

**Testimony of Sean Moulton
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**Before the
United States Senate Committee on the Judiciary**

**On
We the People:
Fulfilling the Promise of Open Government Five Years After the OPEN Government Act
March 13, 2013**

Chairman Leahy, Ranking Member Grassley, members of the committee: My name is Sean Moulton and I am the Director of Open Government Policy at the Center for Effective Government, formerly OMB Watch — an independent, nonpartisan policy organization dedicated to improving government accountability and openness. Improving citizen access to public information has been an important part of our work for almost 30 years. Mr. Chairman, Mr. Grassley, thank you for your continuing interest and commitment to this issue, and thank you for inviting me to testify today on the important topic of how we can improve the working of the Freedom of Information Act (FOIA).

My testimony will examine how the OPEN Government Act and recent executive actions have had an impact on agencies' performance in responding to FOIA requests. Between FY2011 and FY2012, processing of FOIA requests improved significantly, and the number of unprocessed requests fell by 12 percent. However, in 2012, the requests that were granted were more likely to have some portion of the content withheld or redacted than at any time previously.

We believe FOIA would be a more effective system for ensuring government transparency and accountability if: compliance efforts were bolstered; the Office of Government Information Services (OGIS) was strengthened; FOIA's requirements to proactively disclose information were updated; agency IT provided faster processing; and congressional oversight was increased.

About the Center for Effective Government

The Center for Effective Government has advocated for greater online disclosure of FOIA requests on agency websites, for penalties if agencies fail to honor FOIA requests, and for more robust congressional oversight. We also have experience in helping make government information more accessible to the public. In 1989, before widespread public and commercial use of the Internet, we began operating the Right-To-Know Network (RTK NET), an electronic service providing public access to Environmental Protection Agency data. In 2006, we advocated for the policies incorporated in the Federal Funding Accountability and Transparency Act (FFATA),¹ which mandated that federal spending data be displayed on a website, with searchable and downloadable data, and later developed FedSpending.org, a website that contained so many of the legislation's mandated characteristics that it

¹ P.L.109-282.



was licensed to the federal government and became the starting point for USAspending.gov, which launched at the end of 2007.

FOIA and Effective Government

We believe that in a democracy, citizens should have easy access to the information that their government gathers – all but the most sensitive information. This was the logic behind the passage of FOIA in 1966 and remains the driving force for transparency. FOIA provides the public with access to information about food safety, compliance with environmental standards, and special interest influence in government decision making.

Yet some issues have persistently reduced FOIA's effectiveness and delayed agency responses by months and sometimes years. Large backlogs in the processing of requests are common. Some agencies overuse exemptions to withhold documents from disclosure. These problems can result in lawsuits that make obtaining government information more costly for both agencies and the public; furthermore, when the requested information is finally released, it is no longer timely. Recent reforms have made progress on addressing these concerns, but significant problems remain.

1. Impact of the OPEN Government Act on Agency Compliance

The passage of the Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007² was a significant advance in addressing loopholes and weaknesses in the FOIA process that contributed to delayed releases and growing backlogs of requests. We supported the OPEN Government Act at the time of its passage and believe it has contributed positively to the effectiveness of the FOIA system.

Specifically, the OPEN Government Act:

- Created the Office of Government Information Services (OGIS) within the National Archives and Records Administration and directed it to offer mediation services when FOIA requesters and reviewers disagree.
- Made it easier for litigants to recover attorney fees in FOIA cases where an agency makes a "voluntary or unilateral change in position" in the face of a lawsuit. This means agencies will no longer be able to avoid the cost of paying attorney fees if they force complainants to bring a lawsuit and then release the materials at the last minute. This is an important disincentive to bad behavior by agencies, and there are signs that this provision is helping get more information out to the public. We heard that some news organizations had not pursued any FOIA litigation for years before this provision passed; they simply gave up when agencies failed to produce requested information, due to the expenses of litigation. With the new provision in place, however, requesters have been able to challenge agency withholding decisions in court.³

² P.L. 110-175.

³ Overall, FOIA litigation has increased since enactment of the OPEN Government Act. See Transactional Records Access Clearinghouse, "FOIA Lawsuits Increase During Obama Administration," *The FOIA Project*, Dec. 20, 2012. <http://foiaproject.org/2012/12/20/increase-in-foia-lawsuits-during-obama-administration/>.



- Discouraged undue delays in FOIA processing by financially penalizing agencies that fail to respond to FOIA requests within the statutory deadlines, since it bars them from collecting search fees from all requesters and duplication fees from certain favored requestors like the news media. Yet, despite this provision, only modest improvements in timeliness have been noticed at most agencies.
- Required agencies to create a FOIA tracking system that would allow requestors to monitor the progress of their requests on the Internet or by telephone. We believe that this provision has benefitted requesters, but problems remain with consistent and effective agency implementation of this provision. In many agencies, the tracking system is not automated. We have waited for days for agencies to return calls simply asking about the status of a FOIA request.
- Finally, the OPEN Government Act also added several new reporting requirements that demand agencies provide information about their timeliness in processing requests and administrative appeals, their grants of expedited processing and fee waivers, and their use of Exemption 3 statutes. Still, important gaps remain. Most importantly, none of the current statutory reporting requirements asks for data on the *quantity* of information released under FOIA's proactive disclosure requirements or in response to requests from external sources.

In sum, the OPEN Government Act appears to have reduced the “gaming” of FOIA requests by agencies and some of the costs of requesting information, but it has not significantly increased the speed or scale of FOIA processing in most agencies.

2. Executive Actions to Improve FOIA Compliance

On his first day in office, President Obama demanded faster FOIA processing: “Agencies should act promptly and in a spirit of cooperation” when processing FOIA requests.⁴ “Each agency must be fully accountable for its administration of the FOIA,” wrote Attorney General Eric Holder in a 2009 memo, which established new reporting requirements for FOIA processing.⁵ Both memos and the Open Government Directive of December 2009 instructed agencies to proactively disseminate information online to reduce the necessity and costs associated with reviewing and processing FOIA requests.⁶

The 2009 Open Government Directive also tasked agencies with significant backlogs of FOIA requests to reduce them by 10 percent annually. A 2010 memo directed agencies to “assess whether you are devoting adequate resources to responding to FOIA requests.”⁷

⁴ Barack Obama, “Freedom of Information Act,” memorandum, The White House, Jan. 21, 2009.

http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

⁵ Eric Holder, “The Freedom of Information Act (FOIA),” memorandum, Office of the Attorney General, March 19, 2009.

<http://www.justice.gov/ag/foia-memo-march2009.pdf>.

⁶ Peter R. Orszag, “Open Government Directive,” memorandum, Office of Management and Budget, Dec. 8, 2009.

<http://www.whitehouse.gov/open/documents/open-government-directive>.

⁷ Rahm Emanuel and Bob Bauer, “Freedom of Information Act,” memorandum, The White House, March 16, 2010.

<http://www.archives.gov/ogis/memos/foia-memo-03-16-10.pdf>.



Despite this prodding, progress in implementing these reforms has been uneven. Of the 11 cabinet agencies with more than 500 backlogged requests in fiscal year (FY) 2009, only three met the backlog reduction goal each year: the Departments of Health and Human Services, the Interior, and the Treasury. Three other agencies met the goal in two years out of three, while the remaining five agencies met their goal in only one year. At the end of FY 2012, nearly 60,000 backlogged requests remained in these 11 agencies; this represented a total cumulative reduction of less than nine percent, instead of the goal of 10 percent each year.⁸

Yet there has also been important progress in building a government-wide infrastructure for FOIA processing. Several agencies collaborated to develop FOIAOnline, an interactive website that launched in October 2012.⁹ This multi-agency FOIA portal, long a goal of open government campaigners, allows the public to submit and track FOIA requests, receive responses, and search others' requests through a single website. The platform is also expected to improve the efficiency of agency processing of requests.

3. Agencies' Performance in Processing FOIA Requests in 2012

Federal agencies responded to more than half a million FOIA requests last year, which presents plenty of opportunities for a citizen to disagree with an agency decision or to criticize its customer service in a particular case, but at a systemic level, the three primary indicators used to gauge effectiveness are: how many FOIA requests are processed in a timely way; how many requests for information are actually granted; and how many and what are the exemptions used to withhold information.

For the third year in a row, my staff and I analyzed the annual FOIA reports from 25 federal agencies. We assessed the performance of most cabinet-level departments and compared their performance in 2012 with similar data collected since FY 1998.¹⁰

Processing FOIA Requests

In FY 2012, the Obama administration processed more FOIA requests than in any year since 2004. Specifically, the 25 agencies processed more than 512,000 requests, an increase of more than 39,000, or eight percent, over the number processed in 2011. Although these agencies received over 11,000 more requests in 2012 than in 2011, agencies' processing more than kept pace and requests unprocessed at the end of the year declined by 12 percent.

The agency most responsible for the decrease in pending requests was the Department of Homeland Security (DHS). This agency receives the most FOIA requests – more than 38 percent of all requests received by the 25 agencies – and in 2012, DHS received 15,000 more requests than in 2011. But it managed to process 60,000 more requests in 2012 than it did the year before, resulting in a 30 percent decrease in unprocessed requests.

⁸ Data from agency annual FOIA reports. See <http://www.justice.gov/oip/reports.html>.

⁹ "National Archives Joins Federal Agencies to Launch New Freedom of Information Act (FOIA) Online System," press release, National Archives and Records Administration, Oct. 1, 2012. <http://www.archives.gov/press/press-releases/2013/nr13-01.html>.

¹⁰ FY 1998 was the first year of reporting under the statutory reporting requirements as revised by Sec. 10 of the Electronic Freedom of Information Act Amendments of 1996, P.L. 104-231.



Granting FOIA Requests

Nineteen of the 25 agencies denied fewer than 10 percent of FOIA requests in 2012. The Department of Homeland Security denied requests less than one percent of the time. Not surprisingly, the State Department and Central Intelligence Agency were most likely to deny FOIA requests. They provided information, in full or in part, for only 56 and 41 percent, respectively, of the requests processed in 2012.

Overall, the agencies provided information, in full or in part, in 94 percent of the FOIA requests processed in 2012. After a steady decline in the Bush years in the percentage of FOIA requests that released the full information requested, the percentage rebounded in 2010, then fell through 2012 to the lowest level on record – just under 41 percent.

Federal agencies varied in their willingness to release complete information. In 2012, 95 percent of the FOIA requests released by the Small Business Administration provided full and complete information, but less than five percent of the FOIA releases from the Equal Employment Opportunity Commission's (EEOC) did so.

Our analysis excluded requests that have been denied for reasons other than exemptions, such as information requested from the wrong agency or requests for which no records were found.

Use of Exemptions

Under FOIA, there are nine reasons why agencies can deny a request. In FY 2012, total use of exemptions rose by 26 percent from the previous year. Three exemptions accounted for almost three quarters of all exemptions: personal privacy, law enforcement personal privacy, and law enforcement techniques for prosecution. These three exemptions were each used approximately 100,000 times or more.

The use of personal privacy and law enforcement personal privacy exemptions rose 23 percent and 35 percent, respectively, in 2012 to their highest usage levels since 2002, when the use of both exemptions experienced extreme spikes likely related to greater information withholding in the aftermath of the 9/11 terrorist attacks.

The use of the internal rules exemption, once one of the most frequently used exemptions, was almost entirely eliminated (92 percent reduction) in the ongoing shift after the March 2011 U.S. Supreme Court ruling in *Milner v. Navy*, which restricted how broadly the government could apply the exemption.¹¹ However, a subsequent increase (43 percent) in the use of the interagency memos exemption suggests

¹¹ *Milner v. Navy*, 131 S.Ct. 1259 (2011), <http://www.supremecourt.gov/opinions/10pdf/09-1163.pdf>.



that some agencies may have expanded the use of this exemption to withhold records that had previously been claimed as internal rules.

The “statutory” exemption, which was the fastest growing exemption in 2011, declined in use almost 15 percent in 2012. This drop was primarily driven by a significant reduction in use at the State Department: its use fell 62 percent between 2011 and 2012. (In 2011, the State Department sharply increased its use of an exemption to withhold information relating to visa applications, which drove up the usage temporarily.) The overall decline in the use of exemption 3 would have been larger if not for the doubling of its use at DHS and a 30 percent increase at the Equal Employment Opportunity Commission.

Cost Effectiveness

For the first time, we also evaluated the amount spent by each agency to process FOIA requests. The 2012 cost data reveals enormous variation. The highest costs per processed request in 2012 among the 25 agencies examined were at the Nuclear Regulatory Commission (\$8,900) and Department of Energy (\$3,800). Several agencies were able to keep costs per request under \$200, including the Department of Homeland Security, which receives and processes more requests than any other agency.

The 10 agencies with the highest cost per request all processed fewer than 10,000 requests, so there may be some economies of scale in processing FOIA requests. However, four other agencies processed fewer than 10,000 requests and had significantly lower costs per request – the National Labor Relations Board, the Small Business Administration, the Consumer Product Safety Commission, and the National Science Foundation – so it is possible for agencies with smaller FOIA programs to achieve a lower cost per request.

4. Recommendations for Improving Agency Responses to FOIA

We believe that FOIA performance could be improved significantly with improved compliance efforts, a stronger ombudsman, expanded proactive disclosure, better technology, congressional oversight, and expanded reporting. It should be possible to further reduce backlogs while continuing to release high amounts of the information requested, and limiting claims of exemptions.

Improve Compliance Efforts

Despite the OPEN Government Act’s requirements and new FOIA policies from the Obama administration, agencies seem to feel little pressure to improve FOIA performance. The Justice Department should be more aggressive in overseeing compliance by agencies. To improve compliance, Congress should codify the Obama memo’s presumption of openness and the Holder memo’s foreseeable harm standard for withholding. Additionally, the Justice Department should follow the Holder memo’s standard and direct agencies to take all reasonable steps to avoid litigation, including resolving disputes without litigation. When cases do come to court, agency lawyers should argue positions consistent with the president and attorney general’s transparency principles.

Strengthen the Ombudsman



The Office of Government Information Services (OGIS), created under the OPEN Government Act, is already having a positive impact on FOIA processing, despite its limited budget and authority. OGIS has developed a set of best practices for agencies to follow in FOIA implementation, ranging across issues like communications, customer service, and regulations. The administration should explore ways to expand and strengthen OGIS to get the full benefit of an independent ombudsman on FOIA. The office's authority to research and investigate FOIA implementation issues should be expanded so OGIS can explore the more troubling trends – the increased use of partial releases of information requests, the expanded use of key exemptions, and the extent of withholding in partial grants. OGIS should also be tasked with more regularly providing recommendations for improving information collection and enforcement and the creation of new incentives for compliance.

Expand FOIA's Proactive Disclosure Requirements

In an ideal world, the public would be able to easily find government information without needing to file a FOIA request. A 21st century framework for public access must start with a presumption of openness in government. Agencies should explain their activities and operations to the public by routinely posting information online in timely, easy-to-find, and searchable formats.

FOIA already requires agencies to proactively make available certain information, such as final opinions, statements of policy, and votes in agency proceedings.¹² However, these requirements have not been updated since the E-FOIA Act of 1996.¹³ More robust proactive disclosure of information could save staff time and effort by reducing duplicative FOIA requests. The Obama administration made good progress during its first term with the development of Data.gov and new requirements to post information online, but more is needed.

Congress should establish agencies' affirmative obligation to proactively disclose information online, making the principle stated in President Obama's FOIA memo law. This would set openness as the norm and raise awareness of agencies' disclosure responsibilities.

In addition, Congress should require agencies to establish procedures to proactively identify information of public interest and post it online. This would provide an instrument for realizing agencies' affirmative obligation to disclose. A few agencies have already moved to incorporate such procedures in their FOIA regulations.¹⁴

Congress should expand the types of information that agencies are required to proactively disclose to better provide transparency and accountability for core agency functions. All agencies should be required to post key data and records to show how the agency is operating. Specifically, the minimum

¹² 5 USC 552(a)(1), (2), (5).

¹³ See Sec. 4 of the Electronic Freedom of Information Act Amendments of 1996, P.L. 104-231.

¹⁴ Interior Department at 43 CFR 2.67; Special Inspector General for Afghanistan Reconstruction at 5 CFR 9301.4. Cf. Justice Department, "Freedom of Information Act Regulations," proposed rule, March 21, 2011, 76 FR 15236 ("Each component is responsible for determining which of its records are required to be made publicly available, as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting such records.").



standards for disclosure should require agencies to proactively release communications with Congress, FOIA requests and released documents, visitor logs, employee directories, calendars of senior officials, and information about agency advisory panels.¹⁵

Congress should also require agencies to post documents that have been released by the agency in response to a FOIA request. Under E-FOIA, agencies are required to post released documents that the agency considers likely to be the subject of multiple requests.¹⁶ Expanding this requirement to *all* released records, with appropriate exemptions,¹⁷ would make the information more accessible and reduce duplicative requests.

Leverage Technology for Faster Processing

Congress should build on the tracking numbers assigned to each FOIA request required by the OPEN Government Act and mandate that agencies provide automated status information in order to minimize delays. Congress should also require every agency to receive requests and post responses online.

The new interagency portal, FOIAonline, should be improved to add additional functions and a better user interface. The administration and Congress should begin planning to scale up the website to handle government-wide participation.

Codify Reforms and Provide More Oversight

The administration made progress on stronger FOIA policies in its first term, but without legislative action, much of this progress could disappear when the next president assumes office. Congress should pursue legislation to secure FOIA improvements for the long term. A legislative FOIA update should begin by codifying the presumption of openness, withholding records only in the event of foreseeable harm, and an affirmative obligation to disclose.

In addition, Congress should actively exercise its independent oversight role and hold regular hearings on FOIA performance and policies. The goal of this oversight should be to discover best practices, improve on existing efforts, and develop FOIA legislation, not just uncover shortcomings. Congress should also address issues such the allocation and effective use of resources to implement FOIA.

Expand Reporting Requirements

The expanded reporting requirements under the OPEN Government Act have helped shed new light on the state of agencies backlogs and their responsiveness to different types of requests. The new quarterly FOIA reporting requirements that DOJ has initiated should help identify problems within agency performance quicker, but more data is needed.

¹⁵ See “Minimum Standards of Open Government,” <http://www.foreffectivegov.org/files/info/open-gov-min-standards-final.pdf>.

¹⁶ 5 U.S.C. § 552(a)(2)(D).

¹⁷ *E.g.*, records released in response to “first-person requests” for records about the requester, such as those made jointly under FOIA and the Privacy Act (5 U.S.C. § 552a).



For instance, agencies should be reporting how much information is being withheld under partial releases. This could be as simple as a record or page count. Ideally, the data on withholding could be linked with the exemptions claimed so we could better understand how much withholding occurs under each exemption.

6. Conclusion

Like the Committee, the Center for Effective Government is committed to improving FOIA and ensuring that federal agencies provide timely and complete responses to the public's requests for information.

The OPEN Government Act and the Obama administration's new FOIA policies have had a positive impact. Agencies are steadily increasing the number and percentage of requests processed and bringing the number of pending and backlogged requests down.

However, the recent FOIA reforms and Obama administration's emphasis on open government seem to have encouraged a new surge in the use of FOIA requests, increasing the compliance challenge.

Unfortunately, agencies continue to use exemptions and partial granting of requests at high rates to withhold information from the public. In the last four years, we have seen the percentage of full information requests granted fall to its lowest levels. Agencies are increasingly using exemptions to limit the amount of information disclosed in response to FOIA requests. Full granting of requests is seen as more open and likely more cost effective. Data from the late 1990s indicates that it is possible to grant full information requests at much higher rates.

With improved compliance efforts, a stronger ombudsman, expanded proactive disclosure, better use of online technology, more congressional oversight, and expanded reporting, we believe improved compliance and better implementation of FOIA can occur.

I sincerely thank you for the opportunity to address this Committee. Chairman and members of the Committee, I look forward to your questions.

