGIS does not necessarily have to be a lawyer, but he or she does need to be a leader, with the independent standing associated with the Senior Executive Service level of the civil service. The Office should have staff with legal expertise, but the role of the OGIS Director, like the role of the ISOO Director, does not depend upon a law degree. What is necessary is a keen appreciation of government processes combined with the motivation and commitment to open government. For example, one of the most effective information commissioners internationally is Kevin Dunion of Scotland, whose background was in environmental advocacy work and international development aid – each involving the reconciliation of divergent interests – rather than the law or the Scottish bureaucracy. Dunion organized an effective dispute resolution process, issued more than 600 final opinions in the first three years of the Scottish law, and has received judicial endorsement of his major findings. The Scottish experience and that in other states and countries suggests that the Director of OGIS should have dispute

resolution experience or leadership experience that demonstrates that he or she will be able to resolve disputes.

Transparency:

Transparency of the office's process is vital for legitimacy and effectiveness. This means that there should be public criteria for taking a case for dispute resolution services, publication of opinions online, guidance about best and worst practices, and regular (at least annual) reporting to the legislative branch, the Archivist, and the public.

The New York example is again helpful in this respect. The New York Committee on Open Government provides both written and oral advice and opinions, makes them available online, promulgates rules and regulations for the state FOI and Open Meetings laws, and annually reports its observations and recommendations to the Governor and the state legislature, . The New York example also points to the reinforcing role the courts can play in using the office's analysis in their own disposition of cases, the reinforcing role of the agencies in relying on the office's analysis to construct their own best practices, and the reinforcing role of the requester community in appreciating the dispute resolution role played by the office and the net contribution to greater state government openness. This is exactly what Congress had in mind for OGIS.

OGIS will have to take full advantage of the new information technologies to meet the transparency challenge. The OGIS Web presence will be essential for fulfillment of this mission, and should include not only all the advisory opinions that OGIS issues (indexed by subject matter and by chronological order), but also Frequently Asked Questions in an interactive format that will allow visitors to create their own pathways through the information and find their own answers. The potential volume of efficient online assistance dwarfs the direct assistance that the office will be able to render. Again, the example of the New York open government office is instructive: In 2007, that four-person staff answered 6,600 telephone inquiries, issued 800 written opinions, and gave 127 presentations – a highly productive year – yet the largest audience for the office's work was online, where 146,000 unique visitors registered more than 2.5 million "hits" to the office's Web site.

Priority Setting to Focus on Systemic Disputes:

Even with the best leadership and exemplary transparency in its operations, the OGIS could still be overwhelmed with the sheer volume of disputes and potential disputes in the U.S. Freedom of Information system. Depending on how we count the requests by veterans and senior citizens for files relating to themselves or their families, Americans file between a million and 20 million information requests every year with the federal government. Tens of thousands of these requests reach the administrative appeals mechanisms inside federal agencies, and hundreds wind up in federal courts. According to National Security Archive audits, some Freedom of Information Act requests have languished with federal agencies for as long as 20 years! The OGIS will have to set priorities and clear criteria for which cases it takes on, and will have to emphasize preventive action that focuses on disputes that affect large groups of requesters and systemic problems. Otherwise, the office will fall into a reactive pattern, and will add a whole new layer of backlog and delay to the already backlogged FOIA process.

Here, one of the other key provisions of the OPEN Government Act of 2007 can bring to bear expertise and additional resources far beyond what will be available to OGIS alone. This key provision mandates that the Government Accountability Office "shall conduct audits of administrative agencies" on FOIA and "issue reports detailing the results of such audits." Previous GAO audits have been enormously helpful both to Congress and the agencies in identifying problems and making suggestions for improvements, many of which also found their way into the OPEN Government Act of 2007. GAO has built a team of information specialists with extensive experience in the FOI and records management processes of both large and small agencies. GAO's expertise and staff resources should provide exactly the investigative capacity that the OGIS can draw on to identify systemic problems and get out in front of the most significant FOI disputes.

While reduced litigation will initially be achieved by resolving those disputes already on track for litigation, fixing the broken FOIA system will require OGIS to identify – with GAO's help – the most common disputes, the most common complaints, and the most frequent bases for litigation. Past litigation provides one guide; another may be found in the administrative appeals that agencies are dealing with; and requester complaints will also give OGIS something of an early warning system. Which agencies are generating more disputes than others? Why? Is this a

function of the agency's administrative process, bureaucratic culture, or the nature of the requester audience? Are there examples of best practices among the federal agencies where litigation rates are low, requesters are satisfied, backlogs are limited, and disclosure rates high? How can other agencies replicate these best practices?

There is an issue with regard to agencies such as the Departments of Veterans Affairs and Health and Human Services that primarily handle first person requests for personal or family information. These privacy information cases are such an enormous universe (tens of millions) that mediating them could overwhelm OGIS. On the other hand, this information exchange involves so many citizens, and is such a hallmark of the government-citizen interaction, that to ignore the problems that arise here would diminish the legitimacy of the OGIS. But the way for OGIS to deal with this problem of scale is to establish a preventive approach, looking for the most common disputes and offering guidance on those, rather than becoming the office of last resort for a veteran's family trying to find her service records and benefit eligibility.

For the purposes of this hearing on OGIS, the OPEN Government Act of 2007 has several provisions beyond the specific OGIS language that we should take into account. Extremely important are the new reporting requirements for agency annual reports, which should dramatically improve our ability to spot problems and anomalies, and give both GAO and the OGIS better metrics for identifying both best and worst practices. The new reporting information will become available with the February 2009 deadline for agency annual reports, and thus should inform the priority-setting process we are recommending for the OGIS.

Also important is the statutory ratification of the new Chief FOIA Officer and FOIA Public Liaison structures that were the one significant reform in President Bush's 2005 executive order on FOIA. The National Security Archive's audit in March 2008 did find some measurable improvement in customer service from this change, even though the backlog problem did not improve. While there plainly needs to be some relationship between the activities of OGIS and the individual agency Chief FOIA officers, there also must be independence between them. OGIS must be able to remain independent in order to properly act as a mediator for dispute resolution. An advisory council of Chief FOIA Officers would create both the appearance and the reality of a conflict for OGIS.

Similarly, the Chief FOIA Officers at many agencies are high level officials who outrank the OGIS Director and have independent duties to represent their agency's best interests. They are not properly subordinate to OGIS. The statute requires the Chief FOIA Officers to report not only to the head of their agencies, but also to their agency's chief legal officer, and to the Attorney General. In effect, the statute does leave a significant FOIA implementation and guidance role for the Justice Department and its long-standing Office of Information Policy (OIP), which should continue its current practice of cumulating the agency annual reports and improvement plans, issuing legal and administrative guidance to agencies, and publishing the FOIAPost and the annual compilation of caselaw.

Despite the conflicts of interest, both structures – OGIS and the Chief FOIA Officers – were established by Congress to make the FOIA system better serve the public. Accordingly, there should be a liaison and coordinating relationship between the two. As OGIS develops recommendations and findings, those should be communicated to the agencies through the Chief FOIA Officers. The Chief FOIA Officers also need to be closely involved in the dispute resolution processes, especially where GAO and OGIS find systemic problems that require changing agency practices. In resolving individual complaints, the statute is clear that the FOIA Public Liaisons have the primary responsibility, and as OGIS begins to operate, this specifically means that the Liaisons are charged with applying the OGIS guidance to the individual cases.

None of this will be easy, as you know, Mr. Chairman. Every bureaucracy in world history has utilized secrecy as a core tool of its power. The iron laws of turf protection, embarrassment avoidance, and controlling the spin all mean that freedom of information is a constant struggle. But Congressional attention like this hearing today really works, providing decision-forcing deadlines, encouraging wider public dialogue, clarifying both official and stakeholder positions. Again, I thank you for your leadership on this issue, and I welcome your further questions.

Mr. CLAY. Thank you so much, Professor Blanton.

We will go to Ms. McDermott. You may proceed.

STATEMENT OF PATRICE McDERMOTT

Ms. MCDERMOTT. That is a hard act to follow.

Thank you, Mr. Chairman and Congressman Yarmuth, for the opportunity to speak today on the implementation of the new Office of Government Information Services created by the Open Government Act.

I am speaking today on behalf of a coalition of more than 70 organizations—of which National Security Archive is one—that believe that a transparent and open Government is essential to holding Government accountable and earning the trust of the American public. Members of the coalition worked very hard to ensure the passage of the Open Government Act, and the new OGIS was considered a key component of that legislation. We are pleased that you are conducting this hearing and appropriate the opportunity to share our thoughts.

First let me concur with Mr. Blanton's statement. I absolutely agree with everything in it.

I am focusing my comments today on the responsibility of OGIS to review agencies' FOIA policies and procedures, their compliance with the act, and to recommend policy changes to Congress and the President. Ensuring compliance with FOIA has not until now been any entity's clear responsibility or focus, with well-documented results or lack thereof.

The 1974 amendments to the FOIA require the Attorney General to include in its annual report a discussion of the efforts undertaken by department to encourage agency compliance with FOIA. The Department's report generally identifies guidance and training. It has adjured any responsibility for ensuring compliance because it says it does not have responsibility for doing so.

On December 14, 2005, the President issued an Executive order on citizen-centered and results-oriented FOIA administration, but other than reporting back annually for a couple of years there was no real accountability built into the order, nor was there any meaningful oversight of the agency's plans or the implementation thereof. Indeed, the 2007 report to the President obscured the overall failure of the agencies to accomplish much of significance. The Department only describes progress at 25 out of 90 agencies that prepared improvement plans saying that they had made meaningful progress, but his graphics showed that only 11 of those 25 agencies met all their self-generated milestones, and that 3 agencies did not meet a single target, that nothing has happened.

The current situation then is lack of enforcement mechanisms, lack of accountability, and lack of compliance with many aspects of the law. No entity has had clear responsibility for ensuring compliance, and none does so.

Section 11 in the Open Government Act gives OGIS the responsibility for reviewing FOIA policies and procedures and the compliance of administrative agencies in recommending policy changes. The same Section 11 gives the agency chief FOIA officers responsibility to monitor FOIA implementation throughout the agency and keep the head of the agency, its legal officer, and the Attorney

General informed of the agency's performance, and to recommend to the head of the agency such adjustments necessary to improve the implementation of FOIA. Thus, we have two distinct and separate avenues for review and compliance for FOIA and making recommendations: the OGIS responsibilities and the chief FOIA officer's reporting to agency leadership and to the Attorney General.

There may be a simple fix for this, perhaps by requiring the reports to be publicly available as they are issued, perhaps by setting up a CFO office headed by the Archivist and chaired by the head of OGIS. But as it stands now, there is no required communication with OGIS from the chief FOIA officers about their findings and recommendations.

Because of this, it is clear, as others have indicated and will indicate, the head of OGIS must be at a senior level to be at a comparable level with the chief FOIA officers, and he or she should report directly to the Archivist.

The statute also gives the Government Accountability Office, as Mr. Blanton noted, ongoing responsibility to conduct audits of administrative agencies on the implementation of the FOIA and to issue reports detailing the results. We think that, given the at least initial staffing of OGIS, it is appropriate for GAO to perform these audits in lieu of OGIS doing so, and we presume these reports will be used by OGIS in fulfilling its responsibilities.

Simply receiving reports is not sufficient, however. Ensuring compliance will take more resources than OGIS has allocated to it at present.

We also believe that it is essential that there be a robust and transparent mechanism for public input on agency compliance and needed changes. It is not enough to look at agency reports and talk with agency personnel, nor should the focus of such public input be limited to the items in the annual reports that agencies are required to complete and the recommendations of the chief FOIA officers. Given the limited resources of this new office, some hard decisions are going to have to be made about the use of staff and funding.

The public access community believes strongly in both ensuring compliance and in the mediation services and advisory opinions, obligations of OGIS. The balancing of resources required of the office argue strongly for funding adequate to both of its missions and for meaningful support within the National Archives. It will also require the ongoing oversight of Congress.

Thank you for this opportunity. I will be pleased to answer any questions.

[The prepared statement of Ms. McDermott follows:]

Statement
Of
Patrice McDermott
Director
OpenTheGovernment.org

Information Policy, Census, and National Archives Subcommittee
Oversight and Government Reform Committee
On
"Implementation on the Office of Government Information Services"

Wednesday, September 17, 2008
2154 Rayburn HOB
2:00 P.M.

Thank you, Chairman Clay, Mr. Turner, and Members of the Subcommittee, for the opportunity to speak today on the implementation of the new Office of Government Information Services created by the OPEN Government Act last year.

My name is Patrice McDermott. I am the Director of OpenTheGovernment.org, a coalition of consumer and good government groups, library associations, journalists, environmentalists, labor organizations and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles. The more than 70 partners in this coalition believe that a transparent and open government is essential to holding government accountable and earning the trust of the American public.

Members of the coalition worked very hard to ensure the passage of the OPEN Government Act and the new Office of Government Information Services (OGIS) was considered a key component of that legislation. We are pleased that you are conducting this hearing on OGIS and appreciate the opportunity to share our thoughts with you.

As I anticipate you will hear about the mediation responsibilities of the new office from the representatives of the journalism community scheduled to present testimony to you today, I am focusing my comments on the responsibility of OGIS to review agencies' FOIA policies and procedures, their compliance with the Act, and to recommend policy changes to Congress and the President to improve the administration of the FOIA. I chose this focus because ensuring compliance with FOIA has not until now been any entity's clear responsibility or focus – with well-documented results.

The current situation with compliance

As you know, both the Office of Management and Budget (OMB) and the Department of Justice have statutory roles in the implementation of FOIA. Under various statutes, including the Paperwork Reduction Act, OMB has broad authority for coordinating and administering various aspects of governmentwide information policy. FOIA specifically requires OMB to issue guidelines to "provide for a uniform schedule of fees for all agencies." OMB issued this guidance in April 1987.

One of the FOIA provisions added by the 1974 Amendments requires the Attorney General to include in the annual report "a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section."[1] The Department meets its obligations for *encouraging* agencies' compliance with the FOIA through policy guidance for agencies. It makes agencies' annual FOIA reports available through a single electronic access point and notifies Congress as to their availability and, in consultation with OMB, develops guidelines for the required annual agency reports. It furnishes speakers and workshop instructors for seminars, conferences, individual agency training sessions, and similar programs conducted to "promote the proper administration of the FOIA within the Executive Branch."[2] The Department submits an annual report on FOIA litigation and the efforts undertaken to encourage agency compliance – which generally identify guidance and training.

On December 14, 2005, the President issued Executive Order 13392, on "citizen-centered and results-oriented" FOIA administration. The Order directed that agency FOIA operations be results-oriented: i.e., agencies were to process requests efficiently, achieve measurable improvements in FOIA processing (including reducing backlog of overdue requests), and reform programs that do not produce appropriate results.

The order required, among other things, that agency heads designate Chief FOIA Officers to oversee their FOIA programs. The Chief FOIA Officers were directed to conduct reviews of the agencies' FOIA operations and develop improvement plans to ensure that FOIA administration was in accordance with applicable law, as well as with the policy set out in the Order. By June 2006, agencies were to submit reports that included the results of their reviews and copies of their improvement plans.

Other than reporting back annually for a couple of years, though, there was no real accountability built in to the Order, nor was there any meaningful oversight of the agencies' plans or the implementation thereof. Indeed, the 2008 Report to the President from the Attorney General obscured the overall failures of the agencies to accomplish much of significance. As reported in GovernmentExecutive.com, "The [2007] report stated that more than half of the 25 major agencies featured met their milestones and goals for fiscal 2006, and that 90 percent made meaningful progress. But the report's graphics show that only 11 of those 25 agencies met all their milestones, and that three agencies did not meet a single target." In the article, Meredith Fuchs, general counsel for the National Security Archive, noted that the Department of Justice's report only describes progress at 25 agencies out of 90 that prepared FOIA

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1 The Senate Report on the 1974 amendments says (page 33) that "In his testimony before the subcommittee, the Attorney General agreed that 'there are some steps that the Justice Department can take immediately to encourage better administration of the act.' [citing hearings] S. 2543 thus requires the Attorney General to include in his report 'a description of the efforts.....'."

2 The 2007 report is here (http://www.usdoj.gov/oip/07rep.htm)

improvement plans, and "For those 25, it picks and chooses some examples of improvement. It ignores the fact that very little seems to have improved for FOIA requesters."[3]

The National Security Archive's 2008 survey[4] on agency implementations of the Order found uneven progress and outright shortfalls on the problem of backlogs, because the Order lacked any enforcement mechanisms or funding, and left goal-setting up to the agencies themselves. Two years into implementation of the Order, the number of pending FOIA requests government-wide remained in the range of 200,000, with large variations among agencies. The Order also prompted only limited improvement in compliance with the 1996 E-FOIA amendments, which require federal agencies to post certain records and FOIA guidance online. Of the 12 worst agencies identified in an earlier Archive survey[5] of agency Web sites, only one-third showed significant improvement, while 42% of these "e-delinquents" made no apparent changes to bring their deficient sites into compliance with the law.

In 2008, GAO[6] found that "although both the Executive Order and Justice's implementing guidance put a major emphasis on backlog reduction, agencies were given flexibility in developing goals and metrics that they considered most appropriate in light of their current FOIA operations and individual circumstances. As a result, agencies' goals and metrics vary widely, and progress could not be assessed against a common metric. ... Justice's most recent guidance directs agencies to set goals for reducing backlogs of overdue requests in future fiscal years, which could lead to the development of a consistent metric; however, it does not direct agencies to monitor and report overdue requests or to develop plans for meeting the new goals."

The current situation is, then, lack of enforcement mechanisms, lack of accountability, and lack of compliance with many aspects of law, particularly the 1996 E-FOIA Amendments. No entity has had clear responsibility for ensuring compliance – and none does so.

The OPEN Government Act

Now we have the provision (Section 11) in the OPEN Government Act that creates the Office of Government Information Services and gives it responsibility for reviewing the FOIA policies and procedures of administrative agencies, reviewing their FOIA compliance, and recommending policy changes to Congress and the President to improve the administration the Act.

The same Section 11 requires the agency Chief FOIA Officers, imported from Executive Order 13392, to

- have agency-wide responsibility for efficient and appropriate compliance with the FOIA;

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3 Daniel Pulliam. "Open government advocates slam report on FOIA reform." GovernmentExecutive.com, June 25, 2007. http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0607/062507p1.htm

4 National Security Archive. "MIXED SIGNALS, MIXED RESULTS: How President Bush's Executive Order on FOIA Failed to Deliver," March 16, 2008. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB246/index.htm

5 National Security Archive, "**File** Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent," March 12, 2007. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/index.htm

6 Report to the Chairman, Subcommittee on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, House of Representatives, March 2008 "FREEDOM OF INFORMATION ACT: Agencies Are Making Progress in Reducing Backlog, but Additional Guidance Is Needed. GAO-08-344 **http://www.gao.gov/new.items/d08344.pdf**

- monitor FOIA implementation throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing the FOIA;
- recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of the FOIA; and
- review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing the FOIA.

Thus, we have two distinct and separate avenues for ensuring compliance with the FOIA: the OGIS responsibilities, and the Chief FOIA Officers (CFOs) reporting to the Attorney General. There may be a simple fix for this – perhaps by requiring the reports to be publicly available as they are issued, perhaps by setting up at CFO Council headed by the Archivist and chaired by the head of OGIS – but, as it stands now, there is no required communication with OGIS from the Chief FOIA Officers or about their findings and recommendations.

We think that, as the statute clearly intends this responsibility and authority to lie with OGIS, and as the Department of Justice has over the years abjured any responsibility for *ensuring* compliance with the FOIA, there needs to be some more direct line of communication between the Chief FOIA Officers and the head of OGIS. This need is all the clearer in light of the absence of any statutory requirement for the Attorney General to *do* anything with the reports received: not to follow up with the agencies; not to report to Congress; and not to make recommendations for policy changes to Congress and the President to improve the administration of the Act. Leaving the divided reporting as it is now will vitiate the intent of Congress in creating this office.

The statute gives the Government Accountability Office ongoing responsibility to conduct audits of administrative agencies on the implementation of section 552 and issue reports detailing the results of such audits. The GAO has a commendable history in this regard and well-informed and well-trained staff. We think that, given the at least initial staffing of OGIS, it is appropriate for GAO to perform these audits and we presume these reports will be used by OGIS in fulfilling its responsibilities. Simply receiving reports is not sufficient, however. Congress needs to consider what is required to meaningfully ensure compliance and make the necessary resources available. OGIS does not have the necessary resources at this point to fully meet the statutory obligations in this regard.

We also believe it is essential that there be a robust and transparent mechanism for public input on agency compliance and needed changes. It is not enough to look just at agency reports and talk with agency personnel. Nor should the focus of such public input be limited to the items in the annual reports that agencies are required to complete and the recommendations of the Chief FOIA officers.

Given the limited resources of this new office, some hard decisions are going to have to be made about the use of staff and funding. The public access community believes strongly in both ensuring compliance and in the mediation services and advisory opinions obligations of OGIS. The balancing of resources required of the Office argues strongly for adequate funding and for meaningful support within the National Archives. It will also require the ongoing oversight of Congress.

The full and proper implementation of the Freedom of Information Act is essential to the public and to the work of the partners in OpenTheGovernment.org. We look forward to working with you to ensure that the new Office of Government Information Services at the National Archives is effective and helps

to advance Congress' intent in the original Freedom of Information Act and with the OPEN Government Act of 2007.

Thank you for this opportunity to discuss this important issue. I will be pleased to answer any questions you may have.

OPENTHEGOVERNMENT ORG

Americans for Less Secrecy, More Democracy

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About Us

OpenTheGovernment.org is a coalition of consumer and good government groups, environmentalists, journalists, library groups, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles. Our coalition transcends partisan lines and includes progressives, libertarians, and conservatives.

OpenTheGovernment.org Statement of Values

To protect the safety and well-being of our families, homes, and communities; to hold our government accountable; and to defend the freedoms upon which our democracy depends; we, the undersigned individuals and organizations, believe the public has a right to information held by our government.

The American way of life demands that government operate in the open to be responsive to the public, to foster trust and confidence in government, and to encourage public participation in civic and government institutions.

The public's right to know promotes equal and equitable access to government, encourages integrity in official conduct, and prevents undisclosed and undue influence from special interests.

OpenTheGovernment.org seeks to advance the public's right to know and to reduce secrecy in government.

We invite both organizations and individuals to sign. **To add your organization or name, please email us at info at openthegovernment.org**

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Mr. CLAY. Thank you, Ms. McDermott.

And now we will hear from Mr. Blum. Thank you for being here.

STATEMENT OF RICK BLUM

Mr. BLUM. Thank you, Mr. Chairman and Congressman Yarmuth. I am Rick Blum, coordinator of the Sunshine in Government Initiative, a coalition of nine major media associations formed in 2005 to promote open Government policies and practices.

Our coalition strongly supported the creation of the Office of Government Information Services within the National Archives when Congress enacted the Open Government Act. Earlier this year, we first issued recommendations for ramping up OGIS this spring. These are attached to my written testimony.

Mr. Chairman, we commend you, Chairman Waxman, and the committee for spearheading passage of FOIA reforms. We also applaud you for having this oversight hearing on implementing OGIS specifically. Congressional oversight of this provision is critical to ensure that OGIS is implemented in the way that Congress intended and in the way that will make FOIA work better for average citizens.

Let me remind you that, despite its problems, FOIA is a key tool to citizens to hold Government accountable; yet, the media and citizens often run into roadblocks with Government agencies where there is no recourse except an expensive lawsuit. OGIS will provide a new, much needed alternative to resolve FOIA disputes.

Let me give you an example of how this office can help. Mark Schleifstein, a reporter for the Times Picayune in New Orleans, covered Hurricane Katrina as it came ashore. In the first few days after landfall, his readers wanted to know about specific neighborhoods and whether they were contaminated with chemicals. Mark checked logs of chemical spill reports maintained by the Environmental Protection Agency. He knew enough to know he wasn't seeing a complete picture, so he filed a FOIA request. Months later, EPA responded to Mark by referring him to the same logs Mark had examined in preparing his FOIA request, so he quickly appealed the apparent denial.

An OGIS mediator could have stepped in to get a more satisfying response from the agency, yet, more than 3 years have passed since Mark filed his request, and Mark still doesn't have answers. But he does have a Pulitzer Prize.

Many States already have an ombudsman office to help make their laws work better. We appreciate Congress creating this at the Federal level.

Let me note and again reiterate that Congress specifically placed the ombudsman in the Archives. It chose the Archives to ensure independence and to separate it from the Government lawyer who defends agencies in FOIA lawsuits. We also applaud appropriators in both the House and Senate who rejected the administration's efforts to transfer OGIS to the Justice Department and provided $1 million in fiscal year 2009 specifically for the Archives to get OGIS started.

Congress recognized that shifting these ombudsman functions to the Justice Department would create an inherent conflict of interest.

We have three recommendations for implementing this office. First, OGIS should be a high-level office reporting directly to the Archivist. One strong model already within the Archives is the Information Security Oversight Office, which works well managing the classification system. The OGIS should be in a position within the Senior Executive Service and report directly, as I said, to the Archivist. OGIS should be independent of the Archive's own agency FOIA operations and, therefore, should exist separate from the General Counsel's office.

Second, leaders of this ombudsman's office should have the right mix of management, legal, and mediation experience to imbue this office with the stature, independence, and reputation for fairness it needs. The OGIS director should have mediation experience, especially in a Federal environment. The OGIS leaders will require some legal training, but the director need not be a lawyer. OGIS leaders will have to balance these technical skills with a mission to primarily respond to and help the public.

Third, the office should ramp up its mediation services as soon as possible. This office should quickly establish criteria for selecting cases to mediate so it maximizes its impact yet it is not overwhelmed. This is critically important. The office should bring its mediation services to main street by using the Internet to mediate disputes and by posting written advisory opinions online. These moves cut costs, improve agency responses through better guidance, resolve disputes faster, and could help make FOIA work better. Models exist, and OGIS should build on them.

In conclusion, this office will require support from Congress through dedicated resources and active oversight and from the public and those in the open government community, including our own media coalition, to help ensure that this office's important mission of making FOIA work more effectively is achieved.

Mr. Chairman, thank you for the opportunity to testify. I look forward to answering any of the committee's questions.

[The prepared statement of Mr. Blum follows:]

Testimony of Rick Blum
On Behalf of the
Sunshine in Government Initiative

Before the
Oversight and Government Reform Committee
Subcommittee on Information Policy, Census and National Archives

On the Office of Government Information Services,
National Archives and Records Administration

September 17, 2008

Mr. Chairman,

I am Rick Blum, coordinator of the Sunshine in Government Initiative, a coalition of nine major media associations formed in 2005 to promote policies that ensure an accessible, accountable and open government.

Our coalition strongly supported the creation of the Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA) when Congress considered reforms to strengthen the way agencies implement the Freedom of Information Act (FOIA). We view it as one of the key provisions in the OPEN Government Act (P.L. 110-175). OGIS can help make FOIA work more effectively for citizens and the media.

Mr. Chairman, we applaud you for holding this hearing to emphasize the importance of this new Office at Archives. Congressional oversight of its new functions is critical to ensure that OGIS is implemented in the first place and implemented in the way that Congress intended. We believe this independent office can help resolve disputes faster, strengthen understanding of FOIA and increase public trust in the FOIA system.

FOIA helps reveal important stories
FOIA is an essential tool for citizens, not just the media, to inform the public about government activities and other events that shape their lives. (It should be noted this is not just a "media issue." Agency statistics show media requesters account for just six percent of FOIA requests.) For instance:

- Bill Dedman, a reporter for MSNBC, used FOIA to discover that equipment designed to allow injured firefighters to be located in a burning building did not work well when exposed to high heat and moisture, two conditions firefighters are likely to face.

- Christian Lowe, a reporter covering the military, used FOIA to reveal the Army was shipping body armor to soldiers in Iraq despite failing ballistics tests. Faced with imminent publication of the story, the Army recalled 5,277 vests.

These stories illustrate powerfully why FOIA is so important.

OGIS can help resolve disputes without litigation
Oftentimes the media and citizens run into roadblocks with government agencies where there is no alternative but to go to court. OGIS will provide another, much-needed avenue to resolve a FOIA request.

Let me give you an example.

Mark Schleifstein, a reporter in New Orleans, is still waiting more than three years after filing a FOIA request with the Environmental Protection Agency (EPA) for information about chemicals spilled into New Orleans floodwaters following Hurricane Katrina. Mark reports that congressional investigations have uncovered some relevant information, but his FOIA request still has been unfulfilled.

Mark's request is a good example of the impact an ombudsman can have on FOIA requests. Mark made his request knowing that reports of chemical spills are initially reported to the National Response Center. He found some Katrina related spills, but knew enough to know he wasn't seeing a complete picture. Interested in helping his readers protect themselves against the chemicals they faced upon returning home, Mark filed a FOIA request to determine which chemicals were likely lurking in specific neighborhoods.

As the weeks and months passed with no response, the relevance for Mark and his readers faded. Long after evacuees needed immediate answers, the EPA responded to Mark by referring him to the National Response Center website, the same website Mark had examined to focus his FOIA request. Mark explained this to EPA in early 2006.

Mr. Chairman, at this point an ombudsman would recognize that fulfilling this request could broadly inform the public, and that the agency has provided no meaningful response. Mark has been busy covering the hurricane season and efforts to reconstruct the levee system. Mark told me last week that he is still waiting to hear back from EPA.

State-level ombudsmen are already helping to make freedom-of-information laws work better. Their intervention has helped citizens dislodge records revealing criminal activities among those who worked in Chicago schools, misuse of municipal cell phones by employees who called places like the Victoria's Secret store in Puerto Rico, and a private foundation in Florida created as a "slush fund" for developers and shut down once disclosed. The experience of many states has shown ombudsmen can be effective in making freedom-of-information laws work better.

Recommendations

We have three major recommendations with respect to the implementation of OGIS.

1. OGIS should be led by a senior executive reporting directly to the Archivist.

2. NARA should imbue OGIS with the stature, independence and reputation for fairness that the Office will need to be effective.

3. OGIS should quickly ramp up its mediation program.

Please allow me to briefly discuss background on OGIS and explain each recommendation.

Congress Placed OGIS at National Archives and Reaffirmed this Policy this Year
The 2009 Administration budget proposed to eliminate the OGIS entirely and shift its functions back to the Justice Department.[1] After the Sunshine in Government Initiative found this one-paragraph provision placed deep in the budget, we explained quickly and clearly our position: In order for OGIS to function effectively, it was specifically placed in Archives, which has a strong record of openness, and is separate from the government litigator who defends FOIA suits.

Mr. Chairman, the last thing that those who championed the FOIA reforms in Congress wanted was for Justice to be both the federal government's lawyer and independent mediator. The conflict of interest is inherent and unavoidable. We applaud appropriators in both the House of Representatives and Senate who rejected this proposal and provided $1 million in fiscal year 2009, specifically for the National Archives to get OGIS started, and we are pleased this Committee cares enough to hold today's hearing. We hope Congress can quickly complete work on the 2009 budget so OGIS can get serious about its work.

Guiding Principles: Independence, Fairness and the Presumption of Disclosure
To help reduce litigation and resolve disputes for requesters who cannot afford access to the courts, the Office of Government Information Services should be guided by a mission devoted to helping the public understand and use FOIA. The Office should strive to strengthen public trust in the FOIA process and promote the presumption of disclosure. OGIS should have a reputation with requesters and agencies alike as an independent authority that helps resolve disputes in a fair and consistent manner.

Recommendation One:
OGIS should be led by a senior executive reporting directly to the Archivist.

We strongly urge NARA to establish OGIS reporting directly to the Archivist of the United States. Much like the existing Information Security Oversight Office, whose director currently reports directly to the Archivist, OGIS must be taken seriously by other federal agencies for it to succeed.

It also follows that the person serving as director of this new office will shape the program and its fate. The OGIS Director should be a position within the Senior Executive Service.

Finally, OGIS should be independent of the Archive's own agency FOIA operations. Neither should it become an office of lawyers, which I will discuss in a moment. It would therefore be inappropriate for it to fall within the general counsel's office.

Recommendation Two:
Leading OGIS will require management, legal and mediation experience.

The qualities of the director will no doubt shape this office. The Office should not become a law firm. It is vitally important that OGIS and its staff speak "Main Street" so the public can find help and better understand how FOIA operates. In addition, legal training will be important in

[1] "Appendix: Budget of the United States Government, Fiscal Year 2009," Executive Office of the President of the United States, p. 209. Available at www.budget.gov/budget.

interpreting case law and ensuring mediation decisions are legally sound. The OGIS director and deputy director will need the right mix of management, legal, mediation and policy skills to be effective in carrying out the Office's mandate as set forth in the OPEN Government Act.

Mediation will be a key function of this office. The ideal candidate to lead OGIS should have experience leading mediation services. As District of Columbia Circuit Appeals Court Judge David Tatel noted as recently as last week, "[a]lmost everyone who really wants their documents goes to court."[2] Unfortunately, there are plenty of requesters who really want their documents but cannot afford to hire an attorney to press their FOIA cases.

This is where OGIS comes in. Since mediation will be such a visible and significant function for this office, the OGIS Director should have extensive experience providing mediation services, particularly in a federal environment.

While legal and mediation experience are critical, the director should also be able to operate OGIS in a "non-lawyerly" manner. (Alternatively, a director can be successful in the position without formal legal training if the deputy director or legal counsel within OGIS is dedicated to providing OGIS with legal advice.) OGIS should be able to independently assess arguments from the agencies, including the Justice Department, while providing a service to resolve disputes that is accessible for the average requester to participate in without hiring an attorney.

Other factors to consider when hiring the director include a commitment to open and accountable government, familiarity with the Freedom of Information Act and experience with agency implementation of FOIA. In our view, litigation experience is not necessary for this position.

Recommendation Three:
OGIS should focus early on ramping up its mediation services.

A key challenge will be for this office to focus its formal mediation services narrowly on a manageable caseload. OGIS should avoid creating another step in the FOIA process where requests can bottle up backlogged and unaddressed. OGIS should not attempt to accept every invitation to mediate a request if such a goal creates another delay or backlog stalling FOIA requests.

OGIS should involve the public in developing clear, explicit criteria for selecting cases to mediate. OGIS should emphasize giving priority to requests intended to disseminate information to the public. Similarly, OGIS should prioritize cases involving disputes likely to be encountered by future requesters. To maximize limited resources, OGIS should focus mediation efforts on requests from the public, not from agencies or lawmakers.

The Office should bring mediation services to Main Street's everyday residents by making the system friendly so requesters do not have to hire legal representation. Further, the Office should use electronic communications to provide mediation services, accept mediation requests and post written advisory opinions online. A publicly available body of administrative law could help

[2] "D.C. Circuit hears author's Plea for attorney fees in FOIA case," Reporters Committee for Freedom of the Press, September 10, 2008, available at http://www.rcfp.org/newsitems/index.php?i=6979; accessed September 11, 2008.

agencies and requestors alike self-resolve disputes, educate the public about FOIA operations, reduce requests for mediation and improve agency decisions.[3]

OGIS can also build on models and lessons in federal and state governments. Many states have created ombudsman or commission positions to mediate disputes.[4] NARA's own Information Security Oversight Office (ISOO), which manages the federal government's information security programs, has a strong reputation both inside and outside government as an even-handed manager of the classification system. It, and the effective but small ISCAP, could be models for designing the formal dispute resolution services.

Conclusion

OGIS will require support to make it work well. OGIS will require the support of Congress through dedicated resources and active oversight, of which this hearing is an important part. It will require the Archivist's commitment to OGIS' independence so the Office can build a reputation for fairness to both requesters and agencies. And as the budget proposal shows, we at the Sunshine in Government Initiative along with other groups will need to be vigilant to ensure that OGIS's important mission – of making FOIA work more effectively – is achieved.

Mr. Chairman, thank you for the opportunity to testify at today's hearing, and I look forward to answering any of the Committee's questions.

Disclosure Pursuant to House Rule XI, Clause 2(g)(4)

Pursuant to House Rule XI, I hereby affirm to the best of my knowledge that neither the Reporters Committee for Freedom of the Press, a nonprofit organization based on Arlington, Virginia which serves as host to the Sunshine in Government Initiative, nor the Sunshine in Government Initiative coalition, has received federal grant monies in the current or previous two fiscal years.

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[3] At least two models exist within the federal government for making advisory opinions publicly available. The National Mediation Board's Office of Alternative Dispute Resolution Services helps resolve disputes for airlines and railroads. That Office maintains an online database of its arbitration decisions. The database helps mediators create consistent, predictable decisions, and makes that knowledge available to the public. ("Online system takes a quick route to resolving disputes," Government Computing News, 2/18/2008, http://www.gcn.com/print/27_4/45819-1.html)

Second, the Office of Government Ethics, an independent agency within the executive branch that oversees federal conflict-of-interest laws, posts its advisory memoranda to federal agencies on its website (www.usoge.gov). Publicly available versions of these memoranda redact the agency that requested the rules interpretation and identifying information about individuals mentioned so agencies can obtain candid advice on handling a particular situation.

Making these advisory opinions public allows the public and others within government to benefit from OGE's interpretations and advice.

[4] See Harry Hammitt, "Mediation Without Litigation," *FOI Reports*, Vol. 2, No. 3, National Freedom of Information Coalition. Available at http://www.nfoic.org/resources/reports/hammitt_mediation_without_litigation.html, accessed 2/29/08.

Attachment:
Recommendations for Ramping Up the Office of Government Information Services at the National Archives and Records Administration: A Requester Perspective

The Sunshine in Government Initiative

April 2008

Before Congress created the Office of Government Information Services (OGIS) within the National Archives and Records Administration, the federal government lacked an independent entity to help the public resolve disputes that arise in the government's implementation of the Freedom of Information Act (FOIA). The Sunshine in Government Initiative believes this independent office could help resolve disputes faster, strengthen understanding of FOIA and increase public trust in the FOIA system.

In our view, the Office of Government Information Services will perform a wonderful service to the public and government alike if it can fill the gap between an agency's denial of a FOIA request and litigation. OGIS will not be successful if it over-promises or tries to accomplish too much. The Office could quickly become overrun by requests for mediation. The last thing the public needs is another layer of delay between a requester's initial request and the government's final response.

The Openness Promotes Effectiveness in our National Government Act of 2007 (P.L. 110-175) mandates that OGIS provide mediation services and public analyses of the federal government's implementation of FOIA. Currently the largest gap for OGIS to fill is the lack of independent mediation services. OGIS will most affect the public's FOIA experience through its mediation, so for OGIS to be effective early it will be important to have a functioning and effective mediation program in place as soon as possible. Thus, the following recommendations will focus primarily on the mediation function.

Fairness in Promoting a Presumption of Openness: Creating the OGIS Mission and Principles

To be effective, it is important for this new office to clearly identify its mission, principles and goals. The Office should be guided by both the presumption of openness embodied in the law and the fair implementation of the law in the spirit and letter in which it is intended. These principles, which the office should reaffirm at every opportunity, suggest two tasks.

a. **Strengthen open government and public trust in the FOIA process as the mission of this Office.** Defining OGIS's mission as strengthening open government and public trust is consistent with the statutory presumption of openness found in FOIA and the mandate for the office established by the OPEN Government Act (P.L. 110-175), the law that created OGIS.

b. **Cultivate a reputation for fair-mindedness.** OGIS should have a reputation with requesters and agencies alike as an independent authority that helps resolve disputes in a fair and consistent

manner. OGIS should help the federal government ensure that information requiring protection is properly protected and that everything else is publicly available.

Manage the Mediation Caseload:
Design an Accessible, Authoritative Voice

A key challenge will be for this office to focus its formal mediation services narrowly on a manageable caseload. OGIS should avoid creating another step in the FOIA process where requests can bottle up backlogged and unaddressed. While state FOI mediators by and large handle the volume of requests for mediation effectively and OGIS should consider several states' experience, at the federal level the volume of requests is much higher.

If OGIS were to guarantee mediation services to all comers, it would be quickly overrun, creating a backlog for OGIS that would further frustrate requestors and undermine the purpose of the office.

On the other hand, OGIS could select a few cases chosen from objective criteria and mediate them well. Other requesters could be helped by technical tools, like a website with troubleshooting questions, similar to those in computer manuals (e.g., "Did you address your request to the proper agency?" "Yes, and I still didn't get an answer." "No, but I will try that now." "Did you include a telephone number where the processor could reach you?") However, selectively responding to a few requests would result in many requestors languishing without the benefit of mediation.

We suggest as an alternative a system for handling mediation requests both informally and through formal advisory opinions as needed, posting previous decisions with extensive plain-English explanations (FAQs) and other creative approaches to provide guidance to both requesters and agencies. This should help narrow OGIS's workload.

a. **Create criteria for selecting cases to mediate.** OGIS should involve the public in writing clear, explicit criteria for selecting cases to mediate. Some criteria might include:

    1. **Accept requests only from the public, not from agencies or lawmakers, who have other tools available (such as GAO).** Agencies should not be able to request mediation or toll a request pending mediation, which would provide another reason for a delay in processing a request.

    2. **Design a mediation system that is accessible through electronic communications and other tools.** Requesters should not have to hire legal representation to avail themselves of mediation services. Use electronic communications to provide mediation services and accept mediation requests. OGIS mediation services should be available online. Mediation would be accessible to someone living in Washington, DC or Washington state, and mediations could be done quickly and cheaply if based on electronic communications such as email or online submission forms.

    3. **Give priority to requests intended to disseminate information to the public.** Such requests may come from reporters, independent researchers, book authors, historians or neighborhood activists. It follows that the office should not take on cases that also involve Privacy Act requests. Such requests are often handled quickly by the responding agency in the first instance. Thus, any needed assistance would come in the form of

merely directing the requester to the correct office to make the request. This is primarily the responsibility of agencies subject to FOIA. Intervening on these requests is unlikely to help future requesters and wastes OGIS resources. The Office might also choose to de-prioritize mediation requests wherein the FOIA requester is not eligible for fee waivers, which would filter out commercial requesters.

4. **Give priority to requests involving disputes likely to be encountered by future requesters.** Creating a body of published advisory opinions on disputes that are likely to be encountered by other requesters, and making those opinions available online, will help in several ways. OGIS will help cut down on its workload. Requesters can find these decisions and obtain guidance on situations similar to their own. This could lead to a better understanding of agency decisions. It also has the possibility of potentially improving agency decisions in the first instance.

b. **Effectively respond to as many requests as possible while providing in-depth advisory opinions as needed.** We suggest a two-tier system for responding to mediation requests.

1. **Informal FOIA requester assistance.** We urge you respond to as many requests as possible through informal responses. Responses may briefly explain the reasonableness of an agency's position, provide advice for a requester on resolving a dispute, or refer a requester to a previous OGIS opinion in a substantially similar case.

2. **Provide formal mediation to resolve select cases.** When informal requester assistance does not succeed, human intervention and a more formal review of a case may be required to issue an opinion. Where such resource-intensive review is required, OGIS should give special weight to those requests involving disputes likely to be encountered by future requesters. The Interagency Security Classification Appeals Panel (ISCAP) may be a useful model for such reviews.[5]

c. **Post written advisory opinions online.** OGIS should post all written advisory opinions online in an indexed and easily searched form. A publicly available body of administrative law would help agencies and requestors alike self-resolve disputes, and allow OGIS to easily respond to requestors whose disputes are substantially similar to disputes previously addressed in earlier advisory opinions.

At least two models exist within the federal government for making advisory opinions publicly available. The National Mediation Board's Office of Alternative Dispute Resolution Services helps resolve disputes for airlines and railroads. The Office maintains an online database of its arbitration decisions. The database helps mediators create consistent, predictable decisions, and makes that knowledge available to the public.[6] Second, the Office of Government Ethics, an independent agency within the executive branch that oversees federal conflict-of-interest laws, posts its advisory memoranda to federal agencies on its website (www.usoge.gov). Publicly

[5] ISCAP, which is run out of the National Archives, is a body consisting of classification experts from several agencies who hear appeals of agency responses to requests to declassify documents.
[6] "Online system takes a quick route to resolving disputes," *Government Computing News*, 2/18/2008, http://www.gcn.com/print/27_4/45819-1.html

available versions of these memoranda redact the agency that requested the rules interpretation and identifying information about individuals mentioned so agencies can obtain candid advice on handling a particular situation.

Making these advisory opinions public allows the public and others within government to benefit from OGE's interpretations and advice. Similarly, publicly posting OGIS opinions could educate the public about FOIA operations. Over time, this educational effect will help reduce requests for mediation and possibly improve agency decisions.

d. **Build on effective models in federal and state governments.** Many states have created ombudsman or commission positions to mediate disputes.[7] The Archives' own declassification programs may serve as models or at least provide lessons for OGIS's mediation services. In particular, the Information Security Oversight Office (ISOO), which manages the federal government's information security programs, has a strong reputation both inside and outside government as an even-handed manager of the classification system. It, and the effective but small ISCAP, could be models for designing the formal dispute resolution services.

e. **Obtain public input on OGIS activities.** OGIS should consider establishing its own advisory council comprising common requester communities, some state government ombudsmen and possibly even other agency and legislative staffers. The council should be constituted as a FACA-compliant agency so that the public garners greatest benefit from the lessons learned.

Interim Steps

Budget and resource realities will dictate an OGIS that begins with the achievable and grows into the attainable. It is more important for OGIS to do its work deeply and well than to cast its services broadly. Credibility will build resources. Thus, it may be desirable for OGIS to begin its functions within a limited scope of agencies. It might be best, for example, for OGIS to begin this work with five or six agencies chosen from an array of cabinet-level departments and to test its talents before throwing open the doors. If so, it would be best for OGIS to choose its target agencies from a sample of types of agencies that will give it the greatest breadth of experience. It should study request volumes before choosing and try to aim at agencies with histories of poor response records. It also, again, should target for its customer base those requesters who are eligible for fee waivers; the fee waiver can be a proxy for choosing those gathering information for purposes of dissemination.

[7] See Harry Hammitt, "Mediation Without Litigation," *FOI Reports*, Vol. 2, No. 3, National Freedom of Information Coalition. Available at http://www.nfoic.org/resources/reports/hammitt_mediation_without_litigation.html, accessed 2/29/08.

Mr. CLAY. Thank you so much, Mr. Blum.

Ms. Mutchler, you will bat cleanup.

STATEMENT OF TERRY MUTCHLER

Ms. MUTCHLER. Well, Mr. Chairman, thank you for the opportunity to come and talk to you today about open government here. Congressman Yarmuth, thank you as well for listening to this very critical testimony. I also echo each and every thing that was said here today, but I would be remiss if I just didn't tell you how much fun I am having, too. I just wanted to tell you that.

My name is Terry Mutchler. I am the executive director of the Office of Open Records in Pennsylvania. That office is very similar to what the law outlines in creating OGIS, and the reason I am here to talk to you today about this is because I have dealt directly with the Freedom of Information Act from a lot of different angles: as a journalist for the Associated Press in Pennsylvania, Illinois, New Jersey, and Alaska; as an attorney practicing media law in Chicago; and also as an ombudsman in both the State of Illinois and now in Pennsylvania to actually create and mediate issues related to the Freedom of Information Act.

I think we would all agree that secrecy is toxic to good government. The only way in which you can have open and honest government is a free flow of information exchange between citizens and their government, and the tool that we have that makes that happen is the Freedom of Information Act.

The point of my being here today is to just try to offer you some examples of a blueprint, if you will, of what worked for me and what didn't work in both the State of Illinois and in Pennsylvania.

When we started this in the State of Illinois it was called a Public Access Counselor, and it was an ombudsman role, and we didn't have a model to draw on, and so what we simply did was look at what the problems were with the Freedom of Information Act and what some basic solutions could be.

What I discovered quickly in Illinois, and I am starting to quickly discover in Pennsylvania, is that there are two extremes that exist when you deal with the Freedom of Information Act, and there are, to be very blunt with you, there are crazy people on both sides of the open government equation, and I have met each and every one of them.

On one hand you have some citizens and members of the media who are convinced that each and every public official is a criminal and the one document they are not getting is Watergate. They know this. But on the flip side you have public officials who treat this information as though it is coming from their own personal checkbook. Right now under FOIA until OGIS there was no place for a citizen to go to get help.

When the Attorney General created this Public Access Office in Illinois she was criticized as pandering to the press. It was a press-driven issue is what people were told. However, the key was in the 3,000 cases that I handled in Illinois, 85 percent of them were from citizens. The next largest group of people that came to us for help in mediation were public officials. Media brought up the last angle of that.

We had great success in Illinois. For people that think that open government is just a philosophy, let me just give you a few brief examples that will demonstrate to you why it is critical that OGIS be established in a way that can be effective to enforce the Freedom of Information Act.

A reporter filed a Freedom of Information Act request for the city of Chicago. What that reporter wanted from the school district in Chicago was a list that they knew existed of criminals who were still teaching in the Chicago public school system, people who were drug dealers, sex offenders, and folks who had been convicted of attempted murder.

Do you know what the school district said? To release that would be an unwarranted invasion of personal privacy of the criminals. So the Office of the Attorney General became involved, and we mediated the result of having those documents released. When the Governor and the State of Illinois was subpoenaed and is under Federal investigation, those subpoenas were available under the Freedom of Information Act. There was no legal basis with which to hold those. The Office of the Attorney General became involved and we mediated and actually advised that those be released. The Governor's office disagreed, of course, and we went to court, and the open government angle of this won and the subpoenas had to be released.

But time and time again we are not talking about esoteric documents. We are talking about school district budgets. We are talking about police reports. We are talking about 9/11 dispatch logs that demonstrate how long it takes for police to respond into certain communities. This is basic information that is being sought.

I can tell you that what happens with the Freedom of Information Act is delay, denial, and dodging. I have had public officials tell me directly and personally that they use the Freedom of Information Act as a way to block information. That is their goal. That is why my recommendation to this committee and to the National Archives in setting up this OGIS system is going to be in three angles.

You have to have a director that is independent. If you do not have a director that is independent, you might as well go take the million bucks and go do something fun, because it is not going to work. That director has to be someone that is committed to the mission of open government. I would encourage whoever hires this director to not be afraid to hire someone with a media background or an attorney that has dealt with this, someone that will push the open government mission.

The next thing that you have to have is a mission, and the mission should be to err on the side of open government with this.

And the third component is the structure. As I said to someone earlier before this testimony, you are going to be inundated with complaints. You are going to be inundated with mediation cases. The only way that you are going to be able to have this work is to establish a structure that works, and that structure should be one that sets up in advance the intake process, that has a data base to be able to track these so that you are able to get a picture after the first year of statistics to see where the problem agencies are.

To have that person, as someone else said here earlier, be at a senior level, and I would also tell you that putting this in the Department of Justice would be a grave error, not because of this particular administration or any administration that we may see, but you are going to have inherent conflicts of interest. You are going to have conflicts of interest that cannot work.

One of the problems that we faced in Illinois being housed in the Office of the Attorney General, the Office of the Attorney General represented many State agencies, and we quickly came to assess that we were basically giving advice to our clients out of both sides of our mouth. It was kind of an uncomfortable position for me as an attorney, but we managed to get through it.

You need someone with the reputation of the National Archives, someone with that independence, and that is why this should be driven, because the reality—and my experience leads me to say this—is that the Freedom of Information Act comes down to a philosophy. You are either pro open government or you are not. This law, as with any other law, can be used like statistics. You can use it to either shed light and to improve Government or you can use it to shield and block information, which is what we see repeatedly—at least I have seen repeatedly in Illinois and Pennsylvania.

I would encourage the committee to also look at the paradigm set up in Connecticut. The Freedom of Information Act Commission there has been around for 30 years. I would put them as the leader in the Nation, followed by Florida and Texas, hopefully soon to be Pennsylvania but we need a little work on that.

I would also be happy to answer any questions that you have, because I genuinely believe that this Government is not my Government and it is not yours, it is not the administration's, it belongs to the people sitting behind us.

[The prepared statement of Ms. Mutchler follows:]

pennsylvania
OFFICE OF OPEN RECORDS

Statement
Of
Terry Mutchler
Executive Director, Pennsylvania Office of Open Records

Information Policy, Census, and National Archives Subcommittee
Oversight and Government Reform Committee

2154 Rayburn House Office Building
Wednesday, September 17, 2008
2:00 p.m.

Good Afternoon Chairman Clay, Ranking Minority Member Turner and Members of the Committee:

My name is Terry Mutchler and I serve as the Executive Director of Pennsylvania's Office of Open Records. Thank you for the opportunity to speak with you today about the *Openness Promotes Effectiveness in National Government Act of 2007*, and to offer some recommendations on creating a strong Office of Government Information Services to ensure that the nation's Freedom of Information Act is both effective and enforced.

Good government and secrecy cannot co-exist. Ensuring open and honest government is the cornerstone of democracy and is the bedrock principle of the Freedom of Information Act. In my opinion, open and honest government can only be attained through the unfettered exchange of information between citizens and their government. A citizen's right-to-know, granted through the Freedom of Information Act, fosters accountability, prevents abuses of power and promotes trust in government. I believe that creating a strong OGIS within the National Archives and Records Administration will help ensure that citizens receive government documents to which they are entitled.

I have worked with the Freedom of Information Act as an investigative journalist, a lawyer and as a government official trying to mediate the release of public records between government agencies. I have started two offices similar to the Office of Government Information Services – in Illinois and in Pennsylvania.

I am here today to offer recommendations in creating the Office of Government Information Services within the National Archives. In short, I want to share with you my

experience of what worked and what didn't work in establishing these critical open government offices.

By way of background, I am a former journalist for *The Associated Press* in Pennsylvania, New Jersey, Illinois and Alaska. I traded my press pass for a law license and clerked for a Chief Justice of the Supreme Court of Illinois as well as for the Executive Office of the President during the Clinton Administration. I later worked in private practice in a large Chicago law firm and also ran successful state Senate political campaigns. A common thread in everything I have done is FOIA.

Because of the many problems of obtaining documents from government, Illinois created one of the first ombudsman-like offices in the nation within an Attorney General's Office. I was appointed by Attorney General Lisa Madigan to serve as the state's first Public Access Counselor. Very similar to the federal Office of Government Information Services, the purpose of that office was to enforce the state Freedom of Information Act – often through mediation – to serve as a resource for citizens, officials and members of the media and to train all of these groups about the law.

We started this position from scratch. We didn't have a similar model within an Attorneys General Office to guide us. And so I took a very basic, practical approach: identify the problems with FOIA – both real and perceived - and set up the most logical and easy system to solve them. I quickly identified that the key problems with FOIA stemmed from officials ignoring requests or misapplying exceptions in the law – and from citizens not recognizing that public bodies did in fact have the authority to properly withhold certain documents from the public under the law.

To that end, the most critical knowledge I gained in my experience - that I am certain will come into play in Pennsylvania and here at the federal level – is that there are extreme and irrational people on both sides of the open-government equation. On one hand, some citizens and members of the media are convinced that every public official is a criminal, and they know that every document to which they are denied access is tantamount to Watergate. On the flip side, public officials routinely hide the ball from the public, deny access under the misguided belief that the government documents "were none of their business" or find other ways to block access - such as charging copy fees of $100 per page.

Of course, neither of these approaches to government access is correct. But as Public Access Counselor I often battled both extremes. The key to my success in Illinois was to establish a middle-of-the-road, common sense approach to open-government by applying the law fairly and evenly regardless of who made the request and regardless of which agency or political powerhouse held the documents.

The Illinois system worked in facilitating access, but ironically it actually is a weak law. [*The Freedom of Information Act*, 5 ILCS 140, *et. seq.*] The law is weak for several reasons: the opinions of the Public Access Counselor are advisory, no penalties exist for failure to comply, and copy fees were among the most abused and complained

about components of the law. One public body attempted to charge over $14,000 for documents by charging a dime a line. Illinois had 66 exceptions to the law – compared with only nine exceptions at the federal level. Many local and state government agencies were creative in finding ways to use these 66 exceptions to block the free flow in information – and used the law as a shield to succeed in keeping citizens in the dark.

And yet, despite those obviously flawed components of the Illinois law, the Office of Public Access Counselor was able to negotiate release of public records which were initially denied by public officials. Some of the key examples included our success in obtaining the release of a list of convicted criminals teaching in the Chicago Public School system. The list included sex offenders, drug dealers and teachers convicted of attempted murder. The School District initially denied the release of records as an unwarranted invasion of privacy – of the criminals. Other examples included obtaining release of contracts of school superintendents, copies of federal grand jury subpoenas issued to the Governor's office, a tape recording involving a Mayor who had been stopped for driving under the influence of alcohol, a list outlining how much a local government spent in overtime and bonuses, and the budget of a school district. All had been initially denied but later released through informal mediation with the Public Access Counselor.

How did we do this? And more importantly, drawing on that experience in Illinois, how should the new Office of Government Information Systems create its office to accomplish these types of compliance with FOIA?

First, I recommend that OGIS identify a Director who is committed to ensuring open and honest government; a person who will use the Act as a tool to permit citizens to access government, not as a shield to block access to government records. Choosing the right person is paramount to the successful implementation of this Office. Second, OGIS should adopt a mission to enforce the Act, and to serve as a resource for citizens, agencies and members of the media in obtaining information about their government. Third, I recommend that the Office of Government Information Services create the Office using the following structure.

STRUCTURING THE OFFICE OF GOVERNMENT INFORMATION SERVICES

Commitment and Independence

You must ensure that the Director of this new office is committed to open government. In my experience, I have seen attorneys and directors interpret the law with an eye toward denying information. I have had public officials tell me, personally, that their goal was to use FOIA to deny basic information because they did not believe that the operation of government should be of concerns to citizens. The National Archives must next give that Director independence to act without political or agency interference. The Director must have control over both hiring of staff and the budget. If the OGIS is established in a way that does not permit autonomy of its decisions, the federal FOIA

system will continue to experience more of the same – delaying, dodging and denying access to records of government.

Illinois' Public Access Counselor was created within the Office of Attorney General and while I had autonomy – that autonomy was a result of that particular Attorney General's approach and is not guaranteed in the future. I am currently implementing a very similar law and ombudsman-like office in Pennsylvania. I was appointed by Governor Ed Rendell as Executive Director of the newly created Office of Open Records. Instead of leaving the concept of independence and autonomy to the discretion of any particular Administration, the Pennsylvania Legislature established the Office as an independent office within an existing state agency. The law required the Governor to make a six-year appointment of the Executive Director. Further, the law provides that the Executive Director has hiring authority and also jurisdiction over the budget. This component of independence is critical in ensuring that the system isn't stacked in favor of government agencies, and more importantly so that the public knows and believes that it has an independent referee when battling bureaucracy to obtain records of government. Having an assured independence is the only way that OGIS will be able to fairly and evenly apply the law to ensure compliance.

Process

The Office of Government Information Services must have a strong intake process established before receiving its first case, particularly with regard to mediation process. In both Illinois and Pennsylvania, I have used the following components and recommend that OGIS adopt a similar process. Create the following:

1. **Uniform FOIA Request Form**: This will help requestors be as specific as possible in identifying their requests, and will help Agencies better identify and track FOIA information. Include on this form the name of the FOIA officer, date received, calculate and write down the due date and the disposition. If the agency is going to request an extension of time, cite the specific reason permitted by law and include this on this Form.

2. **Uniform FOIA Mediation Request Form**: This will help citizens access the appeal process, it will help the Office of Government Services readily identify the information requested, the Agency involved in the dispute, help obtain a copy of the history of the request, obtain any supporting materials necessary to make a decision and have appropriate contact information easily accessible if additional information is needed by OGIS.

3. **FOIA Database**: Create an OGIS Database to track FOIA requests, status and disposition. This will have a two-fold effect:

i. To keep the mediation process running smoothly because it will enable the OGIS to input information about the request, any written responses and will alert the OGIS when a response is due;

ii. Obtain statistics and identify problem areas to make recommendations for possible FOIA amendments and policy changes within the agencies. It will further help identify the agencies that have troubled response times or issues and which successfully and timely comply; allow OGIS to provide specific tailored training to agencies with repeated compliance problems. This Database should also include the Legislative Districts of the requestor. This will enable OGIS to inform the Representative and Senator of the constituent issue and garner any applicable support in serving the citizen.

4. **Mediation Guidelines:** Establish plain-language Guidelines explaining the mediation process, and how to appeal a denial of information to the Office of Government Information Services. The Office could if it chooses have separate Guidelines written for attorneys, but I would make the Guidelines as basic as possible so that citizens of all educational backgrounds can benefit from the mediation process at OGIS.

5. **Create a Website for OGIS:** Include contact information, sample forms that can be downloaded, helpful links, a copy of the FOIA, a Message from the Director of OGIS outlining its mission, FOIA Guidelines, tracking capability and an explanation of how to obtain an advisory opinion from OGIS. This website should also include a list of every Agency Chief FOIA Officer and their contact information.

6. **Create a Yearly Report:** To fulfill the mission outlined in the law requiring reviewing compliance and making recommendations to Congress and the President, I would create an Access Report outlining what OGIS outlining its findings and accomplishments of the first year. An example of such a report that may be helpful for comparison can be found at www.illinoisattorneygeneral.gov, by clicking on Public Access Counselor's Report.

Educational Trainings

The single most successful component of ensuring compliance with a Freedom of Information Act is to conduct trainings on the law. The Office of Government Information Services should write training materials and conduct trainings for agencies, members of the public, government officials and the media. The training program should encompass a practical knowledge of the law providing information that would answer at least the following questions:

a. What an agency must do to be in compliance?
b. How a citizen can obtain information from a federal agency?
c. How long does an agency have to respond?
d. What information must be provided?
e. What are the examples of information that can be denied?
f. How much can an agency charge to reproduce documents?

I would recommend a 90-Minute training that would allow participants to ask specific questions and make this training available in a downloaded format on the website.

Advisory Opinions

A critical component to the success of OGIS will be its advisory opinions. I would recommend that OGIS consider issuing and putting on its website any advisory opinions about government access issues and also any letters that it writes outlining why a particular record is available or not available pursuant to FOIA as it resolves mediation disputes. This will provide both agencies and citizens a search tool to help them obtain information from Agencies or to have a clear understanding grounded in the law – from an independent OGIS – explaining why a particular record is not available. While these opinions are only advisory, they would probably be given great deference by the Courts as they have in other states with agencies that issues advisory opinions.

Conclusion

My key recommendation would be to create a strong, independent office to administer FOIA fairly and evenly, and to select a Director who is passionate about that mission of open government. The success of the Freedom of Information Act really comes down to a philosophy: public officials are either pro-open government or they are not. Public officials will either use this law to shed light on the actions of government, or it will use this law to shield access to government. As Executive Director of the Office of Open Records, I am very happy to assist the National Archives and the newly created Office of Government Information Services in any way possible. I am committed to citizen access to government because I believe that this government does not belong to me, or to any other public official, but rather this government belongs to its citizens.

Mr. CLAY. Thank you so much, Ms. Mutchler, for your expertise in this field and your testimony.

I thank all of the witnesses for their testimony.

Now we will begin the questioning period. I will start with Dr. Weinstein.

The Doctrine of Sunshine in Government Initiative suggested that OGIS be led by a senior executive that would report directly to you and that the OGIS staff is experienced in mediation to avoid the need to resolve disputes with litigation. As a user of the system and now a manager of the system, what are your thoughts about these recommendations?

Mr. WEINSTEIN. Mr. Chairman, I believe that in some fashion or another the OGIS system is going to be reality. We are looking at that. I believe in that. The question then becomes what kind of a system and what will be the particular strengths of it, how will it define its tasks.

If you don't mind, I am going to take a little detour back into history, because that is my profession. I am not an archivist by background. I first testified before one or another of the subcommittees of Congress on these issues back in 1974 or 1975. I can't quite remember which year it was. That is a long time in this game, if you want to say, 35 years, one way or another. I keep meeting people who have been in the business for a long period of time like that.

One of the things, whatever their particular solutions, whatever their particular perspectives, one of the things that they point out all the time is that there was, for a period of years in the mid-1970's with the passage of the Freedom of Information Act amendments made possible by the Watergate events, exposures, the support for open government at the time, that ushered in a period of relative goodwill. People were working together. People were looking for what several folks on this panel called consensus. They were looking for a pathway that did not result in massive confrontations but agreed strategies for letting this move forward.

I don't see how the OGIS process can work in the end without deep and broad scale consensus made possible by the efforts to consult widespread consultation among all of the various players in this process.

What does that mean? It means that we cannot return, Mr. Chairman, at this stage in the game, to a world of FOIA villains and FOIA heroes. It means we are dealing with a process, and that process, one of the first things that amazed many of us involved in it, is how it seemed to be more useful for business people than it did even for some of the purposes that others had brought to it.

I would say that we should start by basically looking into the process of how we are communicating with those on the other side of the issue.

It goes without saying that the administration prefers that this process be located in the Justice Department. The Congress obviously prefers that the process be located in NARA. If we are mandated to do that, we will do it and will do a good job of it. But this is something that I hope can happen with the greatest measure of consultation and dialog, because it is a spirit we are after, it is an attitude, and that is where the victory can come.

Mr. CLAY. Thank you so much for that response.

Mr. Blanton, I realize the restraints that Mr. Weinstein is under, but I am from Missouri, and let me use the bluntest terms that I know. We know what this administration thinks about the rule of law. We know what they think about our Constitution and particularly what they think about the FOIA law. As they say in Missouri, they could care less than what the little bird left on the branch.

So I am going to ask you, the Open Government Act clearly placed OGIS at the National Archives. Can you tell the committee why your group advocated for placing OGIS at the Archives?

Mr. BLANTON. Mr. Chairman, as the Congress real clearly said, there is a conflict of interest that this function is at Justice. The Congress looked around, and this was bipartisan authors of this legislation. This was overwhelming approval by the committees and ultimately unanimously by the Congress.

National Archives is a highly respected institution. All too often I think National Archives feels like an orphan child. It gets beat up by the White House, as it did on this very testimony that was being submitted to your subcommittee at this hearing today. I don't think that the National Archives that I have worked with in a collegial fashion for probably two or three decades now is the voice that you are hearing in this formal testimony, because the National Archives that I know tries to serve the public, tries to help the public, sees itself as providing essential information and essential evidence to the American people and empowering us.

That is the institution that the Congress picked to make this function, because requesters could go there, find an independent voice, find the help they need to mediate disputes, and there were classic examples of institutions like the Information Security Oversight Office that other witnesses pointed to that should be a great model.

Now, it is true that office, the Information Security Office, has about four times as much money as has been appropriated for OGIS, probably has five times as many staff as OGIS will likely be able to come up with, and has a 30-year history of effectiveness, and largely because of the quality of the leadership that came to that office and the standing of those individuals, and—and I would echo what Ms. Mutchler said—because those individuals understood that secrecy is a two-edged sword. Too much secrecy is bad for Government's process, and that the only way you protect the real secrets is by letting the maximum amount of the other stuff out. If that is the kind of director we can get for OGIS I think we win. We all win. Government, too.

Mr. CLAY. Thank you so much.

Yes, Dr. Weinstein, please respond.

Mr. WEINSTEIN. Thank you.

I have great respect for Mr. Blanton and for his work, but, by God, I have just as great respect for the work of my colleagues at the National Archives in, for example, releasing classified materials and declassifying them and releasing them. By the count of our Director of ISU, we have released, since I became Archivist of the United States, over 4.5 million pages of previously classified material. That doesn't come from people who have no commitment to the mission.

I know also under my supervision we rejected the notion of secret agreements, which I found, too, when I became Archivist. We rejected that notion. We rejected the notion of reclassified materials.

We have a track record, Mr. Chairman, and I want to defend that track record, but whatever the issues may be at this particular moment on this particular bill, there is a broader record and, by and large, I think we have behaved very honorably.

Mr. BLANTON. I agree, Mr. Chairman.

Mr. CLAY. I do, too, and I don't think anyone at this hearing is calling into question the Archives' commitment to open government or yours, so please don't misinterpret that. No one is attacking the National Archives here.

Mr. BLANTON. In fact, we are praising.

Mr. CLAY. That is not what I have heard.

Mr. BLANTON. Yes.

Mr. CLAY. Let me go to my colleague please from Kentucky, Mr. Yarmuth.

Mr. YARMUTH. Thank you, Mr. Chairman.

Once again, I thank all of you for your testimony.

One of the issues here clearly is compliance. That is what several of you have mentioned, the problem with ensuring compliance, and the Office of OGIS is not necessarily going to be able to enforce FOIA laws. So I will pose the question. It seems to me that you all mentioned the independence. The one thing that is absolutely essential if OGIS is going to meet any of its objectives is to maintain absolute credibility, because unless it is totally credible then its value as an ombudsman is limited.

There was a report issued. I think, Ms. McDermott, you mentioned the same report that the Justice Department did on the compliance and the performance of the various agencies. There was a report or document issued by the Coalition of Journalists for Open Government back in July, and it had actually some pretty critical comments to make about the Justice Department report, itself. It called it at one point a rose-colored Justice report, gives credit in some places where it isn't due, questioned the methodology, and so forth. You are familiar with that report, obviously?

Ms. MCDERMOTT. Yes.

Mr. YARMUTH. First of all, would you agree with the assessment of the Coalition of Journalists that the report of the Justice Department was flawed? You can comment on that. And then I guess the followup is: if that is the case, isn't it kind of a prima facie case that OGIS should not be operated within the Department of Justice?

Ms. MCDERMOTT. Absolutely. Let me say first that the Department of Justice does do very good guidance to the agencies through FOIA posts, does a good training, it cooperates with nonprofit organizations that do training. So what they do, they do well. But they don't enforce FOIA. They don't ensure compliance with FOIA.

Yes, that report was a travesty. The National Security Archive also did a report about that. Both found that they mislead, they obscured the facts, they didn't fully report. It is a very confusing report to read, because there is so little data and they draw these grand conclusions. But, again, in fairness to them, the Executive order really did not have any accountability or compliance built in.

Again, the Justice Department was given responsibility for issuing guidance and doing this report. The report is terrible. I agree. And I agree with you that it does argue and OIP's history argues for this office not being there. They have not had responsibility, statutorily, for ensuring compliance, and they have not done so. They will specifically say that is not their job.

So it needs to be somewhere, and I think OIP has statutory responsibilities that it does meet and that do serve important functions, and there are new reporting requirements in the law that will be theirs and that will aid in the Office of Government Information Services and will aid Congress and the President, but they are different obligations and the Office of Information Privacy and Department of Justice in general have not taken that responsibility.

As with the backlog for the mediation and all that, I think, while there is not a basic conflict of interest in that, it is just not something that they have done or that they have been willing to do or that they have shown any interest in doing.

Mr. YARMUTH. Mr. Blum, did you want to comment?

Mr. BLUM. Can I jump in here? I think that report that you mentioned from the Coalition of Journalists for Open Government is critical. I think it was called an opportunity lost. I think that is a very accurate assessment. If you look at the FOIA backlogs, the number of FOIA requests dropped 20 percent over the 9-year period that it looked at. The staffing was reduced by 10 percent. At the same time, the backlog tripled and the cost for process in each request jumped 79 percent. That is what the CJOG study showed for the agencies that it looked at. That is a huge opportunity lost.

We need to continue those kinds of analyses and assessment. The Justice Department at this point has no authority to provide these kind of mediation services, does not do these kind of assessments and analyses that we would very much like to see OGIS do so that we can start targeting the kind of improvements that agencies can make if they know about it.

Do we know about best practices? Which agencies are doing it well? Which agencies are doing poorly? That is something that OGIS could examine. The Archives has the independence, it has the consistent mission with the presumption of disclosure that exists within the FOIA statute, and it already has a model with this Information Security Oversight Office. So it makes a tremendous amount of sense to start this off within the Archives and see how it works. In a couple years see what is working, what is not working. We have specific recommendations about which cases it can select to be very effective. You might want to adjust those after a while.

We should be starting this off. I think we are all very excited among the media group to see this actually get enacted into statute. We want to see it implemented. At the same time, it has to be adequately funded.

Mr. CLAY. Thank you. We will begin a second round of questions. I will start with Ms. McDermott.

You state that there is no linkage between the OGIS and FOIA officers. Why is this necessary for effective implementation of OGIS? What must the National Archives do to make this link?

Ms. McDERMOTT. Well, I think that the problem is in the statute. I think the office was created and given this responsibility for reviewing the policies and procedures and compliance, and then the chief FOIA officers that were created by the Executive order were just sort of incorporated without a lot of thought, I'm afraid, by us or by the drafters about how those two work together.

The chief FOIA office, I think I agree with Tom that they have a key role to play at all levels, in the mediation part, in the ensuring compliance part. They specifically have that responsibility. But they don't report to OGIS. The statute has them reporting on a separate line completely within their agency and to the Attorney General.

I think that if Congress takes seriously and if NARA takes seriously the responsibility of OGIS for reviewing and making recommendations and in that sense ensuring compliance, that we can't have these two separate tracks.

One of the things that I suggest is the possibility of a Chief FOIA Officer Council headed up at the Archives to build a structure for regular communication between and among the Office of Government Information Services and these agency personnel. They should continue to report to the Attorney General, but they also need to have some sort of direct communication, and the Office of Government Information Services needs to have a direct responsibility for receiving that information, and I would argue that down the road they need to have some direct authority for issuing regulations or something to help the chief FOIA officers achieve or accomplish their missions within their agencies.

Mr. CLAY. Thank you so much.

Mr. Blum, do you envision OGIS acting as the referee or mediator in disputed FOIA requests to expedite in a timely manner the requests in order to avoid the backlog such as you cited a reporter who requested information and they did not receive it? How could OGIS have impacted that situation?

Mr. BLUM. Well, I think that OGIS has two basic responsibilities: mediate individual cases where it can make a difference, and to make the agency respond faster. And for a requester, they are not getting answers, and so they are not clear if their non-response is because the agency just hasn't gotten to the request yet.

Some agencies will spend 4 years and then they will call you up. I had this experience myself with one agency. They called me up 4 years after my request went in and they said, are you still interested in this? I said I sure am. I have changed jobs twice, but I sure am interested. Now, what was my request and why was there such a delay? I said, are you getting pushback? Their response was, well, you are just next.

So we don't know are we getting folks behind the curtain saying we don't want to give this to you so we are going to kind of twist you around, or is there just problems because the FOIA process works slowly?

So an independent mediator can help break through some of the logjams on the individual cases, but at the same time, by looking at agency FOIA reports and seeing how FOIA is operating at agencies, seeing which agencies are doing a good job. I have heard the Defense Department has a very good, at least, processing system,

so you get a response back quickly. You might not like the response, but you are getting a response back quickly. So that is going to help you and it is going to help increase trust in the system, and then it will help improve over time how agencies are processing their requests.

Hopefully by putting their advisory opinions online they can then—you know, agencies can then see them and have some good standards and some good guidance for dealing with their particular situation. And then you are going to drive good decisions earlier in the FOIA response process at agencies. That is ultimately what is going to make OGIS so effective.

Mr. CLAY. Let me ask a panel-wide question. We will start with Ms. Mutchler. In your opinion, is it critical that the OGIS report directly to the Archivist and be an SES-level position, and, if so, why?

Ms. MUTCHLER. I do agree with that, Mr. Chairman. I think that you need someone at the senior level that is going to have some punch here with what they are doing, someone that is not going to be at a low-level position that is not going to be listened to or is not going to carry their weight that is necessary.

For me, I believe that the National Archives would be one appropriate place for this, and it is not so much that it is the reputation of the Archives and what not as critically just keeping it out of the Department of Justice. Again, that is not, per se, geared toward a particular administration, but all you need to do is to look at the memo that was issued by John Ashcroft, the Attorney General at the time, saying that when you receive a FOIA request in essence—I mean, this is a paraphrase, but the heart of it was find a way to deny it. And if it is a close call, err on the side of denying it.

That, in and of itself, I think speaks volumes. For me, it underscores that you need it in a place that has credibility. Credibility is key here. I believe that the National Archives seems to be a very appropriate place for that. And it needs to be at the highest level, reporting directly to the Archivist.

Mr. CLAY. Thank you for your response.

Mr. Blum, do you have an opinion?

Mr. BLUM. We did make that recommendation exactly, that it be at a high level and an SES position reporting to the Archivist, precisely because you want an entity that is going to be separate from the Archives or any agency's own FOIA operations so that it has the independence from that processing so that when it gives a decision that may err on the side of the agency, the requester knows that it is credible and it has the independence and the integrity of that.

You also want a high-level position that will have the reputation and the respect of other agencies so that it can, when it makes a decision in a mediation, carry weight with the agency.

So I think it is critically important that it be at a high level, that it report to the Archivist, that it be independent from, obviously, the Justice Department, and from within the Archive's own FOIA operation.

Mr. CLAY. Thank you for that response.

Ms. McDermott.

Ms. MCDERMOTT. I absolutely agree. You said yourself that in order for this office to be effective it is going to have to have credibility, and in order for it to have credibility the person that has this is going to have to be at least at a level comparable with the chief FOIA officers in the agencies, and if it is a person who is buried fairly deeply in the NARA structure, that is not going to happen.

They also need, I would agree, independence within NARA. And also just from a purely practical level, if we want to attract the best possible candidates for this extraordinarily important office, one that is going to have a real impact on the future of FOIA and its effectiveness to the average citizen, it needs to be at a senior enough level that you really do attract senior level, highly competent individuals to apply for this position.

Mr. CLAY. Very good point. Thank you.

Mr. Blanton.

Mr. BLANTON. I totally agree with that, and I think one of the attractions for this position is that whoever is appointed to this job come March 2009 is immediately going to be invited on a nice junket to Norway to meet all the other information commissioners around the world in what will be their sixth annual Conference of Information Commissioners, and see what kind of lessons can be drawn from all those amazing, very different experiences.

I think it is a vote of real respect. I would go beyond what Ms. Mutchler said about to keep it out of the Department of Justice. I think also this designation from the requester community and from the Congress for the National Archives to host this office is a profound vote of confidence and respect in the National Archives as an independent institution. It just needs to take this and run with it.

Mr. CLAY. Thank you. Norway sounds tempting. Maybe I need to dust off my resume.

Dr. Weinstein.

Mr. WEINSTEIN. Mr. Chairman, I don't know if I am running with anything, but let me run my mouth off a little bit on some of this, after all these provocative and appreciative comments.

I get the sense from most of my colleagues at the Archives that they would not find unwelcome the idea of a senior level appointment of this kind and the Archivist playing this role. Neither would I, I suppose. It follows what I have been looking for when I have been stressing perhaps in my fundamental naivete we've managed.

The fact is that goodwill is going to help this process. We have seen that. I have seen it very directly in connection with several other committees, as you know, which have been working with the administration to try to negotiate different results with some success. We have been involved in a few of those.

I would like to strongly urge you and your colleagues, whatever you may decide about the senior officer of this process, to see if it would not be possible, even at this late date in the game, to sit down privately with representatives of the majority and minority on the Hill, the White House, we are happy to play a role if we can, to try and get this process back on track so it becomes a consensus project. In fact, I think that would help it tremendously

down the road. But as for what the committee does, we serve at the pleasure of Congress and we will just await what happens.

Thank you.

Mr. CLAY. Thank you for your suggestion.

Now I would like to recognize my friend.

Mr. YARMUTH. Thank you, Mr. Chairman.

I want to pursue this issue. Ms. Mutchler, you talked about the memo that was released when it was discovered by Attorney General Ashcroft, and there is a temptation, I think, maybe among many of us who don't appreciate this administration's attitude toward transparency, to say, well, 125 days from now things are going to be fine, we do not have to worry about this. It will obviously be better. But I suspect that all of you have experiences with other units of government, both maybe Federal and elsewhere, that would illustrate that resistance to this type of transparency is not limited to the Ashcroft Justice Department.

Ms. MUTCHLER. I would agree with that, Congressman. What I have seen is that it is the one issue that goes across party lines, to be honest.

Mr. YARMUTH. I am trying to be bipartisan.

Ms. MUTCHLER. Exactly. And that is another reason why I think that, in my experience, what I have seen is that Democrats and Republicans, alike, have used the Freedom of Information Act as a way to deny information to citizens. That is why I stress in my remarks that keeping this out of Justice does not, per se, speak to this administration in and of itself.

You know, you need to protect this and shield this and have this in an agency such as archives that has a reputation for fairness, that, as my colleague said, is a vote of confidence, and no one should believe that this is one particular party or administration over another.

What I have found is—and I am still looking to the answer as to why—people in public bodies start with the premise that the record is closed and not available, and that is a critical difference that needs to be changed, and it is why I underscore that you need a director that will have the independence to push to create that presumption of openness, no matter who the requester is and no matter what political powerhouse is holding the record. It is the only way it is going to work.

Mr. YARMUTH. Mr. Blanton, you seem to be chomping at the bit there to say something.

Mr. BLANTON. Well, as you probably know, Congressman Yarmuth, President Johnson had to be dragged kicking and screaming into even signing the bill. I think if Bill Moyers, his press secretary, hadn't set him up with some nasty newspaper editors calling in and saying you had better sign this, it never would have happened. It is a bipartisan problem. All bureaucracies across world history resist this kind of openness and accountability. I think one of the geniuses of the American system is that we count on it, we rely on it, it is a basis.

I would just make one point, though. The current administration produced that Executive order 2 years ago. I just wanted to give a compliment to President Bush, which is a rare thing when approval ratings are running 28 percent, but he did an Executive

order on Freedom of Information improvement to make it more citizen centered back 2 years ago.

[Hearing closed off record.]

[Whereupon, at 3:23 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

COALITION OF
JOURNALISTS FOR
OPEN GOVERNMENT
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7/3/08

An Opportunity Lost

A just completed study by the Coalition of Journalists for Open Government shows that federal departments and agencies have made little if any progress in responding to Freedom of Information Act requests, despite a two-year-old presidential order to improve service.

The CJOG findings are in stark contrast to a bullish Justice Department report made public in mid-June that claims "remarkable improvements."

The CJOG review of performance reports shows agencies did cut their record backlog but more because of a steep decline in requests than stepped up processing of requests. It also indicated scant improvement and some regression in traditional measures of response, including the amount of time requesters have to wait for an answer and whether a request or an appeal is granted.

The Justice Department based its assessment primarily on progress agencies made toward self-established process goals. The CJOG study, using reporting requirements mandated by Congress, assessed actual performance in responding to FOIA requests.

The CJOG study looked at 25 departments and agencies that handle the bulk of the third-party information requests. It looked at but did not incorporate a comparative analysis of the performance of four agencies, including the Department of Veterans Affairs and the Social Security Administration, that include large numbers of first person Privacy Act requests in their FOIA reporting. These requests are quickly and routinely handled and their inclusion would skew a meaningful analysis of FOIA response issues. Here's what the CJOG review found:

- The 25 agencies blew an opportunity to make a significant dent in their huge backlog of requests. Those agencies received the fewest requests since reporting began in 1998 — 63,000 fewer than 2006. But they processed only 2,100 more requests than they did in 2006 when the backlog soared to a record 39%.

- The backlog did fall to 33% of requests processed, primarily because of significant reductions at Homeland Security (97% to 62%), HUD (188% to 10%), and the Securities and Exchange Commission, (126 to 55%). Eleven agencies showed no improvement or greater backlogs.

- Faced with a mandate to bring down the backlog and improve service, agencies cut FOIA personnel. The number of FOIA workers fell by 8%. Spending on FOIA processing was down 3%.

- Agencies got even stingier in granting requests. Fewer people got all the information they sought than at any time since agency reporting began in 1998. The percent of requesters getting either a full or a partial grant fell to 60%, also a record low.

- Those who did get information still had to endure lengthy delays. Fifteen of the agencies reported slower processing times than the year before in the handling of "Simple" requests and 13 showed slower times in dealing with "Complex" requests. And all 21 agencies that processed requests in the "Complex" category said they missed the 20-day statutory response deadline for at least half of the requests processed.

- Those who file administrative appeals are usually out of luck. Even more so in 2007. However, a majority of the agencies did say "no" more quickly. In 2007, the percentage of appeals granted dropped to the lowest level in 10 years. Only 13% of those who appealed got any satisfaction. Of those who appealed, only 3% got all the records requested; another 10% received a partial grant.

In its report, the Justice Department noted at one point that the executive order challenged agencies to deal with the severe backlog of unprocessed requests in a manner "consistent with available resources." The CJOG study shows that FOIA spending at the 25 agencies studied fell by $7 million to $233.8 million and the agencies put 209 fewer people to work processing FOIA requests.

A few agencies did manage to find additional resources, but most did what they did with less. For instance, Homeland Security, despite a 20% reduction in FOIA personnel, processed 23,000 more requests in 2007, a 21% increase.

The rose-colored Justice report said in boldface that an increase in the number of "incoming requests" challenged agencies on backlog reduction, but that statement is dependent on counting the combination FOIA-Privacy Act requests made to Health and Human Services and the Social Security Administration by individuals seeking personal records. Those agencies have historically handled those requests quickly, with little or no backlog.

The troubled agencies, whose performance prompted the executive order, experienced a significant drop in requests in 2007, a fact ignored by Justice. The 25 agencies in the CJOG study — all of the departments except HHS, plus 12 agencies handling at least 1,000 FOIA requests a year — experienced a 13 percent drop in requests, from 494,270 in 2006 o 431,170 last year.

The Justice report also gives credit in some places where it isn't due. In citing specific agencies for "improvements in the area of backlog reduction" it named Agriculture, Education, and Labor. Whatever gains they made, it wasn't in actually reducing their percentage backlog. Indeed, Education and Labor showed both a numerical and percentage gain.

The CJOG study, including a variety of tables showing both full 2007 results and comparisons by reporting categories, can be found at www.cjog.net.

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