

***Testimony
Of
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On Behalf of
Sunshine in Government Initiative***

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

***Thursday, March 18, 2010
2154 Rayburn HOB
2:00 p.m.***

***“Administration of the Freedom of Information Act:
Current Trends.”***

Chairman Clay, Ranking Member McHenry and Members of the Information Policy, Census, and National Archives Subcommittee, I would like to thank you for the opportunity to discuss the state of the federal Freedom of Information Act (FOIA) on behalf of the Sunshine in Government Initiative, a coalition of media associations promoting open government. I would also like to thank you for your continued interest in the ability of the public to access important federal records and information.

After 15 years as an investigative reporter at the Washington Post, where I frequently depended on the law to gain access to important administrative and program records, last year I joined the faculty of Duke University's Sanford School of Public Policy. While I am still close to daily journalism and will continue to pursue stories, I am more free to report on my own experiences and those of colleagues who are still pursuing important public affairs journalism.

Mr. Chairman, the past year has seen several improvements in transparency in government, but the FOIA process has remained largely unchanged.

A year ago, the promise of President Obama's "day one" initiatives to re-embrace the values of open government raised the hopes of those of us who work in the realm of government accountability – investigative reporters, open government experts and a range of public interest organizations who depend on the Freedom of Information Act and transparency to inform citizens about the activities of government taken under the public's name and with the public's money.

There have been some improvements, starting with the President's decision to voluntarily release the White House visitor logs and to ease the path to requesting financial disclosure information for high-level officials. The Open Government Directive may help spur more changes, while centralizing the most basic government statistics and data products at data.gov is a convenience. Some agencies have begun posting important data products, especially those concerning financial institutions, available without the need for FOIA.

But many of the new initiatives and policies have been geared at two prongs of the administration's transparency agenda: collaborative and responsive government. The third prong – transparency for the purpose of government accountability – has changed little, based on my

own experience and reports from journalists and others who work with public records.

One issue is that the nature of the records required for accountability are largely administrative. These are records such as inspections and compliance reports; agency correspondence; calendars of public officials; or grant audits. Most are documents that will require extraction from administrative databases or document searches. Unlike the records typically found on agency websites, such as statistical compilations, consumer service information or basic demographic data, these are records that are requested from deep within the agency.

It was unreasonable a year ago to think we could be magically transported into a world in which problems in FOIA could be fixed overnight.

Even if a single administration could change current practices, subsequent administrations would still be free to turn off the flow of information, important documents and administrative data at the stroke of a pen.

I would like to suggest four areas in which the FOIA law does not appear to work as intended – and hasn't for the generation in which I've been a reporter.

Delays

Receiving documents and data under FOIA remains a path to information that can be used only for the most forward-thinking and patient requesters. I have *never* received a response to federal FOIA request in the time frame outlined in the law, except the form letter telling me that the agency received my letter. One reporter in Texas has not received documents promised from an agency for more than a year. Another was informed before Christmas that his FOIA was almost ready, but now cannot convince the agency to release any records nor negotiate for any release. The ability to wait out a FOIA request remains the most glaring power imbalance between requesters and agencies, and releases are sometimes irrelevant by the time they are completed.

FOIA web sites and proactive disclosures

In 1996, Congress recognized that administrative records held in electronic form had become one of the most difficult sticking points in the law, and addressed it by requiring agencies to post “frequently requested records” on an Internet site; provide basic information on major information systems; and release information in the form requested if it existed in that form, such as a database rather than a printout.

Few agencies have kept the promise of these reforms. For example, the correspondence of Treasury Secretary Geithner has not been posted on its website even though news organizations have received it; detailed records on reconstruction spending in Iraq and Afghanistan are not on Defense's website; and original nursing home inspection reports, including the reviewer's notes, are not on the website at the Centers for Medicare and Medicaid. Correspondence logs, desk calendars of cabinet members and lists of political appointees are three of the most commonly requested classes of records for accountability reporting, but I know of no agency that routinely posts these records, nor any that release them without FOIA requests – a practice that, if followed, could reduce the workload of FOIA offices.

Many agencies still reference the defunct system called the Government Information Locator Service, or "GILS," for documenting their information systems. Other required indices are obsolete or so poorly documented that it is unclear whether the systems have been replaced or are still in use. These documents can help reduce backlogs and confusion in the FOIA process because requesters can, in advance, identify whether the records are likely to exist, which part of the agencies hold them, and can identify them more precisely in a request.

Finally, a growing number of agencies are refusing to release information in its original data form, arguing that a requester could conceivably change, corrupt or otherwise misuse the records. Creating these proprietary printouts costs extra money and can create more errors than simply releasing the data in its raw form, especially when they are reverse-engineered back into a database.

Compliance with Congressional mandates for transparency

In other areas, recognizing that FOIA does not work as well as it should, Congress has enacted laws to ensure release of important records on a timely basis, but those laws are sometimes twisted to do just the opposite. A current issue in the news – defective drywall used throughout the South – is the subject of thousands of complaints to the Consumer Product Safety Commission. The relevant law – the Consumer Product Safety Improvement Act of 2008 – and its implementing regulations require that the commission alert a manufacturer to complaints within five days and publicly publish the information and any responses from the company within 10 in a searchable database. However, the commission has declined FOIA requests for records that include the company names. The Coburn-Obama bill promised that spending records, in particular, would be available online through the

Office of Management and Budget and provided a deadline by which information on sub-contracts and sub-awards would be posted on usaspending.gov. That deadline has long passed, but the Office of Management and Budget exercised an option to delay its implementation for 18 additional months.

Paths to resolution remain unclear

Responding to the delays and the difficulties in resolving disputes, this committee provided leadership and support to amendments to the FOIA enacted in 2007 that, among other things, created the Office of Government Information Services (OGIS) to mediate disputes and recommend improvements to FOIA's implementation, and codified the creation of chief FOIA officers in each agency to monitor and oversee the agency's implementation.

Although the chief FOIA officers have been named, few agencies make the job a primary function. Reporters still often find themselves in a hall of mirrors, in which a FOIA request has stalled. Few know about OGIS, which in its first 6 months of operation has begun mediating cases but hasn't begun to reach the broader array of requesters who might benefit from its services. Last year, for example, a reporter requested of an agency all correspondence regarding human

trafficking. Several months later, he received a letter with the cost estimate for reproducing 700 responsive documents and was asked how he would like to proceed. He was never able to tell anyone – numerous phone calls and emails were never answered, and his story eventually ran without the information that might have been provided in those records. A phone call to OGIS may have helped, but these problems cannot be left to a single office to fix.

There are several steps that Congress might take in its oversight of FOIA to assure its intent is more closely met:

- Clarify definitions of “frequently requested records,” and ask agencies to review FOIA logs at least once a year for classes of records that should be proactively disclosed.
- Build transparency into the oversight of new computer systems, new information systems, and revisions of laws. Currently, agencies work to assure the security and the ability to protect privacy into systems, but do not similarly assure that public information can be extracted from them. The transparency requirements of the Recovery Act resulted in unprecedented openness in the administration of that law. Similar rules could spur better openness across government.

- Encourage compliance with existing law by encouraging agencies to proactively publish online information of interest to the public, such as agency correspondence, calendars and grant audits.

Journalists expect that the needs for records and transparency will sometimes conflict with other priorities, such as protecting personal privacy and national security. However, the issues in FOIA go beyond these relatively straightforward conflicting priorities. I believe most reporters would be happy to disagree on these matters if the government readily released common documents, reduced delays and offered some more effective path to resolution broadly available to FOIA requesters. OGIS is a promise of that, but it needs to develop and grow to have a chance of being effective.

Thank you for the opportunity to present these views on the state of the nation's FOIA.