

**Testimony of**  
**Rick Blum**  
**on behalf of**  
**The Sunshine in Government Initiative**  
**Before the**  
**Subcommittee on Government Operations**  
**Committee on Oversight and Government Reform**  
**United States House of Representatives**  
**on**  
**“Ensuring Government Transparency Through FOIA Reform”**  
**February 27, 2015**

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>1</sup> "VA brass knew of false data for 2 years," USA Today, June 24, 2014; <http://www.usatoday.com/story/news/nation/2014/06/22/va-brass-knew-of-false-data-for-2-years-/11224899/>; accessed February 20, 2015.

<sup>2</sup> "VA official: Don't tell until asked about Legionnaires' outbreak among veterans," Pittsburgh Tribune, May 11, 2014; <http://triblive.com/news/alleggheny/6069373-74/cdc-outbreak-cowgill#axzz31cRALiQH>; accessed February 20, 2015.

<sup>3</sup> Christian Lowe, "Marine Corps Issued Flawed Armor," *Marine Corps Times*, May 9, 2005; version of article published in *USA Today* available at [http://usatoday30.usatoday.com/news/nation/2005-05-08-armor-investigation\\_x.htm](http://usatoday30.usatoday.com/news/nation/2005-05-08-armor-investigation_x.htm); accessed February 20, 2015.

<sup>4</sup> "Expelled Nazis Got Millions In Social Security" (AP, 10/20/14), [http://hosted.ap.org/dynamic/stories/E/EU\\_NAZI\\_SOCIAL\\_SECURITY?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2014-10-19-21-17-02](http://hosted.ap.org/dynamic/stories/E/EU_NAZI_SOCIAL_SECURITY?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2014-10-19-21-17-02); accessed February 20, 2015.

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

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

In short, FOIA remains an important tool for transparency.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Conclusion**

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

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

**Biographical summary for Rick Blum**

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

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

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

Name: Rick Blum

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

None.

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

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

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

None.

I certify that the above information is true and correct.

Signature:

Rick Blum

Date:

2/25/2015