

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.

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

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.

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.

Biographical Information for Rick Blum

Rick Blum coordinates the Sunshine in Government Initiative, a coalition of media groups promoting open government policies and practices. Founded in 2005, the coalition actively supported passage of the 2007 amendments to the Freedom of Information Act that created the Office of Government Information Services, which is the first independent office designed to mediate FOIA disputes and recommend improvements. Rick and the coalition discovered the provision buried in the president's 2009 budget that would have eliminated the ombudsman office before its creation. In the midst of high-profile stories about U.S.-run secret prisons, warrantless surveillance and federal monitoring of international banking transactions, Rick helped media groups successfully explain why Congress should not write new laws criminalizing reporting based on unauthorized disclosures.

Rick was the founding director of OpenTheGovernment.org, a broad coalition of journalists, labor, and free-speech and environmental advocates. There he launched the Secrecy Report Card, an annual report of quantitative indicators of secrecy and openness in the federal government. As a policy analyst at OMB Watch from 1997 to 2001, he worked with environmental groups, librarians, freedom-of-information advocates, and others in the 1999 fight to maintain public access to chemical accident risk management plans.

Rick has conducted research on the effects of the commercialization of science on environmental and public health protections. He holds a master's degree from Indiana University, where his studies focused on democratization efforts in Russia, and a bachelor's degree from the University of California, Berkeley. He lives in Silver Spring, Maryland with his wife and two kids.

Relevant Work Experience

Coordinator, Sunshine in Government Initiative (Arlington, VA) April 2006-present

Raised visibility and effectiveness as coordinator for new coalition of ten media groups promoting open government. Built consensus among media group lobbyists on key provisions of Freedom of Information Act (FOIA) reforms enacted in 2007. Coordinated ultimately successful coalition activities to confront growing government criticism of the media for unauthorized disclosures of classified information throughout 2006. Responsible for developing vision and consensus around coalition objectives and activities, managing the coalition budget, chairing biweekly coalition meetings, overseeing rapid response analyses and long-term research, creating relationships with press and decisionmakers and building new coalition website with searchable FOIA stories.

Director, OpenTheGovernment.org (Washington DC) January 2003-April 2006

Lead development of strategic action plan for new coalition of national organizations to advocate for openness in the U.S. federal government. Engaged new funders, obtaining a three-year challenge grant providing core support for the project. Reached out to new organizations to foster new collaborative relationships. Designed website, wrote reports on government secrecy attracting media coverage from The New York Times, Associated Press, ABC News and reaching 23 million readers. Published biweekly policy and news updates covering access issues. Grew circulation of policy updates from 150 to over 1,000 organizations. Served on selection committee for the Freedom Forum's Freedom of Information Hall of Fame in 2006.

Senior Researcher, Center for Science in the Public Interest (Wash. DC) July 2001-Jan. 2003

Analyzed weaknesses in federal system for obtaining outside scientific review. Created recommendations reiterated by the Government Accountability Office for reforming conflicts of interest on federal advisory committees, which lead to 2008 reform legislation. Wrote grant proposals and reports.

Policy Analyst, OMB Watch (Washington DC) April 1998-June 2001

Managed environmental right-to-know advocacy projects with expertise in information policy with focus on large public databases and the Internet; coordinated public interest coalition in fight against industry efforts to keep chemical accident worst-case scenario information from public; testified before Congress on science and information issues; represented organization in meetings of the NAFTA-created Commission for Environmental Cooperation (CEC); managed online database clearinghouse project; wrote comments on regulatory proposals, analyses and alerts for distribution, and articles for biweekly online newsletter.

Public Affairs Liaison, OMB Watch (Washington DC) August 1997- April 1998

Tracked legislative and administrative proposals; drafted comment letters on agency rulemakings; developed key contacts and conducted outreach efforts for 3,000-member advocacy network of nonprofit organizations.

Publications

"Obama Can Use His Tech Ideas to Enhance Federal Transparency" (editorial), *Roll Call*, December 15, 2008.

"Secrecy Report Card: Quantitative Indicators of Secrecy in the Federal Government," OpenTheGovernment.org, August 2005.

"Sorry, That's Classified: How Post-9/11 Secrecy Hurts Nonprofits" (lead author), *Nonprofit Quarterly*, Fall 2004

- “Advancing the Public’s Right to Know,” with Gary D. Bass, *Quill*, October 2003
“A Citizen’s Platform for Our Environmental Right-To-Know,” OMB Watch, March 2001

Selected Professional Presentations

- “Laws in the Works,” moderator, panel discussion at the American Society of Access Professionals, December 4, 2008
- “Focus on the New Office of Government Information Services,” panel discussion at American University Collaboration on Government Secrecy FOIA Community Conference on the FOIA Amendments of 2007, January 2008
- “FOIA’s Past, Present and Future,” panel discussion, National Freedom of Information Day Conference, Arlington, Virginia, First Amendment Center, March 2006
- “Openness Makes Us Safer and Other Rules of an Open Society, and Why We Break Them,” New York Public Library Annual Presentation in Honor of James Madison’s Birthday, March 15, 2005
- “Why a Coalition for Open Government,” National Freedom of Information Coalition conference, May 2004
- “Where We’re Headed on Open Government,” National Freedom of Information Day Conference, First Amendment Center, March 2004
- “Information Removed from Government Websites Post 9/11,” Library of Congress, Aug. 2003
- “Laying Waste to the Public’s Right to Know: Public Access to Government Information Post 9/11,” Association of Scientists in the Public Interest conference, March 2003
- “Corporate Control Over Science and What You Can Do About It,” Empowering Democracy conference, April 2002
- “Right-To-Know After 9/11,” Association of Public Data Users conference, November 2001
- Testimony before United States Congress House Committee on Science Subcommittee on the Environment, Technology and Standards, ”H.R. 64: A Proposal to Strengthen Science at the Environmental Protection Agency,” March 29, 2001
- “Agenda for Access,” National Freedom of Information Conference, Arlington, VA, Mar. 2001
- “Creating an Information Office for the 21st Century: The Environmental Protection Agency,” American Society of Access Professionals, Washington, DC, April 2000
- “Online Tools for Protecting Public Health,” United Auto Workers Advanced Health and Safety Training Program, Black Lake, MI, March 2000
- “Chemical Accident Worst-Case Scenarios: Terrorism and the Public Right-To-Know,” Computers, Freedom and Privacy conference, Washington, DC, March 1999

Education

- Masters of Arts -- Indiana University (political science), 1993
Bachelors of Arts -- University of California, Berkeley (political science), 1991

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

Name: RICK BLUM

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2008. Include the source and amount of each grant or contract.

None.

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

I AM TESTIFYING ON BEHALF OF THE
SUNSHINE IN GOVERNMENT INITIATIVE. I SERVE
AS THE FULL-TIME COORDINATOR OF THE COALITION.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2008, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None.



I certify that the above information is true and correct.

Signature:



Date:

3/15/2011