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THE FREEDOM OF INFORMATION ACT: CROWD-SOURCING GOVERNMENT OVERSIGHT

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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THE FREEDOM OF INFORMATION ACT: CROWD-SOURCING GOVERNMENT OVERSIGHT

THURSDAY, MARCH 17, 2011

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

The committee met, pursuant to notice, at 9:32 a.m. in room 2154, Rayburn House Office Building, Hon. Darrell E. Issa (chairman of the committee) presiding.

Present: Representatives Issa, Platts, McHenry, Chaffetz, Walberg, Lankford, Amash, Buerkle, Gosar, Meehan, Farenthold, Kelly, Cummings, Towns, Norton, Tierney, Clay, Connolly, Quigley.

Staff present: Ali Ahmad, deputy press secretary; Robert Borden, general counsel; Molly Boyl, parliamentarian; Lawrence J. Brady, staff director; Benjamin Stroud Cole, policy advisor and investigative analyst; Gwen D'Luzansky, assistant clerk; Adam P. Fromm, director, Member liaison and floor operations; Linda Good, chief clerk; Frederick Hill, director, communications and senior policy advisor; Christopher Hixon, deputy chief counsel, oversight; Hudson T. Hollister, counsel; Justin LoFranco, press assistant; Mark D. Marin, senior professional staff member; Tegan Millspaw, research analyst; Laura Rush, deputy chief clerk; Nadia A. Zahran, staff assistant; Krista Boyd and Beverly Britton Fraser, minority counsels; Carla Hultberg, minority chief clerk; Lucinda Lessley, minority policy director; Amy Miller, minority professional staff member; Dave Rapallo, minority staff director; Suzanne Sachsman Grooms, minority chief counsel; Mark Stephenson, minority senior policy advisor/legislative director.

Chairman ISSA. The committee will come to order.

Good morning.

The task of the committee is to hold Government accountable to taxpayers because taxpayers have a right to know what they get from their government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy. This is the mission of the Oversight and Government Reform Committee.

Today's hearing falls exactly within our mission statement and is, in fact, the heart of our statement. Bureaucratic accountability is, in fact, a growing problem in America at a time in which we would hope that data transparency, Web sites that can be automatically populated with information day in and day out so that Americans seamlessly search for information they have a right to know, should be a given, but it is the exception, the rare exception.

FOIA authority needs to be expanded. But let me assure you, FOIA needs to be nearly obsolete, obsolete because most information requested and seldom properly granted should be available online in real time. This committee will have to work with this and future administrations to break down the silos that have for so long caused the closing even of financial information to be done generally by tens or hundreds of bureaucrats retyping and reinputting data or data centers manipulating data from divergent data bases.

Today, we will hear about the President's-issued Executive order directing Federal agencies to disclose more information and disclose it more rapidly and to reduce the backlog. For this, we commend the President.

Just this week, John Podesta, the man who managed the President's transition team, stated his disappointment in how the administration has thus far implemented FOIA procedures. Indeed, transparency is often the victim of electoral success. Every inspiring Presidential candidate promises voters to inaugurate a new era of open government upon his election, but nearly every administration, and if this hadn't been written for me, I might have said every administration, proceeds to delay, redact or deny FOIA requests when public disclosure of information is deemed politically inconvenient.

The committee has initiated a comprehensive analysis of how Federal Governments handle FOIA procedures. In recent weeks, the committee has witnessed firsthand the bureaucratic obstruction that the general public often experiences. The committee experience to date reveals inadequacies in FOIA as well as a disparity in FOIA compliance among Federal agencies.

Today's hearing will afford the committee an opportunity to fully examine some of the problems associated with FOIA design and implementation as well as executive branch compliance.

I look forward to the witnesses today. In closing, before I recognize the ranking member, I also would like to thank the men and women who do FOIA compliance. As much as today's hearing may be about delays and bureaucratic ineptness, there are hundreds upon hundreds of people whose job it is every day to try to work within a system that they did not create, rules that they with which they must comply, and frustrations when people are complaining they didn't get what they asked for, they didn't get it at all, or they didn't get it in a timely fashion.

From this committee, which represents the rights of every Federal worker, if you will, let us understand today it is not about blaming those in the FOIA compliance. It is about blaming those of us well above them who have an obligation to make the system work so they can do their job better.

With that, I recognize the ranking member for an opening statement.

[The prepared statement of Hon. Darrell E. Issa follows:]

"The Freedom of Information Act: Crowd-Sourcing Government Oversight"
March 17, 2011

- Today's hearing, entitled "The Freedom of Information Act: Crowd-Sourcing Government Oversight," represents the heart of the committee's mission – to hold the federal bureaucracy accountable and ensure that right of the American people to know how Washington spends their money.

- The Freedom of Information Act is one of the most important tools for government transparency and accountability. It permits the private-sector, the media, watchdog groups, and the general public to scrutinize the activities of federal agencies – from the telephone logs and email correspondence of federal employees to internal memoranda, transcripts, and meeting minutes.

- Minus a few specific exemptions designed to protect narrowly-defined privacy concerns, national security and law enforcement matters, claims of executive privilege and trade secrets, information about the government's work is required by law to be publicly accessible. Indeed, every federal agency, commission, department and corporation – as well as the White House itself – falls under FOIA's expansive authority.

- But transparency is often the victim of electoral success. Every aspiring presidential candidate promises voters to inaugurate a new era of open government upon his or her election. And nearly every new administration immediately sets a course of delaying, redacting, or denying FOIA requests when the public disclosure of information is deemed politically inconvenient.

- In light of our responsibility to ensure that all federal agencies respond to FOIA requests in a timely, substantive, and non-discriminatory manner, the Committee has initiated a comprehensive analysis of how the federal government handles FOIA procedures. In recent weeks, the Committee has witnessed firsthand the bureaucratic obstruction that the general public too-often experiences.

- While many agencies are thorough and timely in their responses, some agencies have been either partially or completely non-responsive. Others have requested more time. Indeed, the Committee's experience to date reveals inadequacies in FOIA, as well as a disparity in FOIA compliance among federal agencies.

- Today's hearing will afford the Committee an opportunity to fully examine some of the problems associated with FOIA's design and implementation, as well as Executive Branch non-compliance.

Mr. CUMMINGS. Thank you, Mr. Chairman, and thank you for calling this hearing.

I want to begin where you ended. So often so many negative things are said about our public employees. It is very good to hear you feel as I do, Mr. Chairman, that public employees play a very, very important role. They are often unseen, unnoticed, unappreciated and unapplauded. I take this moment to join with you in thanking, not only the FOIA employees, but all of our public employees who, contrary to so many statements we have heard, quite often are underpaid and dedicate their lives to making a difference.

This is Sunshine Week, our Nation's observance of the importance of open and transparent government. This week also marks the 260th anniversary of James Madison's birth. He was a champion of the public's right to know and a strong defender of open government. In 1822, James Madison said, "A popular government without popular information or the means of acquiring it, is but a prologue to a farce, or a tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives."

It is fitting today that our committee is holding a hearing on one of the pillars of open government, the Freedom of Information Act, which helps ensure that the public has the information and the knowledge that Madison described so powerfully.

Beginning with his first day in office, President Obama has reinvigorated the executive branch's commitment to open government and reversed many of the troubling policies of his predecessor. Highlighting FOIA as "the most prominent expression of a profound national commitment to ensuring an open government, the President said, "The Freedom of Information Act should be administered with a clear presumption. In the face of doubt, openness prevails."

Based on this instruction, Attorney General Eric Holder rescinded Attorney General Ashcroft's 2001 policy memorandum on FOIA that allowed agencies to err on the side of secrecy rather than disclosure for eight long years. The Obama administration's new commitment to transparency and open government has resulted in significant improvements in FOIA implementation.

FOIA backlogs have been reduced significantly in back to back years under this administration. Agencies, such as the Departments of Agriculture and Defense, have decreased incoming requests by proactively disclosing more information online. The Department of Justice recently unveiled FOIA.gov, a comprehensive public resource for governmentwide FOIA information and data.

Still, there is always room for improvement, we can always do better. A recent report from the National Security Archive found that the Obama administration "has clearly stated a new policy direction for open government but has not conquered the challenge of communicating and enforcing that message throughout the executive branch."

In my opinion, the best way to make government more effective is to make it more accountable to the public. For this reason, I am pleased to announce that I have introduced legislation this morning

to strengthen the Nation's core Open Government laws, and every Democratic member of our committee is an original co-sponsor.

This legislation, the Transparency and Openness in Government Act, is a package of five bills that overwhelmingly passed the House in the last Congress with broad, bipartisan support, including your own, Mr. Chairman.

This legislation will make Federal commissions more transparent and accountable; increase public access to Presidential records; require greater disclosure of donations to Presidential libraries; ensure that government email records are preserved; and clarify the authority of the Government Accountability Office to access agency records.

Mr. Chairman, I know you believe that transparency should not be a partisan issue, I heard what you just said and I know you mean it, so I hope that you will join as a co-sponsor also. As chairman of this committee and chairman of the House Transparency Caucus and as a supporter of identical language that passed in the last Congress, I know you share our goals.

Given the widespread bipartisan support of these provisions, I hope that you and every single Republican and every single Democrat in the House will join us in making sure that we sign on to this bill and urge Speaker Boehner to move it to the House floor as swiftly as possible.

With that, Mr. Chairman, again I thank you for this hearing. I look forward to the testimony and I thank the witnesses for being with us today.

With that, I yield.

Chairman ISSA. I thank the ranking member.

Members may have 7 days to submit opening statements and extraneous material for the record.

The chair will now recognize the panel of witnesses.

Ms. Nisbet is Director, Office of Government Information Services which acts as a FOIA ombudsman between requesters and agencies.

Professor Daniel Metcalfe is the executive director of Collaboration of Government Secrecy through American University's Washington College of Law and a former Director of the Office of Information and Privacy at the Department of Justice.

Rick Blum is the coordinator for the Sunshine in Government Initiative and has spent over a decade in Washington advocating for greater transparency in government.

Tom Fitton is president of Judicial Watch, a conservative, nonprofit whose mission is to promote transparency and accountability in government. We are very familiar with your work also.

Ms. Angela Canterbury is director of public policy at the Project on Open Government [POGO], which is focused on achieving effective, accountable and open, ethical government. Again, we thank you for your work.

It is the rule of the committee that all witnesses be sworn. Please rise to take the oath.

[Witnesses sworn.]

Chairman ISSA. Please be seated.

I would inform the entire panel that contrary to our ordinary procedure, since this is the last day before recess, votes will be held

sometime during this hearing. There will only be two votes. We will stay for at least 5 minutes, perhaps as much as 10. If you are still making your statements, we will leave, there will be two votes, and we should be back in 20 to 25 minutes after we leave.

I would announce that as soon as anyone returns who can take the chair, we will commence, so that we not interrupt. We will also take Members who come back in the order they return if there is time.

Most of you have been here a lot and you know the drill, green, yellow and red. Let us get through all of you if we can before the votes.

Ms. Nisbet.

STATEMENTS OF MIRIAM NISBET, DIRECTOR, OFFICE OF GOVERNMENT INFORMATION SERVICES, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; DANIEL METCALFE, EXECUTIVE DIRECTOR, COLLABORATION ON GOVERNMENT SECRECY; RICK BLUM, COORDINATOR, SUNSHINE IN GOVERNMENT; TOM FITTON, PRESIDENT, JUDICIAL WATCH; AND ANGELA CANTERBURY, DIRECTOR, PUBLIC POLICY PROJECT ON OPEN GOVERNMENT OVERSIGHT

STATEMENT OF MIRIAM NISBET

Ms. NISBET. Good morning, Mr. Chairman, Representative Cummings and members of the committee.

I am delighted to be here today during Sunshine Week to talk about my office, the Office of Government Information Services at the National Archives and Records Administration. We are an important part of the Freedom of Information and Open Government Initiatives of the Federal Government and we are also a new approach under the FOIA to avoiding litigation.

As you know, the FOIA is pretty simple in concept but a bit more complicated in execution. Anyone can ask for records of the executive branch agencies which then, within strict time limits, must respond to the requester either disclosing the records or giving the reasons why they are not being disclosed under specific exemptions. If dissatisfied, the requester can file an administrative appeal within the agency and then, if still unhappy, file a lawsuit in Federal court.

At least that was the law until the FOIA was amended in 2007 to create the Office of Government Information Services or OGIS, as we call it, to offer mediation services to resolve disputes between FOIA requesters and the executive branch agencies.

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

At this hearing, looking at, among other things, crowd sourcing of FOIA oversight, you will be glad to hear that the interest in

FOIA reaches far and wide, based on what we have seen in our first 18 months of operation. We heard from requesters from 43 States, the District of Columbia, Puerto Rico and 12 foreign countries. Our cases have involved 32 departments and agencies, including all 15 Cabinet level departments.

We answered questions, provided information, listened to complaints and tried to help in any way we could. For the more substantive disputes, we facilitated discussions between the parties, both over the phone and in person, and worked to help them find mutually acceptable solutions.

The statutory term mediation services include the following: formal mediation, facilitation and ombud services. We have found the less formal method of facilitation by OGIS staff members provides something similar to mediation but, as I said, in a less formal way, and parties are more willing to engage with OGIS and with each other without the perceived formality of mediation.

Since September 2009 when we opened, OGIS has closed 541 cases, 124 of them true disputes between FOIA requesters and agencies such as fees charged and FOIA exemptions as applied. As a facilitator for the FOIA process to work as it is intended, we were not calling balls and strikes, but letting the parties try to work matters through with our assistance in an effort to avoid litigation. In three-quarters of the disputes we handled, we believe the parties walked away satisfied and that OGIS helped them to resolve their disputes. You can read about those cases in our public case log which is posted on our Web site.

A realization we quickly faced is that defining success is a challenge. The final results of our process is not both parties getting exactly what they want, sometimes not even close, but if we are able to help them in some way by providing more information or by helping them understand the other party's interest, we feel that we have provided a valuable service.

When OGIS first set out, we spoke of changing a culture, a mind set from one of reacting to a dispute in an adversarial setting to one of actively managing conflict in a neutral setting. OGIS has a unique perspective in the way FOIA works. We work side by side with FOIA professionals and the agencies to improve the process from within, and we also work closely with requesters on the outside to address shortcomings.

We have seen the importance of building relationships and trust among the members of the FOIA community. It is an exciting process. We have just gotten started, but we are pleased to see so many positive results in a short time.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Nisbet follows:]

TESTIMONY OF MIRIAM NISBET

DIRECTOR OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES

BEFORE THE HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

ON

"THE FREEDOM OF INFORMATION ACT: CROWD-SOURCING GOVERNMENT OVERSIGHT"

MARCH 17, 2011

Good morning, Mr. Chairman, Ranking Member Cummings, and members of the committee, I am Miriam Nisbet, Director of the Office of Government Information Services at the National Archives and Records Administration. Thank you for the opportunity to appear before you during Sunshine Week to discuss the work of my office, an important part of the freedom of information and open government initiatives of the Federal Government.

As you know, the Office of Government Information Services, referred to in short as OGIS, has been hard at work carrying out its statutory mission since opening in September 2009. While we have worked to resolve disputes under the Freedom of Information Act, or FOIA, and to develop strategies to review agency FOIA policy, procedures and compliance, we have realized that much of our work falls under the designation that Congress gave us as the "FOIA ombudsman." As an ombudsman, OGIS acts as a confidential and informal information resource, communications channel and complaint handler. We see the ombudsman role as the most fitting way for OGIS to work with members of the public and with Federal agencies to improve the

administration of FOIA. OGIS supports FOIA – not by championing requesters over agencies or vice versa. We work to encourage a more collaborative and accessible FOIA process for everyone in the FOIA community.

The first OGIS report issued just this month details the work our office has done. It focuses on our first fiscal year and discusses both our internal workload and experiences as well as what we have seen in working with the public and the 94 Executive Branch departments and agencies. This is only the beginning, but we are already off to quite a start. In the first five months of FY 2011 we opened an average of 38 cases a month compared to an average of 17 cases a month for the same time period in FY 2010.

In the first 18 months, we heard from requesters from 43 states, the District of Columbia, Puerto Rico and 12 foreign countries who asked for assistance on everything from how to make a Freedom of Information Act request to which agency might have records they are seeking, and from how to navigate fee categories and waivers to how to request mediation services over denials of information. We answered questions, provided information, listened to complaints and tried to help in any way we could. For the more substantive disputes, we facilitated discussions between the parties, both over the phone and in person, and worked to help them find mutually acceptable solutions.

The statutory term "mediation services" includes the following: formal mediation, facilitation and ombuds services. OGIS continues to offer formal mediation as an option for resolving disputes, but has not yet had a case in which the parties agreed to participate in that process. We

have found that the less formal method of facilitation by OGIS staff members, a novel approach when applied to FOIA, provides a very similar process, and parties are more willing to engage with OGIS and with each other without the perceived formality of mediation. OGIS-conducted facilitation is cost effective, as it bypasses hiring outside mediators to perform similar services.

Since September 2009, OGIS has closed 541 cases, 124 of them true disputes between FOIA requesters and agencies (for example, a dispute over application of an exemption or a fee assessment rather than a simple request for information). As a facilitator for the FOIA process to work as it is intended, we were not calling balls or strikes, but letting the parties try to work matters out with our assistance in an effort to avoid litigation. In three-quarters of the disputes we handled, the parties walked away satisfied. We believe that OGIS involvement helped to resolve their disputes.

A realization we quickly faced is that defining success is a challenge. The final result of our process is not both parties getting exactly what they want – sometimes not even close – but if we are able to help them in some way, by providing more information or by helping them understand the other party's interests, we have provided a valuable service. When OGIS first set out to fulfill this part of its statutory mission we spoke of changing a culture or mindset, from one of reacting to a dispute in an adversarial setting to one of actively managing conflict in a neutral setting. Today, after 18 months of working to prevent and resolve FOIA disputes, the experience has revealed that our work may well go deeper than a culture change. We now see that the task before us also includes seeking more acceptable outcomes than "win-lose"

scenarios. With this goal in mind, we continue to work on how we will define success with our customers – both requesters and agencies.

To date, OGIS cases have involved 36 Federal Departments and Agencies, including all 15 Cabinet-level agencies, some of which contacted OGIS with questions or for assistance with a dispute. We heard from agency FOIA professionals who wanted suggestions on how best to work with difficult requesters and who asked for OGIS assistance in resolving disputes related to FOIA responses. One area where we have had success this year is working with multiple agencies that have received essentially the same FOIA request to help facilitate a strategy for responding with some consistency across government. We have found that agency professionals faced with these sometimes daunting requests are greatly relieved to hear that someone else is working on the same thing and may be able to help. We also continue to provide agency FOIA Public Liaisons and their staffs with the tools they need to improve their approach to FOIA requests and to make the process less adversarial. One year ago OGIS developed and began offering dispute resolution skills training for agency FOIA professionals, helping build their skill sets to provide better customer service to requesters and also to work more successfully with other offices within their own agencies. More of this type of alternative dispute resolution (ADR) training is scheduled for this year, and our hope is that equipping FOIA professionals with these skills will help solve or prevent disputes.

Though we have heard from many agency professionals and members of the public, we know outreach continues to be essential. Increasingly, agencies are letting requesters know about OGIS as a resource – we know of 11 agencies that routinely do so – and we have had some OGIS

customers come in by way of Congressional recommendation, but there are still agencies that have not yet begun to include the OGIS "pitch" in their letters to FOIA requesters. My staff and I regularly meet with members of the requester community and attend meetings, conferences and events attended by requesters to let them know about OGIS services. We also are meeting with agency FOIA staffs, alternative dispute resolution professionals and general counsels' offices and participating in agency FOIA training offered by the Justice Department and by agencies themselves to get the word out. Our approach to providing information to agency FOIA professionals includes a sample facilitation, which has resulted in positive feedback from participants and has proven to be very effective in lessening the fear factor of how OGIS will work with agencies to resolve disputes.

Because we have had so many requests for mediation services, we have also been challenged in setting up a comprehensive review strategy to fulfill that prong of our statutory mission. We see and hear a lot about agency policy, procedures and compliance as we work to resolve disputes and answer inquiries, but are setting up a more robust method to accomplish the goals of this prong of our mission in our second year. For now, the review plan includes using existing data to create value-added reporting to topics such as backlogs or referrals and consultations and to offer what we call collaborative reviews of agency FOIA operations alongside willing agencies. By using our observations from our caseload as well as a thorough analysis of all 94 Chief FOIA Officer Reports of 2010, we were able to develop some best practices for agencies and requesters. We also have succeeded in engaging in collaborative review by offering our services to review agency FOIA regulations with agencies that are considering revising FOIA regulations or practices. A few agencies have already worked with OGIS in that capacity and we plan to

continue the collaborative review process going forward. To further this goal, OGIS continues to invite agencies to participate in collaborative reviews of their FOIA processes and to gather ideas from the public and Federal agencies about ways in which OGIS can best accomplish this prong of its mission in a cost-effective way.

OGIS has a unique perspective on the way FOIA works. As an entity that works side-by-side with agency FOIA professionals to improve the process from within and that also works closely with requesters on the outside to address shortcomings, we have seen the importance of building relationships – and trust – among the members of the FOIA community. It takes a lot of us to make FOIA work – agency FOIA staffs, general counsels, requesters, the Justice Department's Office of Information Policy, the White House and of course all of you in Congress – and OGIS gets to work with all of these stakeholders to help build a better FOIA. It's an exciting process and while we have just gotten started and see it as a long-term effort, we are pleased to see so many positive results in the short term and to see that our process works. We will continue to engage with all members of the FOIA community to improve the FOIA process by reviewing what works and what does not, resolving disputes and providing assistance wherever we can.

Please do not hesitate to contact us with any questions or if we can help you – or any of your constituents – on FOIA issues. Thank you for the opportunity to testify; I look forward to answering any questions you may have.

Chairman ISSA. Thank you.
Mr. Metcalfe.

STATEMENT OF DANIEL METCALFE

Mr. METCALFE. Good morning, Mr. Chairman and members of the committee.

As someone who has worked with the Freedom of Information Act for almost 35 years now, I am pleased to be here to provide an academic perspective on the act and its Government-wide administration.

My own views today are rooted in my work at American University's Washington College of Law in recent years where I teach courses in Government information law and direct the Collaboration on Government Secrecy or CGS for short. CGS came into existence in 2007 as the first academic center at any law school in the world to focus on the subject area, in addition to maintaining an extensive Web site as an academic resource for all those interested in Government secrecy and transparency as two sides of the same coin.

We have conducted a dozen day-long programs on the subject with particularly heavily focus on the FOIA.

This academic perspective is also informed by decades of experience in leading the component of the Department of Justice that discharges the Attorney General's responsibility to guide all agencies of the executive branch on the complexities of the FOIA's administration. I know, firsthand, both the difficulties to Federal agencies that FOIA requests can pose and the challenges met in encouraging proper compliance with the act, including new policy conformity by all agencies notwithstanding those difficulties.

It is through that lens that I view the many ways in which the openness in government community has been disappointed by the surprising slowness and incompleteness of the Obama administration's new FOIA policy implementation during these past 2 years.

This began with the Holder FOIA memorandum itself, as quickly issued as it was. Contrary to all expectations and despite the precedent established by Attorney General Janet Reno not long before, the Holder FOIA memorandum did not, by its terms, apply its new foreseeable harm standard to all pending litigation cases where it could have had an immediate, highly consequential impact. Rather, it contained a series of lawyerly hedges that appear to have effectively insulated pending cases from it.

As one of the speakers at CGS' FOIA Community Conference in January pointedly observed, the FOIA requester community is still waiting to see a list of any litigation cases in which the foreseeable harm standard has been applied to yield greater disclosure. There is a very strong suspicion that there are few, at best, and perhaps even no such cases. Thus, the best possible opportunity to press for full adoption of the standard throughout the executive branch in a concrete, exemplary fashion was lost.

Neither did the Holder FOIA memorandum or its initial implementation and guidance take the expected step of directing agencies to reduce their backlogs of pending FOIA cases. Whereas the Reno FOIA memorandum and its implementing guidance had immediately confronted that difficult subject, their 2009 counterparts

contain hardly a word about it, let alone a direction to reduce any backlog. That did not come until the broader Open Government directive was issued in December 2009. This led to the Department of Justice straining at this time last year to claim Government-wide backlog reduction progress based upon new annual report statistics that hardly could be connected to what the Obama administration actually had done.

This remains a matter of concern today for more than one reason. First, there is the awkward fact that the Justice Department's own FOIA backlog has not been reduced in the past year. Rather, it has been allowed to worsen.

When the lead Government agency for the FOIA fails in its entirety to reduce its own backlog, it makes it much harder to press other departments and agencies to do so. This do as I say, not as I do, problem is exacerbated by the fact that the Department's high visibility leadership offices, the Offices of Attorney General, Deputy Attorney General and Associate Attorney General, saw their own numbers of pending requests increase in this past year by an aggregate figure of nearly 33 percent. This makes it impossible to lead by example.

Turning to the FOIA's exemptions, the one that cries out for immediate attention is, of course, exemption 2. This is because Federal agencies have been for nearly three decades using the so-called High 2 aspect of the exemption to withhold sensitive information, the disclosure of which could reasonably be expected to enable someone to circumvent the law, especially in the post-9/11 context.

Ten days ago, the Supreme Court firmly ruled in *Milner* v. *Department of the Navy,* that this longstanding interpretation of exemption 2 is incorrect. As of that date, High 2 simply ceased to exist. This means that the large amounts of information that agencies have regularly withheld under exemption 2 alone are no longer properly withheld on that basis. It places agencies in an immediate quandary over how to handle such sensitive information both at the administrative level and in FOIA cases pending in court.

I think the summary of the position with respect to exemption 2, in the interest of time, is that this committee does need to address it with nothing less than a wholesale rewrite of the exemption carefully contoured to protect security sensitive information with a firm harm standard.

In conclusion, I also want to mention something briefly about exemption 3 because I think the committee will also want to pay attention to that. I know it struggles with the proposed new exemption 3 statutes that it tries to flag for attention, but there is also the matter of the existing exemption 3 statutes.

This past year, CGS conducted an academic study of this subject by first compiling a list of the statutes invoked, more than 300 of them, and in summary, we found nearly half of them were not properly qualified to be invoked as exemption 3 statutes.

The committee could take this groundwork if it chooses and buildupon it simply by asking each agency that reports using a questionable statute under exemption 3 to look into why and how it is doing so. I daresay that if the committee were to take such a step, it would, at a minimum, result in dozens of agencies realiz-

ing that many dozens of the statutes it now regularly uses, are not truly exemption 3 statutes at all.

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

[The prepared statement of Mr. Metcalfe follows:]

Testimony of Daniel J. Metcalfe
Adjunct Professor of Law and Executive Director, Collaboration on Government Secrecy
American University Washington College of Law
Before the House Committee on Oversight and Government Reform

March 17, 2011

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

My own views today are rooted in my work at American University's Washington College of Law in recent years, where I teach courses in government information law and direct the Collaboration on Government Secrecy ("CGS"). CGS came into existence in 2007 as the first academic center at any law school in the world to focus on this subject area; three more have been established since then. In addition to maintaining an extensive Web site as an academic resource for all those who are interested in government secrecy and transparency (as two sides of the same coin), we have conducted a dozen day-long programs on the subject, with particularly heavy focus on the FOIA.[1] Next month, on April 27, we will hold our fifteenth program, an academic conference on the protection of homeland security information.

This academic perspective is also informed by decades of experience in leading the component of the Department of Justice that discharges the Attorney General's responsibility to guide all agencies of the Executive Branch on the complexities of the FOIA's administration. I know first-hand both the difficulties to federal agencies that FOIA requests can pose and the challenges met in encouraging proper compliance with the Act, including new policy conformity, by all agencies notwithstanding those difficulties. Simply put, I have "been there, done that," through several presidential administrations, time and again.

Obama/Holder FOIA Policy Implementation

So it is through that lens that I view the many ways in which the openness-in-government community has been disappointed by the surprising slowness and incompleteness

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

of the Obama Administration's new FOIA policy implementation during these past two years.[2] This began with the Holder FOIA Memorandum itself, quickly issued as it was. Contrary to all expectations, and despite the precedent established by Attorney General Janet Reno not long before, the Holder FOIA Memorandum did not by its terms apply its new "foreseeable harm" standard to all pending litigation cases -- where it could have had an immediate, highly consequential impact.[3] Rather, it contained a series of lawyerly hedges that appear to have effectively insulated pending cases from it.[4] As one of the speakers at CGS's FOIA Community Conference in January pointedly observed,[5] the FOIA-requester community is still waiting to see a list of any litigation cases in which the "foreseeable harm" standard has been applied to yield greater disclosure, and there is a very strong suspicion that there are few at best and perhaps even

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[2] Actually, the specific policy standard employed by Attorney General Eric Holder is not "new," in that he adopted the same "foreseeable harm" standard that was established by the Reno FOIA Memorandum in October 1993 and used during the Clinton Administration. This standard is designed to govern both litigation and agency decisionmaking at the administrative level, and it works hand in hand with a strong emphasis on the making of discretionary disclosures wherever possible under the Act.

[3] As an example, when the "foreseeable harm" standard was applied to all pending litigation cases under the Reno FOIA Memorandum, the Justice Department applied it even to a litigation case that had recently concluded, one in which the courts already had upheld nondisclosure for a Justice Department report investigating the Nazi past of former U.N. Secretary-General Kurt Waldheim. See *FOIA Update*, Vol. XV, No. 2, at 1(noting that the new policy "triggered a decision to disclose the report entirely as a matter of administrative discretion . . . [even] though there was a substantial legal basis for withholding, affirmed by the court of appeals"), *available at* http://www.justice.gov/oip/foia_updates/Vol_XV_2/page1.htm. Ironically, the subject matter of that case was the same as that of the "Nazi-hunter" report that the Justice Department inexplicably withheld large portions of during this past year, even after that report's "leakage" to the *New York Times* revealed the seeming non-sensitivity of the many portions withheld. One could not ask for a more striking direct contrast between Reno and Holder FOIA policy implementation than that.

[4] Specifically, the Holder FOIA Memorandum states as follows: "With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information." One of the speakers at a recent CGS program, herself a former Justice Department FOIA litigator, described this as "a major loophole" continuing even to the present day.

[5] This recent program, entitled "Transparency in the Obama Administration -- A Second-Year Assessment," is part of a series of such FOIA Community Conferences that have been conducted by CGS in January of each year (i.e., in 2009, 2010, 2011), and one is likewise planned for January 20 of next year. CGS's Web site contains a compilation of all of its programs to date, which is available at this link: http://www.wcl.american.edu/lawandgov/cgs/programs.cfm.

"no such cases."[6] Thus, the best possible opportunity to press for full adoption of this standard throughout the Executive Branch -- in a concrete, exemplary fashion -- was lost.

Neither did the Holder FOIA Memorandum or its initial implementation guidance take the expected step of directing agencies to reduce their backlogs of pending FOIA requests.[7] Whereas the Reno FOIA Memorandum and its implementing guidance had immediately confronted that difficult subject, their 2009 counterparts contained hardly a word about it, let alone a direction to reduce any backlog; that did not come until the broader Open Government Directive was issued in December 2009. This led to the Justice Department straining at this time last year to claim governmentwide backlog-reduction "progress" based upon new annual FOIA report statistics that could hardly be connected to what the Obama Administration actually had done.[8]

This remains a matter of concern today for more than one reason. First, there is the awkward fact that the Justice Department's own FOIA backlog has not been reduced in the past year; rather, it has been allowed to worsen. When the "lead" government agency for the FOIA fails in its entirety to reduce its own backlog (and, worse yet, fails in this first truly relevant statistical year), it makes it much harder to press other departments and agencies to do so. And this "do as I say, not as I do" problem is exacerbated by the fact that the Department's high-visibility leadership offices saw their own numbers of pending requests increase in this past year,

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

[7] Also perplexing, to say the least, was the Holder FOIA Memorandum's primary emphasis, as an "important implication" of its openness policy, on the making of "partial disclosures" of records that cannot be disclosed in full -- as if agencies were not already doing so to begin with. If fact, all federal agencies have been following this practice, without question, since the mid-1970s, as matter of clear statutory command, not policy. Yet even as recently as this past week, the Justice Department was still stating as if with significance that Attorney General Holder "directed agencies to make partial disclosures of records whenever full releases are not possible." It would be far better to place concentrated emphasis on implementation of the renewed "foreseeable harm" standard than on a decades-old statutory requirement, as if the latter were something new.

[8] If one looks closely at the nature and context of those statistics, including the fact that they reflected activity during a reporting year (Fiscal Year 2009) that began on October 1, 2008, it becomes clear that they bore no evident connection to new policy activity.

by an aggregate figure of nearly 33%.[9] This makes it impossible to lead by example.[10]

And on the subject of leading by example, there is the matter of White House "visitor logs," which for decades were regarded as "agency records" of the United States Secret Service and subject to the FOIA as a matter of law. Recently, the White House established a new, "voluntary disclosure policy" for such records that is highly commendable insofar as it involves automatic disclosures of them at regular intervals and in far greater numbers than ever before. But hidden beneath that policy, and its very "voluntariness," is the highly questionable notion that the FOIA no longer applies to those records -- which means that they are fully shielded from the Act's accountability mechanisms. It also means that, within this "voluntary" scheme of things, the White House can effectively withhold from the public any White House visitor information it chooses, whenever it chooses, invisibly. We have focused on this at one of our recent CGS programs as an area of considerable concern.[11]

Exemption 2

Turning to the FOIA's exemptions, the one that cries out for immediate attention is of course Exemption 2. This is because federal agencies have for nearly three decades been using the so-called "High 2" aspect of this exemption to withhold sensitive information the disclosure of which could reasonably be expected to enable someone to circumvent the law, especially in a post-9/11 context. Ten days ago, however, the Supreme Court firmly ruled that this longstanding interpretation of Exemption 2 is incorrect; as of that date, "High 2" simply ceased to exist. See *Milner v. Dep't of the Navy*, No. 09-1163 (Mar. 7, 2011).[12] This means that the large amounts of information that agencies have regularly withheld under Exemption 2 alone are no longer properly withheld on that basis, and it places agencies in an immediate quandary over how to

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[9] According to the Department's most recent annual FOIA report, the numbers of FOIA requests that remained pending as of the beginning and end of that reporting year (Fiscal Year 2010) increased by 34.8% in the Office of the Attorney General, 31.8% in the Office of the Deputy Attorney General, and 26% in the Office of the Associate Attorney General.

[10] This of course connects to the fact that the "Leahy/Cornyn Faster FOIA" bill, which focuses solely on the subject of backlog reduction and was passed by the Senate in the last Congress, is expected to be re-introduced this week.

[11] The Webcast for this particular program session can be found at this direct link: http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=ba4d8b58-78b5-483b-95af-bc876063678e. See also *From FOIA Service to Lip Service: The Unexpected Story of White House Visitor Logs*, 36 Admin. & Reg. Law News 3 (Spring 2011).

[12] It should be noted that with this, Exemption 2 in its entirety is now a "dead letter," at least as a matter of policy under the Holder FOIA Memorandum. This is because the exemption's other aspect, known as "Low 2," uniquely is not based on any expected harm from disclosure but rather shields an agency from the mere burden of responding to requests for low-level administrative information of no real significance. As such, any "Low 2" information readily fails the "foreseeable harm" policy standard and could not properly be withheld in accordance with it.

handle sensitive such information both at the administrative level and (in some cases most immediately) in FOIA cases that are presently pending in court.

Justice Kagan, in her opinion for the Court in *Milner*, observed with some understatement that the Court's decision "may force considerable adjustments," and she suggested FOIA Exemptions 1, 3, and 7(F) as "tools at hand" for that. Slip op. at 18. Justice Alito, writing separately, took pains to suggest likewise as to Exemption 7(F) "[i]n particular."[13] Slip op. at 1 (Alito, J. concurring). No doubt some part of the *Milner* "adjustment" will involve at least two of these three FOIA exemptions, but there also should be no doubt that federal agencies now maintain highly sensitive records -- computer system vulnerability assessments, for example -- with respect to which remedial legislation will be necessary.[14] And with due respect to Justice Kagan's suggestion that Congress might possibly address this through Exemption 3, it appears that nothing less than a wholesale rewrite of Exemption 2, carefully contoured to protect security-sensitive information with a firm harm standard, is now warranted.[15]

Exemption 3

Speaking of Exemption 3, I think the Committee will want to carefully consider the proliferation and use of other statutes to withhold information under the FOIA, which has been a matter of growing concern in recent years. I know that it struggles almost daily, as does its Senate counterpart, to identify for full attention any proposed new "Exemption 3 statute," a process made only somewhat easier by the 2009 amendment of Exemption 3 on that point. But beyond that, there is the matter of the many existing statutes that are used by agencies to withhold information from FOIA requesters on a daily basis. This past year, CGS conducted an academic study of this by first compiling all of the different statutes that are relied upon by

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[13] To be sure, some portion of the highly sensitive information previously withheld by agencies on an "anti-circumvention" basis may well qualify for protection under Exemption 7(F) in lieu of it. The compilation of cases in the "Post-9/11" FOIA Litigation section of CGS's Web site indicates that. See: http://www.wcl.american.edu/lawandgov/cgs/post911foia.cfm#ex7f (citing, e.g., *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313 (D. Utah 2003). It also is foreseeable that some small portion will qualify under Exemption 7(E) of the Act as well. See id. As to the viability of Exemption 1 toward that end, such an approach, to any degree, would run directly contrary to the current policy imperatives favoring less national security classification rather than more.

[14] This will figure prominently in the academic conference on the subject of homeland security protection that CGS is holding on April 27.

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

agencies for Exemption 3 withholding, more than 300 in total, and then analyzing them for technical compliance with Exemption 3's substantive standards. We found that less than half of them, just slightly more than 150, do properly qualify for use under Exemption 3 -- which means that by their own admissions (in their annual FOIA reports) agencies are employing roughly twice as many statutes in this way as they ought to and withholding untold amounts of information from FOIA requesters in so doing.

The Committee could take this groundwork and readily build upon it, simply by asking each agency that reports using a questionable statute under Exemption 3 to look into why and how it is doing so.[16] Perhaps some agencies would try to take issue with CGS's substantive evaluation of one or more of the statutes that they use (and that would be only fair), but I daresay that if the Committee were to take such a step it would at a minimum result in dozens of agencies realizing that many dozens of the statutes they now regularly use are not truly Exemption 3 statutes at all. (See the Exemption 3 section of CGS's Web site, which can be reached directly at this link: http://www.wcl.american.edu/lawandgov/cgs/about.cfm#exemption3.)

In sum, there certainly is much reason to look askance at the implementation of new FOIA policy over the course of the past two years, to put it mildly, all rosy characterizations of it notwithstanding. Perhaps in time the public will be shown some real, concrete examples of this policy at work, both in litigation and at the administrative level. But to those who have good reason to expect better, it already is a disappointing case of too little too late at best.

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

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

Chairman ISSA. Thank you.
Mr. Blum.

STATEMENT OF RICK BLUM

Mr. BLUM. Thank you, Chairman Issa, Ranking Member Cummings and members of the committee.

I coordinate the Sunshine in Government Initiative, a coalition of media groups dedicated to prompting transparency and accountability in government.

FOIA is a vital tool to identify problems in government and society. Because of FOIA, the public learned that meat in school lunches has been held to a lower safety standard than meat supplied to adults and firefighter safety equipment would not work well at high temperatures or when wet and yet journalists comprise only about 6 percent of all FOIA requests. Why? There are several reasons, none surprising.

Some are long delays and backlogs that persist in every administration, no matter which party controls the White House, few consequences for agencies improperly denying and delaying requests; and most journalists simply don't have the luxury to wait or fight bureaucratic battles and move on to the next story.

The most successful FOIA filers are the most organized and patient. Despite some improvements from the President's transparency efforts, reporters filing FOIA requests are seeing little improvement on the ground. I would like to focus my comments on the costs of FOIA, troublesome statutory exemptions to FOIA under exemption 3, as Dan mentioned, and the use of technology to better manage the FOIA process.

First, the cost of FOIA, the government is spending more money on the FOIA process. Federal spending on FOIA is up 35 percent in 2 years. In 2010, agencies reported spending nearly $400 million to process FOIA requests. At the same time, the investment in FOIA can save taxpayer dollars by shining a light on what Government is doing. Let me give you an example.

The Washington Post tied good reporting with FOIA to show that farm subsidy payments meant as a safety net for struggling farmers were going to wealthy farmers and suburbanites. Proposed reforms to the subsidy program would save taxpayers an estimated $228 million in the first year and $2½ billion over 10 years. We have no position on farm subsidies, but it is worth noting these changes would pay for most of the Government's FOIA expenses. That is just one set of FOIA requests.

Let me also address statutory (b)(3) exemptions. These are exemptions that are written into the law. These undermine FOIA's presumption of disclosure. Our Coalition spends considerable resources fighting defensively against the worst of these proposed exemptions. We looked at agency reports over the last decade that count how many statutes there are, similar to what Dan did. We found, when you eliminate duplicates, Federal agencies cited at least 240 different statutes, it may be over 300, in denying FOIA requests.

For Sunshine Week, ProPublica, a nonprofit investigative journalism center, took our data and created an easily searchable online data base of these exemptions and launched it this week. Why

protect the identity of honeybee handlers or watermelon growers, or certain pigmy owls at a particular national park or more significantly, losing contract bids submitted through competitive bids for Federal contracts? Separate (b)(3) statutes bar the disclosure of all these things.

Our hope is to learn from readers when these exemptions are used and when they are abused. We are crowd sourcing oversight of FOIA.

Mr. Chairman, the provision in the Dodd-Frank reform law that you successfully opposed with others was just one of these (b)(3) exemptions. Let me suggest several steps to better limit exemption (b)(3) statutes.

First, in the House, this committee should receive limited referral of the particular provisions within legislation that affect FOIA, including (b)(3) statutes.

Second, in its regular review of legislation, the Office of Management and Budget should evaluate an agency's proposed (b)(3) exemptions when they are proposed.

Third, any author, sponsor or reviewer should first assess whether existing exemptions would suffice without a new exemption or the proposed exemption is justified or any foreseeable harm results from disclosure is greater than the public benefit from disclosure and if the statute is narrow in scope, what is proposed is narrow in scope and specific and that there is adequate public notice so we can have an open debate about them. These steps would go a long way to avoid cutting overbroad or unnecessary holes into FOIA.

Let me finally turn to the use of technology to better track FOIA request responses and agency performance. For the public to help improve FOIA, the FOIA process itself should be more transparent. We see OGIS as an important part of this and they are already helping to clarify the process for requesters and provide best practices for agencies.

At a systemic level, the Justice Department's new FOIA.gov is a vast improvement. We hope it grows into a more robust system so the public can view past requests and responses, agencies can better manage caseloads and we all can track in real time the backlogs and whether agencies are staying ahead rather than falling behind. Mexico has such a system and it makes perfect sense for the United States.

Thank you, Mr. Chairman, for the opportunity to testify and I look forward to your questions.

[The prepared statement of Mr. Blum follows:]

Testimony of Rick Blum

on behalf of

the Sunshine in Government Initiative

before the

House Oversight and Government Reform Committee

On "The Freedom of Information Act: Crowd-Sourcing Government Oversight"
March 17, 2011

Dear Chairman Issa, Ranking Member Cummings, and members of the Committee,

I appreciate the opportunity to testify today on the state of the federal Freedom of Information Act, or FOIA.

I coordinate the **Sunshine in Government Initiative (SGI)**, a coalition of media groups dedicated to promoting transparency and accountability in government. Members of SGI include the **American Society of News Editors**, **The Associated Press**, **Association of Alternative Newsweeklies**, **National Newspaper Association**, **Newspaper Association of America**, **Radio-Television Digital News Association**, **Reporters Committee for Freedom of the Press** and **Society of Professional Journalists**.

FOIA is a Vital Tool

FOIA has been an essential tool for crowdsourcing problems in government and society at large. Because of FOIA, the public learned that beef in school lunches has been held to a lower safety standard than meat supplied to adults,[1] and firefighter safety

[1] Blake Morrison, Peter Eisler and Anthony DeBarros, "Why a recall of tainted beef didn't include school lunches," *USA Today*, http://www.usatoday.com/news/education/2009-12-01-beef-recall-lunches_N.htm; accessed March 12, 2011.

equipment would not work reliably at high temperatures or when wet.[2] More recently, FOIA forced disclosure of the chemical ingredients in the dispersants used in controversial ways during the BP oil spill.[3]

Strengthening FOIA is not just a media issue. In fact, journalists comprise only about 6 percent of all FOIA requests, according to a 2006 study by the Coalition of Journalists for Open Government.[4] The majority of requests are private entities seeking information about competitors or other commercial interests.

Few journalists use FOIA because the obstacles are many. While the law requires agencies to respond within 20 business days, one award-winning journalist who frequently uses FOIA has never received records by the deadline. This committee over the years has documented the long delays and backlogs that persist in every administration no matter which party controls the White House. Requesters still face little recourse to long delays when a resistant agency refuses to process a FOIA request. The relatively new Office of Government Information Services has prodded agencies to negotiate or disgorge records in specific cases, but the process can still be lengthy.

There are no penalties other than occasional public shaming for agencies that refuse to disclose information that the law says should be public. Agency practices create frustration. Some inform the requester that a long-pending request will be considered fulfilled if the requester fails to express continued interest in the request within a short period of time. Deserved or not, some reporters see the lengthy delays and opaqueness of the FOIA process itself as a sign of the government's lack of commitment to it.

The President's FOIA efforts show impact, but longstanding problems remain.

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[2] Bill Dedman, "Flaws in firefighters' last line of defense," MSNBC, http://www.msnbc.msn.com/id/17007251/; accessed March 12, 2011.

[3] "Groups sue for safety studies of oil dispersants," Sunshine in Government Blog, July 15, 2010, available at http://sunshineingov.wordpress.com/category/gulf-oil-spill/; accessed March 15, 2011.

[4] "Who Uses FOIA," Coalition of Journalists for Open Government," July 3, 2006, available at http://www.cjog.net/documents/who_uses_foia__cx.pdf; accessed March 12, 2011.

The President has spurred some agencies to be more transparent, and made some great strides, but at the risk of sounding like a Government Accountability Office report, FOIA has a long way to go. The president's Day One memorandum on the FOIA followed by the attorney general's memorandum issued March 19, 2009 together reinstated the presumption of disclosure in FOIA decisions, and there is a mixed response: some agencies are making changes, while others are not. Full releases are up in fiscal 2010, but overall agencies that the Associated Press examined did not keep up with the flood of incoming requests. At the same time, many reporters filing FOIA requests are seeing little improvement on the ground in how their FOIA requests are handled.

FOIA costs are going up.

According to data submitted by agencies, the federal government is spending more money every year fulfilling its FOIA responsibilities. Federal agencies reported spending $288 million in fiscal 2008, $339 million in 2009, and $391 million in 2010. That's a 35.4 percent increase over two years.[5]

At the same time, FOIA can help the government save money by shining a light on ways the government spends taxpayer dollars.

The Washington Post tied good reporting with data obtained through FOIA from the Department of Agriculture to show farm subsidy payments meant as a safety net for struggling farmers were going to wealthy farmers and suburbanites. The story was based in data that Congress required USDA to track. In 2008, Congress replaced a "shall" with a "may" and gave USDA the option of no longer tracking payments down to individual recipients. Sure enough, soon thereafter the Agriculture Department argued it could not afford the $6.7 million price tag and stopped identifying individual recipients of subsidies.[6]

But this is penny wise and pound foolish. The Obama administration recently proposed reforms to the subsidies program that it claims would save taxpayers $228 million dollars in the first year, and $2.5 billion over ten years. These changes would pay

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[5] FOIA.gov, U.S. Department of Justice, accessed March 13, 2011.

[6] Claritza Jimenez, "USDA pulls plug on some farm subsidy data," *Data Mine,* Center for Public Integrity, available at http://www.publicintegrity.org/data_mine/entry/2100/, accessed March 15, 2011.

for the majority of the entire executive branch's expenses for FOIA. Whether you support or oppose these changes, less than $7 million for a little accountability for a program that annually costs $5 billion seems like a good return on investment. And in this fiscal environment, it's important to remember an effective and well-functioning FOIA can identify how the government spends taxpayer dollars and what the American public is getting for that expense.

Second, statutory (b)(3) exemptions undermine FOIA's presumption of disclosure.

My organization is particularly concerned when Congress or the executive branch considers adding to the hundreds of specific laws that agencies invoke to trump FOIA's requirement of disclosure.[7]

Our coalition spends considerable resources monitoring these exemptions at the time they are proposed to, first, find them, and, second, openly debate their merit.

Our researcher, Chris Green, thoroughly examined agency reports going back to 1998 and found that federal agencies cited at least 240 different statutes in denying FOIA requests. Roughly 140 are used in any given year (the number fluctuates each year).

As of this week the public can now easily browse through these statutes. We partnered with ProPublica, a nonprofit investigative reporting center, which created an easily searchable online database of these exemptions and launched it on Monday.[8] The database shows which agencies invoke the statutes and how often, and allows requesters to let us know when they have seen these exemptions in denials. Beyond spurring greater awareness of these "buried laws," Our hope is to learn from readers when these exemptions are used and whether they are abused.

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[7] To qualify as an Exemption 3 statute that supercedes disclosure requirements under FOIA, the statute must describe specific information or provide specific criteria the agency must use to decide whether information should be withheld. Congress also relatively recently enacted the OPEN FOIA Act, a requirement that any new (b)(3) statute enacted after October 28, 2009 must specifically cite to FOIA's Exemption 3 (5 U.S.C. 552(b)(3).

[8] Jennifer LaFleur, "FOIA eyes only: How buried statutes are keeping information secret," March 14, 2011, http://www.propublica.org/article/foia-exemptions-sunshine-law; accessed March 14, 2011.

We recognize there are reasons for keeping some information confidential, to protect national security, legitimate trade secrets and law enforcement investigations to name a few. We simply believe that the exemptions to FOIA must be narrow in scope and enacted only after careful consideration. We find many overbroad or unnecessary exemptions proposed each year in legislation.

These laws can be necessary. The need to protect the identities of covert intelligence agents is clear. So is walling off tax returns of private citizens.

But others have dubious merit on their face. Why protect the identities of honey bee handlers or watermelon growers? Or certain pygmy owls at a particular national park? Or, more significantly, losing contract bids submitted through competitive bids for federal contracts? Separate (b)(3) statutes bar the disclosure of all these things.

Mr. Chairman, Sec. 929I of the Dodd-Frank Wall Street Reform and Consumer Protection Act was *just one* of these (b)(3) exemptions. As you know, the Securities and Exchange Commission originally sought this (b)(3) exemption to provide unequivocal confidentiality for the information it collects when monitoring investment brokers, financial advisors and others to ensure fair markets. As written, Section 929I gave the Securities and Exchange Commission the discretion to withhold information pertaining to "risk assessments, surveillance activities, or other regulatory or oversight activities." Given that the SEC's mission is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation,"[9] virtually all of what the SEC does could have fallen within the boundaries of that statute.

When a news organization raised concerns about this particular exemption, last year the House Financial Services Committee Chairman Barney Frank held a hearing at which you testified urging Congress to "un-ring the bell." Within three weeks the President signed the bill effectively repealing the (b)(3) exemption. In its place, the SEC and the

[9] "The Investor's Advocate: How the SEC protects investors, maintains market integrity, and facilitates capital formation," *Securities and Exchange Commission*, available at http://sec.gov/about/whatwedo.shtml; accessed March 15, 2011.

new entities are covered by Exemption 8, a broadly worded statute that allows agencies to withhold inspection reports from financial institutions.

One lesson from this experience is that these exemptions are difficult to monitor and effectively engage with decisionmakers in a timely manner. The earlier we can find these proposals, the better the chances we have of eliminating the most egregious or narrowing the broadest but well-intentioned proposals. Please allow me to suggest several steps to better reign in the use of these statutory exemptions.

The fundamental problem is there is no gatekeeper to evaluate an agency's request for a new (b)(3) exemption. In the House, the committee with jurisdiction over FOIA should receive limited referral of provisions within legislation that propose to create a new statutory exemption or amend an existing statutory exemption. In its regular review of legislation, OMB, or certainly the Justice Department and Office of Government Information Services could evaluate any agency's proposed (b)(3) exemption. Before proposing a new statutory exemption to FOIA, any reviewer should first assess whether

(a) existing exemptions would not apply,
(b) the proposed exemption is justified publicly,
(c) any foreseeable, articulable harm resulting from disclosure is greater than the public benefit from disclosure,
(d) the statute is only as broad as necessary to identify the information qualifying for protection, and
(e) there is adequate public notice and debate about the provision.

While there is certainly no guarantee that overbroad statutes would be caught and addressed before becoming law, we feel these steps would go a long way to better limiting the exemptions written into law and avoid cutting overbroad or unnecessary holes into FOIA.

Finally, Mr. Chairman, I want to briefly comment on the use of technology to better track FOIA requests, responses, and agency performance.

We will only know if agencies are improving or backsliding with reliable and comparable data that agencies can use to set goals for improvement, the public can use to track agency progress, the Congress can use to provide effective oversight, and requesters can use to know when - or if -- they can expect a response.

For the past several years my organization and colleagues have hand-tabulated FOIA annual report data from PDF formats and re-compiled it to compare across agencies. While we are still analyzing data for fiscal year 2010, in 2009 it was clear that agencies were focusing attention on processing initial requests at the cost of its appeals process. The wait time on appeals soared.

FOIA.gov is a vast improvement over compiling agency annual reports by hand from annual reports in PDF format. It helps give a window into how well agencies are meeting their FOIA obligations. But it should grow into a robust system for tracking requests, viewing responses and better managing FOIA. Agencies and requesters alike could track in real time the status of the backlog and focus attention on staying ahead rather than falling behind.

To do that, the FOIA process should be more transparent. We were excited to push for the creation of OGIS in part because it would help address this need, and OGIS is already helping to clarify the process for requesters and provide best practices for agencies.

The federal government should post in a searchable location online all requests, responses, and milestones so requesters can track the progress of their requests online and in aggregate identify the bottlenecks in the process. From such a system, which could be based on the existing FOIA logs, agencies and requesters could see what aspects of the response process cause the most significant delay, for example.

Thank you, Mr. Chairman, for the opportunity to testify today on behalf of the Sunshine in Government Initiative. I look forward to your questions.

Chairman ISSA. Thank you.
Mr. Fitton.

STATEMENT OF TOM FITTON

Mr. FITTON. Thank you, Mr. Chairman, Congressman Cummings. We appreciate the renewed focus on transparency by this committee.

Essential to Judicial Watch's anti-corruption and transparency mission is the Freedom of Information Act. We have nearly 17 years experience in using FOIA to advance the public interest and Judicial Watch is without a doubt the most active FOIA requester and litigator operating today.

The American people were promised a new era of transparency with the Obama administration. Unfortunately, this promise has not been kept. To be clear, the Obama administration is less transparent than the Bush administration. We have filed over 325 FOIA requests with the Obama administration and filed 44 FOIA lawsuits against the administration to enforce FOIA law. Administratively, agencies created additional hurdles and stonewalled even the most basic FOIA request during this administration.

The Bush administration was tough and tricky, but the Obama administration is tougher and trickier. For instance, we recently asked the Transportation Security Administration for documents detailing passenger complaints about TSA pat-downs and imaging procedures at airports. The response, which is attached to my written testimony, TSA asked us to define what we meant by complaint. Once we are forced to go to Federal court, the Obama administration continues to fight us tooth and nail. The litigious approach to FOIA is exactly the same as it was in the Bush administration. So one can imagine the difficulties we encounter litigating these issues in court against the Obama Justice Department.

Judicial Watch has been digging hard into the role, for instance, of political corruption and its impact on congressional oversight of Fannie and Freddie, which collapsed in 2008. Government has spent upwards of $153 billion on these entities and they have taken complete control of them.

We have asked for documents about political contributions. We have asked for other documents. The administration's new position under the Federal Housing and Finance Administration is that Fannie and Freddie are not agencies subject to FOIA. Not one document those agencies have created over the time were subject to disclosure under the law, which we believe is contrary to public interest and to the law.

I cannot quite fathom how this administration can want a new era of transparency while over $1 trillion in Government spending is shielded from practical oversight and scrutiny by the American people. I am not only talking about FHFA on that, Fannie and Freddie, I am talking about the Treasury Department, the Federal Reserve, all the agencies involved in the bailouts. This Government is growing by leaps and bounds, for better or worse, and FOIA and transparency are simply not keeping up.

This committee might also be interested to learn the truth behind the Obama White House repeatedly trumpeting the release of Secret Service White House logs. In fact, the Obama administra-

tion is refusing to release tens of thousands of visitor logs, repeating a Bush administration last ditch legal effort that the visitor logs are not subject to the Freedom of Information Act. The Secret Service is part of Homeland Security. They create the logs. It is obvious they are subject to FOIA.

While the Obama administration attempts to take the high ground by voluntarily disclosing them, it shields tens of thousands of others from public disclosure in defiance of FOIA law.

In the fall of 2009, we were invited by the Obama White House to visit and talk about this very issue. We were told by then special counsel to the President, Norm Eisen, who was in charge of these issues, will you please publicly praise our transparency efforts. It will be good for you and the Obama administration. Of course they didn't want to release these records to us as they are required under law, so we have filed a lawsuit. Don't invite us to your office, you never know what is going to happen.

To date, every court that has reached this issue, there have been four court decisions that have said these records are subject to FOIA. We even got these records under FOIA from the Bush administration. We know now from published reports, White House officials have been meeting with lobbyists at a nearby Caribou coffee shop across the street to avoid their trumpeted voluntary disclosure of logs. They don't want these people visiting the White House, so they meet them elsewhere because they don't want to tell the American people who they are visiting with.

We have asked for records about the Obamacare waivers. Months, not one document. We asked for records about that illegal alien who allegedly killed a nun in a drunk driving incident. Final report last fall, we asked for the final report, we sued. They said they would give it to us in a week. Then they told us in the court, that final report is a draft report. You can't get the draft report, we are still working on the final report. We just got the final report. It was dated November 24th. They told us they were working on a final report that had been dated 3 months previously. This is the sort of gamesmanship and frankly only a government, political appointee would come up with that sort of craziness in terms of FOIA responses.

I draw your attention to the end of Exhibit B. We asked for the FBI file of Ted Kennedy. It took us four iterations to get the final file. In the end, they were proposing, we fought back and successfully uncovered, to secure as national security information, a comment from 40 years ago by a State Department official that Ted Kennedy was a brat. It shows the FBI is not above politics in how it evaluates what to release to the American people. You can imagine why they would be hesitant to release this information.

As a frequent requester and litigator at Judicial Watch, the Obama administration deserves a failing grade on transparency. This government is too big and they are not as concerned as they should be about the transparency with the actual work our Government is doing.

[The prepared statement of Mr. Fitton follows:]

Opening Statement

Tom Fitton, President
Judicial Watch

"The Freedom of Information Act: Crowd-Sourcing Government Oversight'"

Hearing of the U.S. House's Committee on Oversight and Government Reform

March 17, 2011, 2154 Rayburn House Office Building

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

Thank you, Chairman Issa and Congressman Cummings. It is an honor for me, on behalf of Judicial Watch, to appear before this Committee. Judicial Watch appreciates the Committee's renewed focus on government transparency.

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

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

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

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

Administratively, agencies created additional hurdles and stonewalled even the most basic FOIA requests. The Bush administration was tough and tricky, but the Obama administration is tougher and trickier. For instance, we recently asked the Transportation and Security Administration for documents detailing passenger complaints about TSA pat-downs and imaging procedures at airports. The response: TSA asked to us to define what we meant by "complaint"! (Exhibit A)

And once we're forced to go to federal court, the Obama administration continues to fight us tooth and nail. The Obama administration's litigious approach to FOIA is

exactly the same as the Bush administration's – so one can imagine the difficulties we encounter litigating these issues in court against the Obama Justice Department.

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

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

Unfortunately the Obama administration disagrees.

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

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

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

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

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

of these previously independent entities. Hence, these records are subject to FOIA like any other agency records.

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

So I can't quite fathom how this administration can laud a new era of transparency, while over $1 trillion in government spending is shielded from practical oversight and scrutiny by the American people. This government is growing by leaps and bounds, and FOIA and transparency are simply not keeping up.

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

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

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

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

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

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

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

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

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

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

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

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

A final egregious example of the abuse of FOIA is the FBI's response to our request about the late Senator Ted Kennedy, whose file we requested after he passed away. Exhibit B documents how, over seven months of hard-fought litigation, the FBI resisted disclosing controversial material about Senator Kennedy. (*Judicial Watch, Inc. v. Federal Bureau of Investigation*, USDC Case No. 10-963;http://www.judicialwatch .org/files /documents/2010/jw-v-fbi-complaint-06092010.pdf.) It was like pulling teeth. The only basis for withholding the requested material was to protect the historic legacy of

Senator Kennedy (or to protect from embarrassment President Obama, who has gone out of his way to lionize Kennedy). This FOIA fight shows that the FBI is not above politics and that President Obama's admonition that the "government should not keep information confidential merely because public officials might be embarrassed by disclosure" has no force in our nation's top law enforcement agency (http://www.whitehouse.gov/the-press-office/transparency-and-open-government).

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

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

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

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

Thank you.

EXHIBIT A

U.S. Department of Homeland Security
Washington, DC 20528-6020

Transportation
Security
Administration

January 25, 2011

Mr. John Althen
Judicial Watch
425 Third St., SW, Suite 800
Washington, DC 20024

Re: **TSA11-0142**

Dear Mr. Emerson:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the Transportation Security Administration (TSA), dated November 23, 2010, and seeking All records of complaints in response to the Transportation Security Administration's new pat-down procedures at checkpoints nationwide, first implemented at the end of October, 2010. All records of complaints in response to the Transportation Security Administration's Advanced Imaging Technology (AIT). TSA began deploying 450 advanced imaging technology units in March 2010. **We need to define "complaint".** Your request was received in this office on December 2, 2010.

After careful review of your FOIA request, we determined that your request is too broad in scope or did not specifically identify the records which you are seeking. Records must be described in reasonably sufficient detail to enable government employees who are familiar with the subject area to locate records without placing an unreasonable burden upon the agency. For this reason, §5.3(b) of the DHS regulations, 6 C.F.R. Part 5, require that you describe the records you are seeking with as much information as possible to ensure that our search can locate them with a reasonable amount of effort. Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipients, and subject matter of the records, if known, or the DHS component or office you believe created and/or controls the record. The FOIA does not require an agency to create new records, answer questions posed by requesters, or attempt to interpret a request that does not identify specific records.

Please resubmit your request containing a reasonable description of the records you are seeking. Upon receipt of a perfected request, you will be advised as to the status of your request.

If we do not hear from you within [10] days from the date of this letter, we will assume you are no longer interested in this FOIA request, and the case will be administratively closed. Please be advised that this action is not a denial of your request and will not preclude you from filing other requests in the future.

Your request has been assigned reference number **TSA11-0142**. Please refer to this identifier in any future correspondence. You may contact this office at 866-289-9673.

Sincerely,

TSA FOIA Officer
Freedom of Information Act

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D.C. 20201

January 28, 2011

Dear Requester:

This will acknowledge receipt of your Freedom of Information (FOIA) request of January, 2011. Your request has been assigned a case number based on the date of its receipt in this office and is being processed as expeditiously as possible. The actual processing time will depend on the complexity of your request and whether sensitive records, voluminous records, extensive search, and/or consultation with other HHS components. These agencies will provide a direct response to you. There may be a charge for those records and, in some cases, the charges may be substantial.

If you have any questions, please call (202) 690-7453 refer to case number 2011-0465GD.

Freedom of Information/Privacy Acts Division
Office of the Assistant Secretary for Public Affairs
330 C Street, S.W.
Switzer Building, Room 2206
Washington, DC 20201

EXHIBIT B

EXEMPT FROM AUTOMATIC
DECLASSIFICATION
AUTHORITY DERIVED FROM:
FBI AUTO DECLASSIFICATION GUIDE T
EXEMPTION CODE 25X(1)
DATE 2-22-10

Obtained by Judicial Watch
through FOIA: June 14, 2010

SECRET

TO : MR. A. H. BELMONT

DATE: December 28, 1961

FROM : W. C. SULLIVAN

SUBJECT: TED KENNEDY

ALL INFORMATION CONTAINED
HERE IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

You may be interested in the following information which was furnished to the Bureau Agents during the course of the South America assessment survey:

As you know, a few weeks ago Ted Kennedy made a tour of several Latin American countries. According to [redacted] (S)

[redacted] (S)

[redacted] (S)

ACTION:

For information.

1 - Mr. Belmont
1 - Mr. Sullivan
62-107296
(Mission to South America)

1 - Liaison
1 - Mr. Ferris
1 - Mr. Papich

SJP:gp (7)

MCT - 18

REC-32

JAN 11 1962

5 JAN 18 1962

SECRET

Obtained by Judicial Watch
through FOIA: September 2, 2010

EXEMPT FROM AUTOMATIC
DECLASSIFICATION
AUTHORITY DERIVED FROM:
FBI AUTO DECLASSIFICATION GUIDE
EXEMPTION CODE 25X(1)
DATE 2-22-10

Dept. of State, ISS/IPS, Margaret P. Grafeld, Dir.
(X) Release ( ) Excise ( ) Deny ( ) Declassify
Exemption (b)( ), E.O. 12958, 25x( )
( ) Declassify after
With concurrence (not)obtained
IPS by Date 7/23/10

TO : MR. A. H. BELMONT DATE: December 28, 1961

FROM : W. C. SULLIVAN

SUBJECT: TED KENNEDY

ALL INFORMATION CONTAINED
HERE IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

F4

You may be interested in the following information which was furnished to the Bureau Agents during the course of the South America assessment survey:

As you know, a few weeks ago Ted Kennedy made a tour of several Latin American countries. According to

(S)

Douglas Henderson, State official in Lima, confidentially advised that Kennedy had made similar requests in Peru. Henderson described Kennedy as pompous and a spoiled brat.

(S)

ACTION:

For information.

1 - Mr. Belmont
Mr. Sullivan
1 - Liaison
1 - Mr. Ferris
1 - Mr. Papich
(Mission to South America)

SJP:gp (7)

SECRET

Obtained by Judicial Watch
through FOIA: November 29, 2010

C05584131

EXEMPT FROM AUTOMATIC
DECLASSIFICATION
AUTHORITY DERIVED FROM:
FBI AUTO DECLASSIFICATION GUIDE
EXEMPTION CODE 25X(1)
DATE 2-22-10

SECRET (b)(3)

TO : MR. A. H. BELMONT DATE: December 28, 1961

FROM : W. C. SULLIVAN

SUBJECT: TED KENNEDY

ALL INFORMATION CONTAINED
HERE IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

You may be interested in the following information which was furnished to the Bureau Agents during the course of the South America assessment survey:

As you know, a few weeks ago Ted Kennedy made a tour of several Latin American countries.

Kennedy was accompanied by Professor Plank, who may be identical with John Nathan Plank, Associate Professor, Center of International Affairs, Harvard University. Bufiles contain no previous reference to Plank prior to his trip with Kennedy. Plank apparently served as Kennedy's political counselor on the trip.

Ambassador Rubottom, Bogota, said the first person whom Kennedy wanted to meet was Lauchlin Currie. (S)

Douglas Henderson, State official in Lima, confidentially advised that Kennedy had made similar requests in Peru. Henderson described Kennedy as pompous and a spoiled brat.

(S)

ACTION:

For information.

1 - Mr. Belmont
1 - Mr. Sullivan
1 - Mr. Ferris
1 - Mr. Papich
(Mission to South America)

SJP:DP (7)

SECRET

Declassified by Judicial Watch
through FOIA: February 24, 2011

SECRET

(b) (1)
(b)-(3)
Per CIA

TO: MR. A. H. BELMONT

DATE: December 28, 1961

FROM: W. C. SULLIVAN

SUBJECT: TED KENNEDY

ALL INFORMATION CONTAINED
HERE IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

You may be interested in the following information which was furnished to the Bureau Agents during the course of the South America assessment survey:

As you know, a few weeks ago Ted Kennedy made a tour of several Latin American countries. (b)(3) per CIA (b)(3) per CIA Kennedy was accompanied by Professor Plank, who may be identical with John Nathan Plank, Associate Professor, Center of International Affairs, Harvard University. Bufiles contain no previous references to Plank prior to his trip with Kennedy. Plank apparently served as Kennedy's political counselor on the trip. (b)(3) per CIA in each country Kennedy insisted on interviewing "the angry young men" of the country. He wanted to meet with communists and others who had left-wing views. Plank allegedly was the person who recommended that certain local politicians be made available. Ambassador Freeman, Bogota, said the first person whom Kennedy wanted to meet was Lauchlin Currie.

(b)(3) per CIA in Mexico Kennedy asked Ambassador Mann that certain left-wingers be invited to the Embassy residence where interviews could be held. Mann took the strong position that he would not invite such people and stated that if any such interviews were to be conducted, all arrangements should be made by Kennedy himself.

Douglas Henderson, State official in Lima, confidentially advised that Kennedy had made similar requests in Peru. Henderson described Kennedy as pompous and a spoiled brat.

(8) (b)(1),(b)(3) per CIA (b)(1),(b)(3) per CIA while Kennedy was in Santiago, he made arrangements to "rent" a brothel for an entire night. Kennedy allegedly invited one of the Embassy chauffeurs to participate in the night's activities.

ACTION:

For information.

1 - Mr. Belmont
1 - Mr. Sullivan
62-107296
(Mission to South America)
SJP:gp (7)

1 - Liaison
1 - Mr. Ferris
1 - Mr. Papich

SECRET

FBI-MSJ-3

Chairman ISSA. Thank you.

For the record, I am sure I was a brat 30 to 40 years ago.

Mr. FITTON. I am sure we all were. It is not a security issue.

Chairman ISSA. It won't be for me.

Ms. Canterbury.

STATEMENT OF ANGELA CANTERBURY

Ms. CANTERBURY. Chairman Issa, Ranking Member Cummings, members of the committee, thank you for the opportunity to testify today.

I am the Director of Public Policy at the Project on Open Government Oversight or POGO, which is an independent, nonpartisan watchdog that champions good government reform.

It is a particular pleasure to be here with you today to talk about FOIA, the Freedom of Information Act which for nearly 45 years has been a cornerstone for our democracy and for open government.

On day one, President Obama committed to creating an unprecedented level of openness in government. This administration certainly has put unprecedented energy into this goal, but how is the government doing.

It takes time to build an openness infrastructure and change a culture resistant to change and scrutiny. If the measure is proactive disclosure of information, there have been leaps in innovation. Just this week, the administration launched FOIA.gov which has terrific potential for improving public access to information like Data.gov, Recovery.gov and USASpending.gov.

However, if FOIA is the yardstick for openness, then we haven't gotten very far yet. Some mixed, but overall disappointing reviews were delivered this week through independent studies. The Knight Survey found that the number of agencies that make concrete FOIA reforms jumped form 13 in 2009 to 49 in 2010. However, they included 90 agencies in their survey and 17 were still working on the survey's FOIA requests after 117 business days, 4 did not even acknowledge that they had received a request.

The new analysis from the Associated Press also yielded mixed results. On a positive note, those studies showed that the use of withholding for inter and intra agency information or exemption 5 decreased which the administration reported this week was a 26 percent drop last year. Also, the administration noted that 93 percent of requests were leased in full or part.

However, the AP also noted that the DHS, Department of Homeland Security, cut its backlog by 40 percent in part by referring thousands of cases to the State Department. State ended up with a backlog twice as big as they had last year. Not only is this a shell game but referrals are a major cause for delays.

In sum, the overall picture does not look markedly better for FOIA operations and the bottom line is, as Chief Justice Roberts recently acknowledged, there are a large number of FOIA requests and "it takes forever to get the documents."

However, there are many ways in which this committee can improve the status quo through oversight and legislation. First, it is time for FOIA to move fully into the digital age, making most requests a relic of the past. A first step to better serve the public and save money over time would be to put online in a common data

base all FOIA logs, request tracking and the responses. A guiding vision for the future should be making all public information available online in a timely manner.

Second, we need better information on how FOIA is working. POGO supports the Faster FOIA Act reintroduced by Senators Lahey and Cornyn this week to create an independent, bipartisan body to study how to improve FOIA. In addition, we need to know more about who is reviewing FOIA requests and why, and how this impacts disclosure.

Chairman Issa is investigating possible political interference in FOIA at DHA. If founded, these issues are of great concern. FOIA should never be used for political purposes and the identity or affiliation of a requester should never impact the response.

POGO, however, is also concerned with the involvement of government contractors in FOIA at DHS and at other agencies as well as the interference with IG independence, all of which should be examined and perhaps independently investigated.

Third, this committee should take a closer look at statutory exemptions gone wild. POGO has long been concerned about the proliferation and scope of these statutory exemptions or (b)(3)'s as well as the lack of oversight. Last year, POGO helped to repeal an extremely broad statutory exemption for the SEC, along with the chairman and the ranking member, that was enacted in the Dodd-Frank bill, the Financial Reform Act.

The controversy and ultimate repeal of the secrecy provision is illustrative of the potential dangers of statutory exemptions that sweep too broadly. Hopefully, it also serves as a cautionary tale to agencies that might seek unnecessary exemptions.

Fourth, as proposals to replace the exemption thrown out by the Supreme Court surface, this committee must resist the pressure to substitute it outright. A thoughtful approach must be taken. If there is a demonstrated need to protect information that existing exemptions no longer cover, it must be very carefully considered.

POGO hopes that you will be vigilant in balancing the public's right to know with other interests. Too often overt secrecy has not only impaired the promise of FOIA, but also has put the American people at risk. Abuse of FOIA over classification, quasi-classification and the suppression of whistleblowers are the most common tools of secrecy.

In conclusion, while FOIA is the central mechanism for open government, there are several other openness issues ripe for legislative reform including the Transparency in Government Act introduced today by Ranking Member Cummings, which we support.

Last, to fulfill a pledge to America, this Congress must begin to proactively disclose congressional information, serving as a model for the new paradigm of FOIA.

I thank you and I look forward to the discussion and your questions.

[The prepared statement of Ms. Canterbury follows:]

Testimony of Angela Canterbury, Director of Public Policy
before the House Committee on Oversight and Government Reform
on "The Freedom of Information Act: Crowd-Sourcing Government Oversight"
March 17, 2011

Chairman Issa, Ranking Member Cummings, and Members of the Committee, thank you for inviting me to testify today, and for your attention to the critical issues of openness in government and the Freedom of Information Act. I am the Director of Public Policy at the Project On Government Oversight (POGO). Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. Therefore, POGO has a keen interest in protecting the public's right to know, increasing open government, and expanding access to public information—or, as in the title of this hearing, "crowd-sourcing government oversight."

It is particularly a pleasure to be here during the 6th Annual "Sunshine Week" when we promote open government and celebrate the Freedom of Information Act (FOIA), which for nearly 45 years has been a cornerstone of open government and a hallmark of our democracy. Some might disagree on what kind of information is most important, but we can all agree that the American people have a right to know what their government is doing on their behalf. Still, even as we enjoy a presidential administration and a Congress that embrace the ideal of open government, it is difficult to put into practice.

President Barack Obama has made opening the government a centerpiece in his administration. On his first full day in office, he called upon all federal executive departments and agencies to administer FOIA with a "clear presumption: In the face of doubt, openness prevails."[1] On that same day he also issued the Memorandum on Transparency and Open Government which states:

> My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration.[2]

The administration has sent a clear message that agencies need to proactively get information to the public and improve the FOIA process. Steps have been taken over the past two years towards meeting the President's high standard of openness. Just this week, the administration launched

[1] January 21, 2009, Memorandum from Barack Obama, President of the United States, to Heads of Executive Departments and Agencies, regarding Freedom of Information Act, Federal Register, Vol. 74, No. 15, January 26, 2009. http://edocket.access.gpo.gov/2009/pdf/E9-1773.pdf (Downloaded March 16, 2011)
[2] January 21, 2009, Memorandum from Barack Obama, President of the United States, to Heads of Executive Departments and Agencies, regarding Transparency and Open Government, Federal Register, Vol. 74, No. 15, January 26, 2009. http://edocket.access.gpo.gov/2009/pdf/E9-1777.pdf (Downloaded March 16, 2011)

several new initiatives, including FOIA.gov and Data.gov/law, both of which have terrific potential for improving public access to information, although we hope that FOIA.gov will become more robust and include more tools for analyzing FOIA implementation and trends over time. These public portals join the ranks of landmark sites such as Data.gov, Recovery.gov, and USASpending.gov. Importantly, all of these initiatives facilitate affirmative disclosure of information that might otherwise have been unavailable except through FOIA requests.

In addition, the Open Government Directive (OGD) has created unprecedented inter-agency cooperation on open government through the Transparency Working Group.[3] The OGD also has spurred a burgeoning open government infrastructure in many agencies, especially where cross-departmental teams have been established to design, implement, and improve upon their Open Government Plans. In addition to requiring agencies to identify and release high-value datasets and make other affirmative disclosures, several of these plans include activities and goals that are directly related to FOIA, particularly in reducing backlogs and encouraging proactive disclosure.[4]

Measuring Openness

With all of the emphasis on openness, how are we doing? It depends on the measure. The Obama administration has certainly put unprecedented energy into open government efforts, and many of the benefits are not yet quantifiable. It takes time to build an infrastructure and change the internal culture of agencies that are often hesitant to shine a light on their activities. However, there are some anecdotal success stories, which provide great opportunity for sharing best practices between agencies, such as Department of Health and Human Services' Centers for Medicare and Medicaid Services reengineering their FOIA process towards "intelligent case processing."[5] If the measure is affirmative disclosure of government information, then the government is making leaps in mechanisms and quantity. For example, Data.gov now has more than 300,000 records and growing. Unfortunately, the audit released by OpenTheGovenment.org, in which POGO participated, shows that the agencies are not yet consistently proactively disclosing such high-value information as visitor logs, contract and grant award documents, lobbying reports, and Inspector General reports.[6] Happily, the White House announced this week that at least one measure recommended in this audit is planned—the statutorily mandated reports agencies submit to Congress will be posted on the agencies' open government pages.

However, if FOIA is the yardstick for openness in government, then we haven't gotten very far.

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[3] Congressional Research Service, *The Obama Administration's Open Government Initiative: Issues for Congress*, January 28, 2011, p. 23. http://www.fas.org/sgp/crs/secrecy/R41361.pdf (Downloaded March 16, 2011)
[4] Memorandum from Peter R. Orszag, Office of Management and Budget Director, to Heads of Executive Departments and Agencies, regarding the Open Government Directive, December 8, 2009. http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf (Downloaded March 16, 2011)
[5] Department of Justice, *2010-2011 Agency FOIA Success Stories: Creating a Culture of Transparency.* http://www.justice.gov/oip/docs/agency-success-stories2011.pdf (Downloaded March 16, 2011)
[6] OpenTheGovernment.org, "Audit Reveals Lack of Access to Accountability Information," March 15, 2011. http://www.openthegovernment.org/node/3041 (Downloaded March 16, 2011)

Some mixed, but overall disappointing, reviews were delivered this week through the release of two independent studies: *The Knight Open Government Survey 2011* by The National Security Archive (the Archive)[7] and an analysis by The Associated Press (AP).[8] Both reviews offer a mixed bag of results and deserve closer examination.

The Knight Survey found there was some progress, but also that only a little more than half of the agencies have taken concrete steps to implement the President's FOIA Memorandum. The agencies were instructed to 1) update their FOIA guidance to include the principles outlined in the President's memo, and 2) assess whether they are devoting adequate resources to promptly respond to FOIA.[9] This year's survey, based on responses to a FOIA request submitted to the agencies by the Archive, found the number of agencies that made concrete reforms jumped from 13 to 49. In addition, several agencies provided the Archive with draft and internal emails discussing their response to the President's memo, which suggests these agencies are responding to concerns raised by openness advocates about the widespread withholding of internal documents and staff-level reports under FOIA's (b)(5) exemption covering pre-decisional or deliberative process information.

However, according to the Knight Survey, 49 agencies had made some concrete changes to their FOIA procedures, only 24 agencies actually updated their FOIA guidance, and only 13 had fulfilled both steps required by the President's memo. Seventeen agencies were still working on the Archive's FOIA request 117 business days after receiving it. Four agencies did not even acknowledge they had received the Archive's request; it should be noted that agencies are required by law to send a basic acknowledgement of receipt of requests within 20 business days. In addition, some of the agencies that had made improvements in releasing more information through FOIA started to regress this year. Finally, the Archive's report noted that 12 agencies have overdue FOIA requests that are at least six years old.

The new analysis by the Associated Press also yielded mixed results. The AP found that the 35 largest agencies received 544,360 FOIA requests last year, up nearly 41,000 from the previous year, and responded to nearly 12,400 fewer requests. The agencies refused to release any information for over 1 in 3 requests. To be fair, the reasons for this ranged from cases where the agencies couldn't find any records to those where the requester refused to pay for copies. Agencies only honored around 20 percent of requests for expedited processing on matters deemed particularly urgent or newsworthy. There were also wide disparities in response time at different agencies, especially those agencies working on national security or financial oversight issues.[10]

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[7] The National Security Archive, "Glass Half Full: 2011 Knight Open Government Survey Finds Freedom of Information Change, But Many Federal Agencies Lag in Fulfilling President Obama's Day One Openness Pledge," March 14, 2011. http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB338/index.htm (Downloaded March 16, 2011)
[8] "PROMISES, PROMISES: Little transparency progress," *Associated Press*, March 14, 2011. http://www.washingtonpost.com/wp-dyn/content/article/2011/03/14/AR2011031400630.html (Downloaded March 16, 2011) (hereinafter "AP FOIA Study")
[9] Memorandum from Rahm Emmanuel, White House Chief of Staff and Bob Bauer, Counsel to the President, to the Agency and Department Heads, regarding the Freedom of Information Act, March 16, 2010. http://www.whitehouse.gov/sites/default/files/rss_viewer/foia_memo_3-16-10.pdf (Downloaded March 16, 2011)
[10] "AP FOIA Study"

On a positive note, the AP confirmed the Archive's findings that the agencies' use of FOIA's (b)(5) exemption decreased last year, although it was still commonly used at the Department of Homeland Security (DHS), which accounted for nearly 80 percent of (b)(5) exemptions across the government.

The AP report also highlights a problem with inter-agency referrals. DHS cut its backlog by 40 percent, in part by referring as many as 3,800 cases each month to the State Department. State ended up with a backlog of twice as many cases as last year (20,500 overdue).[11] Not only is this a shell game, but inter-agency referrals are one of the major reasons for delays. As Adina Rosenbaum, Director of Public Citizen's Freedom of Information Clearinghouse, put it, "From the FOIA requester perspective, when an agency refers records to another agency for processing, they are essentially being sent into a black hole."[12]

The Obama administration also issued some statistics this week. The agencies overall reduced their backlog by more than 10 percent, hitting their target for the second year in a row. The administration also noted that 93 percent of requests processed for exemptions were fully or partially released. The use of Exemption 2 dropped 20 percent and the use of Exemption 5 dropped 26 percent.[13]

Chief FOIA Officers across the government also released their second annual reports.[14] Attorney General Eric Holder's guidance on Obama's Transparency and Open Government Memorandum required Chief FOIA Officers to report on steps taken to fulfill the presumption of openness and improve FOIA operations.[15] While currently it's not easy to download and analyze these reports in the aggregate, the individual FOIA Officer reports should be examined and compared with the independent reports by AP and the Archive to get a fuller picture of the steps actually taken by FOIA offices government-wide.

In sum, the overall picture does not look markedly better for FOIA operations. At American University Washington College of Law this past Monday, Miriam Nisbet, Director of the Office of Government Information Systems (OGIS), noted that many of the problems identified in the 1990s when there was an effort to reform FOIA are not unfamiliar today. She pointed out that delays continue to be a problem: 1 in 5 complaints OGIS received are regarding delays. Other continuing problems for requesters are excessive fees, expensive litigation when the

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[11] "AP FOIA Study"

[12] Statement of Adina Rosenbaum, Staff Attorney, Public Citizen, Director, Freedom of Information Clearinghouse on Administration of the Freedom of Information Act: Current Trends
before the Information Policy, Census, and National Archives Subcommittee, Oversight and Government Reform Committee, United States House of Representatives, March 18, 2010.
http://www.fas.org/sgp/congress/2010/031810rosenbaum.pdf (Downloaded March 16, 2011)

[13] Steve Crowley, "The Freedom of Information Act: What the Numbers Tell Us," *The White House Blog*, March 14, 2011. http://www.whitehouse.gov/blog/2011/03/14/freedom-information-act-what-numbers-tell-us (Downloaded March 16, 2011)

[14] Department of Justice, "Reports: Chief FOIA Officer Reports, FY 2011." http://www.justice.gov/oip/reports-fy2011.html (Downloaded March 16, 2011)

[15] Memorandum from Eric Holder, Department of Justice Attorney General, to Heads of Executive Departments and Agencies, regarding The Freedom of Information Act (FOIA), March 19, 2009. http://www.justice.gov/ag/foia-memo-march2009.pdf (Downloaded March 16, 2011)

administrative process fails, and the concern about media and the public abandoning FOIA as a tool because it just takes too long to be useful.

However, there are many ways in which this Committee can improve the status quo through oversight and legislation.

It's Time for FOIA 2.0

It is time for FOIA to move fully into the digital age, and for the government to begin to make most FOIA requests a relic of the past. The guiding vision for the future should be making all public information publicly available online in a timely manner. This will eventually allow the public and the government to stop spending time, money, and other resources on the process of requesting, responding, and litigation. This Committee can begin to formulate the process and standards for making public information proactively available now by considering something like the POIA—the Public Online Information Act, introduced in the last Congress.

A first step to better serve the public and save money over time would be to automate and put online in a common, searchable, sortable database all FOIA logs, request tracking, and the responses.

In addition, better tools and information for assessing FOIA implementation, and more transparency in decision-making for determinations, including which exemptions the Department of Justice (DOJ) chooses to defend, would greatly improve operations. FOIA.gov is promising, but we hope this Committee will push to make it more robust over time to meet the call of "crowd-sourcing government oversight."

The Problem with Statutory Exemptions

In addition to the nine permanent exemptions to FOIA, there are hundreds of statutory exemptions pursuant to FOIA's Exemption b(3), known as statutory exemptions or b(3)s.[16] POGO has long been concerned about the proliferation and the scope of these statutory exemptions, as well as the lack of oversight. Any exemption to FOIA requires very careful consideration of the balance between the public's right to know and other interests. However, for years there was little oversight of laws created to withhold records from the public—legitimately or not. Enactment of Senators Grassley and Cornyn's OPEN Government Act of 2007 and OPEN FOIA Act of 2009 provided for new mechanisms for tracking. The law now requires that b(3) exemptions be specifically cited in legislation. Also, since 2008, agencies have reported statutory exemptions they invoke and how often in their annual FOIA reports.

This Sunshine Week, ProPublica, a non-profit news organization, released an interactive database for tracking statutory exemptions, based on the annual FOIA report data compiled by the Sunshine in Government Initiative, a coalition of journalism and transparency groups. The

[16] 5 U.S.C. § 552(b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute— (A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

b(3) exemption is used to withhold seemingly absurd categories of information such as lists of watermelon growers and caves. Among the interesting findings in ProPublica's analysis of the 2008-09 data is that the b(3) exemption most widely used was one protecting information related to losing contract bids (20 agencies reported using this in FY09).[17]

Last year, POGO helped to repeal an extremely broad statutory exemption for the Securities and Exchange Commission (SEC) enacted in the Dodd-Frank Wall Street Reform and Consumer Protection Act. The controversy and ultimate repeal of the secrecy provision known as Section 929I is illustrative of the potential dangers of statutory exemptions that can sweep too broadly, and hopefully also serves as a cautionary tale to agencies which might seek unnecessary exemptions to FOIA.[18]

However, too often b(3) exemptions go completely unnoticed. Though the OPEN FOIA Act requires citation of b(3)s, the use of a simple savings clause can get around the requirement for a citation.[19] Also, there is no official or consistent mechanism for actively tracking these provisions as legislation moves through Congress. This Committee and the Senate Judiciary Committee are not given jurisdiction over every bill that contains an exemption to FOIA. Thus, often it is only due to the courtesy of another committee or a diligent staffer that it is brought to the attention of this Committee before it becomes law.

This Committee must take a close look at statutory exemptions and how they are being used, and determine if they are necessary.[20] This Committee should ensure there is a study to explore options for a mechanism for bringing proposed statutory exemptions to light for full consideration, and to review the scope and utility of existing b(3)s. This Committee also can help to hold the line on proliferating unnecessary statutory exemptions, ensuring they are necessary and narrow in scope. Requiring a study by the Inspector General of a new exemption, as Senator Leahy's amendment to a b(3) in Dodd-Frank did, or adding a sunset clause might help curtail unnecessary exemptions.[21]

This Year's Supreme Court Decisions on FOIA

The Supreme Court has recently affirmed more open government and reaffirmed the intent of Congress to narrowly construe exemptions to FOIA in two high-profile cases: *FCC v. AT&T* and *Milner v. the Department of the Navy*. In *AT&T*, the Court rightfully rejected the arguments that personal privacy applies to any entity other than natural born persons for FOIA purposes.[22]

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[17] Jennifer LaFleur, "FOIA Eyes Only: How Buried Statutes Are Keeping Information Secret," *ProPublica*, March 14, 2011. http://www.propublica.org/article/foia-exemptions-sunshine-law (Downloaded March 16, 2011)

[18] Testimony of POGO's Angela Canterbury Before the House Committee on Financial Services regarding Legislative Proposals to Address Concerns Over the SEC's New Confidentiality Provision, September 16, 2010. http://www.pogo.org/pogo-files/testimony/financial-oversight/fo-fra-20100916.html (Downloaded March 16, 2011) (hereinafter "POGO Testimony")

[19] Such as "not withstanding any other provision of law."

[20] "FOIA b(3) Exemptions: All Statutes," *ProPublica*. http://projects.propublica.org/foia-exemptions/statutes (Downloaded March 16, 2011)

[21] 111th Congress, "Restoring American Financial Stability Conference Amendment." http://pogoarchives.org/m/er/sec-foia-study.pdf

[22] *Milner v. Department of the Navy*, No. 09–1163, Argued December 1, 2010—Decided March 7, 2011. http://www.supremecourt.gov/opinions/10pdf/09-1163.pdf (Downloaded March 16, 2011); *Federal*

In *Milner*, the Court threw out the so-called "High 2," which was a broad interpretation of Exemption 2 that was intended to cover things too trivial to expose. Exemption 2 covers records "related solely to the internal personnel rules and practices of an agency," but was eventually expanded by a court decision, and used liberally by agencies to withhold a wide range of documents that might "risk circumvention of the law." We expect the administration, the agencies and other interests to seek a substitute. But Congress must resist pressure to replace it outright. If there is a demonstrated need to protect information that existing exemptions do not cover, it must be very carefully considered.

Unfortunately, in her decision for the majority, Justice Kagan suggested that a remedy for agencies in lieu of High 2 might be classification. Here POGO agrees with the dissenting opinion where Justice Breyer states, "And both Congress and the President believe the Nation currently faces a problem of too much, not too little, classified material."[23]

Congress must conduct rigorous oversight to ensure response to this decision does not compound the problem of over-classification.

Better Information on How FOIA Is Working

POGO supports proposals for a study by an independent, bipartisan body of government-wide FOIA practices; the persistent structural problems manifested in delays, backlogs, and other issues; and practices that lead to more withholding than disclosing, such as the use of statutory exemptions. The Sunshine Week, Senators Leahy and Cornyn re-introduced the Faster FOIA Act, which would create such a commission and passed the Senate unanimously in the last Congress. This Committee should work with these Senators to ensure legislation is enacted in this Congress.

We also hope this Committee will take full stock of the state of FOIA as part of the overall efforts to create substantially more openness in our government, and will do so in a strategic and transparent manner.

The FOIA project that Chairman Issa has underway could yield very useful information, helping to provide a more complete picture of how FOIA is and isn't working. Chairman Issa has asked 180 FOIA offices to provide agency FOIA logs over the past five years, plus "all communications," including emails, between agencies and requestors for all pending FOIA requests identified in agency FOIA logs that were sent 45 days prior to his letters. This may be the first time searchable logs will leave all government agencies, and if Chairman Issa makes this data transparent and available to the public, there could be tremendous value in isolating problems and tracking inter-agency referrals.

Communications Commission et al. v AT&T Inc. et al., No. 09–1279. Argued January 19, 2011—Decided March 1, 2011. http://www.supremecourt.gov/opinions/10pdf/09-1279.pdf (Downloaded March 16, 2011)

[23] *Milner v. Department of the Navy*, No. 09–1163, Argued December 1, 2010—Decided March 7, 2011. (Justice Breyer, J., dissenting) http://www.supremecourt.gov/opinions/10pdf/09-1163.pdf (Downloaded March 16, 2011)

However, we agreed with the initial concerns raised by Ranking Member Cummings and Representatives Connelly and Welch regarding the potential burden on agencies due to the broad scope of the request, particularly the request for "all communications" with requestors.[24] I understand that the Chairman is currently working with the agencies on a case-by-case basis to ensure the request is manageable, which could alleviate this concern. POGO hopes the Chairman will set an example of transparency with this project, both in the process, communications with agencies, and the full complement of responses. Again, we also hope this Committee will help to make it law that FOIA logs be proactively made public and posted online.

Chairman Issa has another high-profile investigation about possible political interference in FOIA request responses at DHS initially reported by the AP in July of last year.[25] If founded, these issues are of great concern—FOIA should never be used for political purposes, and the identity or affiliation of a requester should never impact the response.

POGO also believes the broader question of who is reviewing FOIA requests and why deserves more attention. Certainly the scope of policies at DHS—and other agencies—that allow for review by political appointees or government contractors should be determined, and perhaps independently investigated. It appears from the policies posted on the DHS FOIA Reading Room that a similar policy was in place as early as 2005.[26] Emails obtained by the Electronic Privacy Information Center show that John Sandweg, then-Chief of Staff for the DHS Office of General Counsel, raised a concern with the front office, stating: "I have a concern that contractors are frequently doing substantive reviews to determine what is to be released."[27]

POGO is likewise concerned. *The Washington Post* reported that TDB Communications of Lenexa, Kansas, helped DHS reduce its backlog under a $7.6 million federal contract.[28] It should be determined to what extent agencies rely on contractors, whether contractors are making exemption determinations, and whether any agency personnel are reviewing them or if the contractor's decision is the final say. We hope the Committee will investigate the use of contractors in the FOIA process throughout the government.

In addition, it may be that many agencies have policies where management reviews FOIA requests. On Tuesday, Melanie Ann Pustay, Director of the Office of Information Policy, told the Senate Judiciary Committee that management at the DOJ components are routinely made aware of requests, as has been the case for the more than 20 years she has been at DOJ.[29] At the SEC,

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[24] 112th Congress, House Committee on Oversight and Government Reform, Minority, "Oversight Committee Democrats Call on Chairman Issa to Revisit FOIA Investigation," February 2, 2011. http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=5176&Itemid=49 (Downloaded March 16, 2011)

[25] Ted Bridis, "AP Impact: A political filter for info requests," July 21, 21, 2010. http://www.ap.org/foi/foi_072110a.htm (Downloaded March 16, 2011)

[26] Department of Homeland Security, "FOIA Electronic Reading Room," last modified on February 3, 2011. http://www.dhs.gov/xfoia/editorial_0424.shtm (Downloaded March 16, 2011)

[27] John Sandweg, email message to Amy Shlossman and Noah Kroloff, "Re:***FRONT OFFICE REVIEW REQUESTED***," December 15, 2009. p.16. http://epic.org/open_gov/foia/OGIS_Ltr_12_08_10_Appendix_1-6.pdf (Downloaded March 16, 2011)

[28] "AP FOIA Study"

[29] Statement of Melanie Pustay, Director, Office of Information Policy, before the Senate Committee on the Judiciary on The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age, 112th

the Inspector General found that the SEC General Counsel was often involved in both the determinations and appeals of the same requests and recommended an end to this conflict of interest.[30]

We also have concerns about agency management interfering with the independence of Inspectors General in making FOIA determinations. For instance, we have found the regular redacting and wholesale withholding of SEC OIG investigative reports by the Commission's Office of General Counsel.[31] This is troubling because all IGs should have the ability to have FOIA determinations made independent from the agency management they often are criticizing on the release of their products. We hope the Committee will explore this issue further as well.

More Open Government Initiatives

FOIA is the central tool for open government, but there are several other openness issues ripe for legislative reform that can compliment the Act's purpose of shedding light on the workings of the government. POGO supports several bills that would go a long way to increase transparency in government.

The Access to Congressionally Mandated Reports Act introduced in the last Congress is one such bill. Though the administration has announced that agencies will begin to post congressionally mandated reports on their websites, this Committee can help ensure regular and permanent disclosure of these reports and make them more accessible to the public by requiring that they be posted on a centralized website.

Additionally, there are five bills that passed the House of Representatives in the 111th Congress on which the Committee should quickly take action:

- Electronic Message Preservation Act (H.R. 1387)
- Federal Advisory Committee Act Amendments of 2010 (H.R. 1320)
- Government Accountability Office Improvement Act of 2010 (H.R. 2646)
- Government Information Transparency Act (H.R. 2392
- Presidential Library Donation Reform Act of 2009 (H.R. 36)
- Presidential Records Act Amendments of 2009 (H.R. 35)

Additionally, I hope the Committee will consider legislation to standardize and make searchable government spending data so that we can know how taxpayer dollars are being spent.

A Word About Secrecy

Too often, overt secrecy has not only impaired the promise of FOIA but also has put the American people at risk. The tension between secrecy and openness in government continues to

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Congress, March 15, 2011. http://judiciary.senate.gov/pdf/11-3-15%20Pustay%20Testimony.pdf (Downloaded March 16, 2011)

[30] Securities and Exchange Commission, Office of Inspector General, *Review of the SEC's Compliance with the Freedom of Information Act* (Report No. 465), September 25, 2009, pp. 18-20. http://www.sec-oig.gov/Reports/AuditsInspections/2009/465.pdf (Downloaded March 16, 2011)

[31] "POGO Testimony"

be extremely high. Abuse of FOIA, over-classification, quasi-classification, and suppression of whistleblowers are the most common tools of secrecy. POGO urges the Committee to closely monitor the administration in each of these areas, especially as new policies are promulgated on so-called controlled but unclassified information (CUI) and in response to the WikiLeaks disclosures of classified information.

Additionally, this Committee also must ensure the free speech for those who warn us of waste, fraud, and abuse. We urge you to waste no time in ensuring all federal whistleblowers have safe, legal channels and protections to hold the government accountable to taxpayers by enacting the Whistleblower Protection Enhancement Act.

Conclusion

There are many opportunities for bipartisan collaboration on legislative reform and productive oversight of open government for the House Oversight and Government Reform Committee. POGO hopes you will be vigilant in balancing the public's right to know with other interests.

Naturally, government spending is out of control and this Congress is moving towards slashing budgets to reduce the deficit. However, we hope this Committee will recognize that some short-term investments may be needed to modernize freedom of information to yield long-term savings. Also, we hope the Committee will seek to preserve adequate resources for FOIA offices, particularly at the agencies of high public interest, at OGIS, and for the nascent open government infrastructure and its initiatives.

Lastly, to fulfill "A Pledge to America," this Congress must begin to proactively disclose congressional information, serving as a model for the new paradigm for FOIA.[32]

[32] In "A Pledge to America," House Republican candidates pledged "We will fight to ensure transparency and accountability in Congress and throughout government." GOP.gov, "A Pledge to America: The Republican Agenda." http://pledge.gop.gov/ (Downloaded March 16, 2011)

Chairman ISSA. I thank you and I was with you right up to that last part, then it got a little confusing.

First of all, thank you all. Your statements were great and obviously there is some additional material each of you will be placing in the record.

I now recognize myself for 5 minutes.

I would begin on a sad note for all of you. The whistleblower, one of two people who voluntarily came in and were interviewed with an attorney from the Department of Homeland Security, had her title removed, her office changed and her job responsibilities changed or eliminated the very next morning.

So it is this committee's opinion, at least on the majority's side, this constitutes a demotion in violation of the spirit of the Whistleblower Act and it is our intention to openly attempt to get her reinstated and to deal with the politicization in this case or the politicization of FOIA requests by referring requests and at least at the latest new stated truth. I always call it new stated truth because I wouldn't want to say someone lied, but the original truth was they didn't do it, then they didn't do anything other than send them for information, were now down to they didn't delay them more than 3 days and we have not yet gotten to exactly how much changes or denials came as a result of sending otherwise completed FOIA requests to political appointees. That is a disappointment I wish I didn't have to bring up today.

Ms. Nisbet, I am delighted to hear your testimony but I am confused, and that happens a lot around here, particularly to me. You said, since September 2009, you have handled, a little over a year, 541 cases. Our records show that, for example, in fiscal year 2009, you mediated 541, correct?

Ms. NISBET. Mr. Chairman, it is a little confusing when you start talking about those numbers.

Chairman ISSA. Why don't we do this.

Ms. NISBET. I am happy to try and clarify as best I can.

Chairman ISSA. Since there is so little time, for the record, would you clear up for our committee staff if you have processed 541 and the entire FOIA statistics for the government for fiscal year 2009 were only 557 received and 612,000 processed, so your number is substantially similar to the gross amount. We would like that resolved for the record.

Mr. Fitton, I guess my question to you is, in addition to what you said, if you would provide the committee with additional materials as to specific areas in which we could use our powers, either through cooperation or subpoena, to get some of the information you believe should most be brought to the attention of the Congress, not be brought to you around litigation but it is one in which we would be particularly interested in seeing what it is they are not showing you. I would appreciate it if you would do that for the record.

Mr. FITTON. Certainly.

Chairman ISSA. Ms. Canterbury, your organization has been extremely helpful to all of us, and I thank you for that. Many of the organizations do a great deal in Washington and around the country. Yours has been proactive in a way that we don't always appreciate what we do.

I wanted to give you something for the record and ask your interpretation. We do not make these public out of my office currently, but it is a possibility that we would.

My office received 31,138 inquiries from constituents in calendar year 2010. We did that with one legislative respondent who answered all of them. They centered around 300 major issues. Obviously they are not all different.

The Department of Justice received 63,682. They used 425 full-time individuals to do this work costing a total of $60 million. My one person cost somewhat less.

I would ask each of you to respond. The biggest thing we think matters is that once you answer a question, you now it should be answered for one, it should be answered for all. How much of that cost across government do you believe would be eliminated if in searchable data form, every answer once given was made simultaneously available to anyone who wanted to search a data base so that those questions would not come in again and take a plethora of study to give substantially the same information depending upon how clever the questioner was versus the answer person?

Ms. NISBET. Certainly millions and billions, I would say. Over time, very quickly it would add up to a huge amount of savings and allow the government to do other things.

Chairman ISSA. I will take you in any order, but Ms. Nisbet, since you see so many of these and obviously, you saw cases in your 541 that were substantially the same as other cases, so you were arbitrating or mediating cases where different people were asking for substantially the same information, correct?

Ms. NISBET. Certainly there are multiple requests from different requesters for the same kinds of records. We would say absolutely, it would be a great goal and I think there are people looking to do exactly as you suggest which is to have one place where people can make requests, where they can track the responses to them and ultimately all the records that are released are available, easily searchable so that people can see what is already out there.

Chairman ISSA. Anyone want to comment on that, something along the lines of the consolidation of answers?

Mr. METCALFE. I would just point out, Chairman Issa, that there is indeed an existing statutory mechanism. It is called the frequently requested record provision that was added to the act in 1996, subsection (a)(2)(d).

Chairman ISSA. And seldom used.

Mr. METCALFE. But it provides for that type of thing with a numerical threshold, that threshold being the first request is processed, records are disclosed and then if the agency either believes or receives two more requests at hand, then it is obligated by law to make it affirmatively available. There is a mechanism in the law that is at that number. Congress could, of course, lessen that number from two or three down to zero.

Chairman ISSA. Thank you. Thank you all.

Mr. Cummings.

Mr. CUMMINGS. Thank you very much.

Mr. Chairman, you started your questioning with some very strong allegations and certainly if they were true, this is one Member who would be 100 percent with you.

One of the things I said from the beginning when we first began this Congress is that we want to be fair to the folks. I think we can put out allegations, they sit out there and the press writes them up and a lot of times, some things are cleared up later on and still people are harmed. I know that is not your intention, so I would like to make two points about the letter you sent yesterday alleging retaliation against the DHS employee who was interviewed by our committee.

It appears there are two major factual inaccuracies in the letter. First, your letter asserted that this DHS employee was demoted. In fact, she had competed for a new Senior Executive Service promotion and she did not receive it. A panel of senior career and noncareer employees conducted a detailed competitive process and the person who was selected was better qualified according to DHS. We will discover that later on, I am sure, and look into that. Committee staff were aware of this because they discussed it in several interviews they conducted with DHS employees.

Second, your letter asserts that the DHS employee was demoted the day after she conducted her interview with the committee staff. This is also incorrect. Her interview with the committee was on March 3rd. She was informed that she did not receive the SEC promotion on January 10th, nearly 2 months earlier. Committee staff also knew this fact because they were told on a joint conference call with DHS the day before you sent your letter.

Finally, as a result of these factual inaccuracies, your letter assumes conclusions that are not supported by the actual evidence. In fact, they appear to directly contradict information the committee has already collected. Despite the fact the minority staff raised these concerns directly with your staff, you chose to send this inaccurate letter anyway.

Since the March 16th letter is a letter to you, I am going to request unanimous consent that the DHS response to your letter which was sent last night be entered into the hearing record.

Chairman ISSA. I object based on the fact that we have not yet received that letter. We certainly will be happy when we receive the letter apparently the minority and the administration wrote, we look forward to seeing it when it arrives and then consider it.

Mr. CUMMINGS. Thank you.

Mr. Chairman, I think we have to be very careful. You just complimented our public servants and I want to make sure they are treated in a fair fashion. I would make that argument whether it was employees on that side of the aisle or this side of the aisle, no matter where they are. People are human beings and they have to go back to their families. People look at this, see it on C-span, see their names in the Washington Post and then if there is no clarification, it is just out there, it is just a headline and that person can be ruined for the rest of their lives without the ability to get a job or accomplish much of anything. I have seen that happen to too many people. I just don't want it to happen to another human being.

Mr. Metcalfe, on September 23, 2010, President Obama addressed the United Nations' General Assembly. In his address, he highlighted the importance of a world that fosters openness. This is what he said, "The strongest foundation for human progress lies

in open economies, open societies and open governments. In all parts of the world, we see the promise of innovation to make government more open and accountable. When we gather back here next year, we should bring specific commitments to promote transparency to fight corruption, to energize civic engagement, to leverage new technology so that we strengthen the foundations of freedom in our own countries while living up to the ideals that can light the world."

Mr. Metcalfe, in your experience, has any other American President done anything at this level to personally promote government openness on the world stage?

Mr. METCALFE. No, Congressman Cummings. As a matter of fact, I think it is fair to say that action by President Obama is not only unprecedented, but it goes much further than any other President has gone to be involved in fostering transparency internationally and promoting the U.S. leadership role in that area.

Not only did he do that in September, but he also in November of last year while in India entered into a very explicit partnership with that nation aimed at fostering openness in government.

Mr. CUMMINGS. Mr. Chairman, I ask for the 1 minute and 38 seconds that you got.

Chairman ISSA. Of course.

Mr. CUMMINGS. Ms. Canterbury, Danielle Brian, the executive director of your organization, the Project on Government Oversight, made this statement about President Obama's efforts. She said, "There is no question this is the first President in my experience who has personally elevated open government issues to the extent that Obama has." Are you familiar with that statement?

Ms. CANTERBURY. Yes, I am, sir, and I would agree with it.

Mr. CUMMINGS. Do you agree with your President?

Ms. CANTERBURY. Yes.

Mr. CUMMINGS. Another one of your colleagues, Tom Blanton is the Director of the National Security Archive at George Washington University. This is what he said about the President's efforts. "President Obama is the first President to invite transparency advocates into the Oval Office to talk about open government." In addition, the organizers of the National Freedom of Information Day Conference are giving President Obama an award this week to honor his deep commitment to an open and transparent government. I want to be clear, everyone I just quoted also believes much more can be done. I want to make it clear that I believe much more can be done.

Our job is to promote these gains through continued oversight and to push for even greater transparency measures in Congress. That is why today we introduced the Transparency and Openness in Government Act. Ms. Canterbury, our legislation consists of five bills that all passed the House overwhelmingly with Republican and Democratic support last session but were not enacted. I think I heard you say you support that legislation?

Ms. CANTERBURY. Absolutely, sir, we do.

Mr. CUMMINGS. Finally, I have about 15 seconds, do you think our committee should mark up this legislation at the next available opportunity?

Ms. CANTERBURY. Yes.

Chairman ISSA. The gentleman's time actually is 32 over the additional time we gave you, but thank you very much.

For everyone's edification, we are going to take one more round of questions, we will break and then Mr. Clay will be first up when we come back. We will be out for about 15 to 20 minutes. As soon as somebody is back in the chair, we will start again so don't go too far.

Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman, for that latitude. Thank you to the witnesses for being here today and expressing desire for sunlight.

Mr. Blum, let me ask you, you have called the Obama administration's Open Government initiatives a "road map for transparency." In your opinion, has that road map been effectively used by Federal agencies?

Mr. BLUM. Oftentimes, maps get loss, they get put on the car seat and the kid rips them up or you stick them in a pocket and they are hard to find. I think that some agencies have that map and are following it and I think some agencies don't know where the map is. I think you see that in some of the compliance statistics and I think it is all over the map.

Mr. WALBERG. What are the most egregious examples of agencies that have lost the map, use it for a litter box or whatever else?

Mr. BLUM. It is hard to come up with specific examples, but I think the issues exist today, they existed yesterday, they exist in this administration, the last administration and since the creation of the FOIA itself. It is the long delays.

We have one reporter I know of who was working during Hurricane Katrina, literally in the floodwaters trying to figure out the chemicals that were in those waters because his readers were asking him, can we come back, can we come home, can we start getting on with our lives? He was trying to give them that answer. Through FOIA, he couldn't get an answer.

In fact, he actually moved because he had to evacuate and let the agencies he had requested information from have his new address, send this information here and they sent it back to the address of his destroyed home. It is really these longstanding problems.

Ms. Nisbet, OGIS should not have to remind agencies to return phone calls or to even pick up the phone.

Mr. WALBERG. Thank you.

Mr. Fitton, your organization's Web site includes an archive of documents that you have received under FOIA. You make these documents electronically available to any member of the public. Do you think the government should also provide electronic access to already released records?

Mr. FITTON. Yes, but that only goes so far. My concern is that these document dumps that the administration is highlighting are documents that you largely can get if you know where to look otherwise and are not a matter of great public interest.

The FOIA fights we get into are matters of public controversy. That is where the rubber meets the road on FOIA. If the agencies release information that makes them look bad or may highlight an issue they don't want to talk about, on that issue that is where we face the most resistance.

We appreciate the additional information on the internet. The government is doing so much, the more on the Internet, the better, but on issues of political controversy or corruption allegations, you are not going to find that on the Internet. No agency is going to put it up there.

Normally, I would think you would get the email traffic, for instance, that you want about a specific decision. That is not necessarily going to be posted on the internet. I don't know if it is a good idea to do that.

Mr. WALBERG. Should they be?

Mr. FITTON. I don't know. Do we think that Government bureaucrats should post their emails almost immediately after sending them? Maybe. The Government is asking us to do a lot of things, requiring us to give them a lot of information, has a lot of control, but the accountability is lacking, especially given the dramatic expansion of Government we have seen recently.

Mr. WALBERG. Do you have some examples of cooperative agencies and how they have worked to meet not only the rule of the law, but the spirit of the law your requests?

Mr. FITTON. The letter of the law is almost never followed. The State Department is an interesting agency. They take forever to give you a response, the response they give you is usually something that you are asking for. The Department of Justice is terrible. As I said in my testimony, the financial agencies are the worse. The Treasury Department is probably the worst in our experience, which is the most troubling given the financial crises we have gone through and all the decisions that have been made related to the spending of our money to the tune of $1 trillion or so, that have gone through Treasury and related agencies.

Mr. WALBERG. Thank you, Mr. Chairman. I yield back my time.

Chairman ISSA. I thank the gentleman. As we take a 20 minute recess, I would note to the ranking rember that by unanimous consent, I would ask that both yours and corresponding letters be placed in the record, along with any supplementals you might want to put in so there may be a complete review of what quite frankly is a disagreement about somebody getting a demotion but more importantly, of interest to all the people who are testifying here today.

I thank the ranking member.

Mr. CUMMINGS. Thank you, Mr. Chairman.

Chairman ISSA. We stand in recess until 5 minutes after completion of the last vote which I will ask to be posted on the monitor so you will know when we are done.

We stand recessed.

[Recess.]

Chairman ISSA. Thank you all for your patience.

The Chair will now recognize the gentleman from Missouri for 5 minutes.

Mr. CLAY. Thank you, Mr. Chairman.

Let me start with Ms. Nisbet. As the FOIA ombudsman, Ms. Nisbet, you and your staff have done a great job in handling and disposing of hundreds of cases. As an original sponsor of the bill that created OGIS, I am proud of the important work that you are doing, but your role is so critical and ultimately saves the tax-

payers so much money that I want to make sure you have what you need. Is your funding and staffing sufficient to meet your responsibilities under the law?

Ms. NISBET. Thank you, Mr. Clay, for those very kind remarks.

We are working hard, we have a staff of six professionals who are very dedicated and hardworking, and I think in this budgetary environment, we know we are going to our very best to make the most with what we have.

Mr. CLAY. With whatever amount you have, you are going to accomplish your mission then?

Ms. NISBET. Yes, sir.

Mr. CLAY. Thank you for that.

Ms. Nisbet, we have heard unsubstantiated charges of politicization in the FOIA process at some agencies. Are there legitimate reasons why top agency executives and others should know about certain FOIA requests before the releases are made and isn't this very different from having appointees make release decisions?

Ms. NISBET. Mr. Clay, I think you stated that very well. We would have to agree that there is a difference and notice is one thing and approval is another. I understand the committee is looking into this.

Mr. CLAY. Thank you for your response.

Mr. Blum, you say the President's FOIA efforts show impact but that some agencies have been slow to improve. These problems go back to at least the previous administration which was significantly less transparent and much less willing to disclose. In fact, the previous administration changed the official presumption to withholding rather than disclosing. Thankfully, President Obama reversed that presumption back to disclosure to what it was during the Clinton administration.

Do you think the issue is simple agency reluctance to change or agency culture to not disclose, or are there other reasons for those agencies who are not complying with the President's clear direction?

Mr. BLUM. How much time do we have here? I think there are many reasons. I think in some cases, it is that there is a reluctance to disclose when there is doubt because there is a perception that there is greater consequences if you disclose something that you shouldn't. If you don't disclose it, even though you probably should, who is going to find out, the requester, maybe not others.

I think there is a reluctance to disclose that is inherent. I think there is a lack of funding. Ms. Nisbet answered the question about her funding, but when you look at the CBO score for her office, it was many times more. They estimated it would take her many times more, much more money for her to actually do the job than she actually has. I think that is an important factor as well. I think that is true for agencies as well.

I also think that the system does need to be changed so that you create more efficiencies. Once a request has been responded to, get those records up online, make them searchable.

Mr. CLAY. It sounds to me like statutory (b)(3) exemptions are more problematic and responsible for more denials, is that correct?

Mr. BLUM. From the numbers that I saw in the studies, yes.

Mr. CLAY. On top of your good work to make the public aware of these varied exemptions, what do you recommend we do to fix the problem?

Mr. BLUM. I think if this committee could take a hard look at these exemptions when they are proposed, make sure they are absolutely necessary, that they are narrowly described, that they don't cover additional information, make sure the drafting is narrow, make sure they are publicly justified and make sure we all have a chance to weigh in. I think that would help. I think there needs to be awareness of what FOIA is amongst all the committees of Congress.

Mr. CLAY. Critics have accused this administration of being more secretive than the previous one. Do you find that to be accurate?

Mr. BLUM. I don't think it is the place of our coalition to try to answer that question.

Mr. CLAY. Thank you and I yield back.

Chairman ISSA. I thank the gentleman.

The Chair now recognizes the gentleman from Arizona, Dr. Gosar, for 5 minutes.

Mr. GOSAR. To the panel, outside of circulated memos, what true or real hard core pursuits of FOIA enforcement have you seen from this administration and Department of Justice? I would like to start with Ms. Nisbet.

Ms. NISBET. I do know all FOIA professionals in government in the executive branch agencies have received guidance on the President's memos, on Attorney General Holder's memos, not only written guidance but FOIA training which is regularly done not only by the Department of Justice but by agencies as well on their FOIA responsibilities. Certainly the guidance and the word is getting out there. It does take time.

Mr. GOSAR. Mr. Metcalfe.

Mr. METCALFE. Dr. Gosar, as my written testimony explains in even greater detail, I think a major aspect, a critical aspect of implementation is being able to show examples, concrete examples so people at other agencies can see what actually has occurred first and foremost in litigation, perfect opportunity for examples, and then even examples of actual discretionary disclosures that have been made under the foreseeable harm standard at particular agencies, especially at the Department of Justice, the lead.

That is a major part of implementation that I think has been lacking. It probably will come in time. It almost has to as a matter of good common sense but the fact that we are here 2 years after the fact, even on the Holder memorandum, and there has not been one litigation case cited despite people in the openness in government community clamoring for that, where that has taken place is telling. It stands in very stark contrast with what happened and what I know firsthand happened in the implementation of the Reno memorandum during the Clinton administration.

Mr. GOSAR. From your expertise here, we have seen an unprecedented tactic of choosing laws to uphold and ignore. Arizona is a perfect example of that. I am from Arizona, for your information. Do you see an ability, something we could do to have better access and revitalize America's access to FOIA, that the administration and the Department of Justice could do?

Mr. METCALFE. When you use the word we, Dr. Gosar, do you mean this committee first and foremost?

Mr. GOSAR. Yes.

Mr. METCALFE. I think a very simple step this committee could take right away with respect to the exemption 3 statutes is to focus on the roughly half of them that our academic study showed do not qualify as exemption 3 statutes to begin with. That would be an easy hit, so to speak. You could buildupon the research that we did. Beyond that, the Department of Justice could follow more the model of what was done during the Clinton years to implement by example. That is just a key thing that doesn't seem to be there.

Mr. GOSAR. If each one of you had to pick an agency, which is the worst in compliance with FOIA? Ms. Nisbet.

Ms. NISBET. Dr. Gosar, that is a very tough question to ask and I am not sure that I feel comfortable answering it. We are still looking at agencies. We are very new, we are still really beginning to implement our mission.

Mr. GOSAR. I would like to see us really pursue this because this is very important to the American public. Mr. Metcalfe, do you know?

Ms. NISBET. Dr. Gosar, may I just add I am going to echo what Mr. Metcalfe just said. That is, this committee looking at FOIA, looking at the issues of transparency and openness is very, very important and really sends a strong message. I thank you for it.

Mr. GOSAR. I would like to take it a step further because in the real world, mainstream America, when we see an example made and reteach an agency how to do something, that makes a stronger vantage point for everybody to follow. That is why I am asking the question. Mr. Metcalfe, one word, which agency?

Mr. METCALFE. Again it is difficult to single out someone, but I can tell you that prior to the time I retired in January 2007, I was most disappointed by the Department of Treasury which has plummeted precipitously prior to that in the quality and effectiveness of its FOIA performance. Since then, I am not sure that has changed.

Mr. GOSAR. Mr. Blum.

Mr. BLUM. I think it would be no surprise that I say, representing news media groups, that depending on the issue and the hot news at the time, you are going to have difficulty. Over the last decade, the post-9/11 environment, and two wars, the Defense Department and other intelligence agencies were very difficult because reporters were trying to get information from them.

Now, as the attention turns more to financial information and conflicts over access, that is an area of concern.

As a quick example, to echo what these two witnesses are saying, the Defense Department is very good in the process, not too much drops between the cracks, they will tell you no quickly.

Mr. GOSAR. Ms. Canterbury, real quick.

Ms. CANTERBURY. I haven't looked at the numbers to give you a specific cite for which agency is doing the worse, however, in our experience, we have had lots of trouble at the SEC that requires more investigation and also the Department of Homeland Security. Currently there are several troubling issues around their FOIA practices including how they are using contractors in the process.

If I could for a second address your previous question about things the administration has done on FOIA, I think in addition to the directives, the memoranda, the guidance and the work that is being done at OGIS, the Open Government directive has also created a sort of open government infrastructure where FOIA has played a large role, it has been featured. The agencies when they prepare their Open Government plans, many of them, if not all, had some FOIA improvement component.

I would say we weren't completely pleased with POGO's initial Open government plans. We are part of a review process, an independent look at those plans, but we are just beginning and I think improvements have already been made not only on those plans but in the implementation of the Open Government directive and the President's memorandum on FOIA.

Mr. GOSAR. Thank you, Mr. Chairman.

Chairman ISSA. Thank you, Dr. Gosar.

The chair takes pleasure in recognizing the former chairman of the full committee for 5 minutes, Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman. Let me thank you and the ranking member for holding this hearing because I think the timing is pretty good because this is Sunshine Week. To have this hearing in Sunshine Week is very, very important.

Let me begin with you, Ms. Nisbet. FOIA has nine built-in exemptions of information that cannot be disclosed under a FOIA request, correct?

Ms. NISBET. Mr. Towns, there are nine exemptions, but they do not all necessarily require that information be withheld. Some of them do allow some discretion by the agency. I will give you an example.

Mr. TOWNS. Please do.

Ms. NISBET. Exemption 1 is national security information. If information is properly classified pursuant to the Executive order on national security information, agency officials are not free to just release it. In fact, they are prohibited from doing that. They have to be extremely careful in the way they handle that.

Under other exceptions, for example, exemption 5, which incorporates certain privileges in civil discovery, and typically is thought of as including deliberative process privilege or executive privilege, attorney work product, attorney-client privilege, that is an exemption the courts have long held, does allow the Government to decide whether or not it wants to essentially invoke the privilege so that information particularly after the passage of time might be very appropriate for disclosure. It does not have to be withheld.

Mr. TOWNS. Thank you.

I understand that outside of FOIA, there are over 200 other exemptions of information that cannot be disclosed under FOIA that were written into laws passed by this Congress, is that right?

Ms. NISBET. I think the number of statutes that would be considered to fall within exemption 3, which incorporates other statutes, is really a number that we not all quite sure about. In fact, I think that is something this committee could look at, what those statutes are and whether or not they are properly being used.

Mr. TOWNS. I am committed to open government and I am also committed to closing some of these exemptions such as the one

Chairman Issa and I completed last Congress in the SEC exemption. My question is, can OGIS, your agency, track new exemptions contained in legislation before they actually become law? Can you do that?

Ms. NISBET. I would like to say that we can and certainly, we would try to do that particularly in partnership with some of the other organizations that do track those things, but my understanding from talking to people who work very closely with all of you on the Hill is that it is sometimes very difficult to spot those things before they go through, so it really takes some vigilance from you all as well as from the executive branch.

Mr. TOWNS. Mr. Blum, you made the suggestion that any new FOIA disclosure exemptions be referred to the committee for review before any new law is passed or any statute is amended. Do you agree with this suggestion?

Mr. BLUM. Yes, we have advocated this position for many years.

Mr. TOWNS. Mr. Chairman, on that note, I yield back and say I really appreciate the fact that you are having this hearing. I think it is a very important hearing because we are talking about transparency and opening up government. I think in order to do it, we would have to be involved in the process and we all have to work together to get where we need to go. I want to thank you and the ranking member.

Chairman ISSA. Will the gentleman yield?

Mr. TOWNS. I would be delighted to yield.

Chairman ISSA. Thank you for your friendship and support in the last Congress and I commit to you not only are we going to do it, but I have arranged with each of the subcommittee chairmen that they are going to hold at least one FOIA related to their portion of the government and we will deconflict it, so we will have at least seven subcommittee hearings on this.

We are also forming a working group which I am very confident you will be joining along with other parties, some of whom are at the table today, to begin the process of fashioning FOIA reform not just to deal with one exemption but to look at all of them that presently exist.

Thank you for your leadership in the past and I look forward to us working together throughout this Congress.

Mr. TOWNS. Thank you very much, Mr. Chairman. I look forward to working with you.

Chairman ISSA. Thank you.

Does the ranking member have additional questions?

Mr. CUMMINGS. None.

Chairman ISSA. I want to thank our panel of witnesses for your testimony. I want you to know that the record will remain open for 5 legislative days. If any of you need additional time to respond to questions or to revise and extend things you may have said, please let the committee know and the chairman and ranking member, by unanimous consent, will extend that to allow your information to get in. This is extremely important.

I would close by asking, are all of you willing to come back again if so invited?

Ms. CANTERBURY. Absolutely.

Chairman ISSA. Thank you.

We stand adjourned.

[Whereupon, at 11:23 a.m., the committee was adjourned.]

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