

QUESTIONS FOR THE RECORD

Senate Judiciary Committee

“We the People: Fulfilling the Promise of Open Government
Five Years After The OPEN Government Act”

March 13, 2013

Senator Amy Klobuchar

Questions for Sean Moulton

1. In addition to the improvements that have been made since the OPEN Government Act’s enactment, what two or three other reforms do you believe are most important to fully and effectively promoting open access to government?

The top three FOIA reforms I would recommend are:

- (1) Establish Proactive Disclosure – A 21st century framework for public access should start with agencies posting much more information online to avoid the need for FOIA requests. The law should require all agencies to proactively post online communications with Congress (reports, testimony, formal communication), all FOIA requests and released documents, all contract and grant award documents, agency visitor logs, employee directories, calendars of senior officials, and information about agency advisory panels. Agencies and the Office of Government Information Services should also be tasked with identifying new categories of records to be posted to avoid FOIA requests. Judges should also have the power to order agencies to publish information if they fail to do so.
- (2) Improve Enforcement – While FOIA performance is monitored, there is no real effort to ensure compliance and improvements from agencies. The Justice Department should be given clear responsibility to engage in aggressive enforcement of FOIA – regularly listing agencies as non-compliant or poor performers, demanding compliance plans with specific measurable milestones from lagging agencies, and instituting administrative penalties. The law should also include stronger penalties, such as mandatory fines and automatic attorney fees recovery, for agencies that force requestors to pursue lawsuits and then settle or lose in court.
- (3) Strengthen the Office of Government Information Services (OGIS), the FOIA ombudsmen. OGIS is already having a positive impact on FOIA but needs expanded authority and resources to get the full benefit of an independent ombudsman on FOIA. OGIS should have the authority to research systemic FOIA implementation problems (slow responses, expanded use of key exemptions, and increased use of partial releases) and share its recommendations with Congress and the public without having to get approval from the NARA administrator. Agencies should be required to cooperate with OGIS investigations and provide the office with any requested information. Finally, OGIS should have a budget that would allow this expanded role.

H.R. 1211, which has been reported in the House, takes some initial steps to address these issues, but we believe broader legislation is needed to achieve lasting reform.

Beyond FOIA, I would emphasize two broader open government reforms;

- (1) *Open Government Enforcement*: Inconsistent agency implementation applies not just to FOIA, but to open government activities overall. Agencies need to have a senior-level locus of authority and responsibility for transparency issues. Agencies should also issue public implementation plans for key transparency and accountability policies, including whistleblower protections, scientific integrity, and controlled unclassified information, or be required to include these plans within their Open Government Plans. There also needs to be real incentives, such as awards or public acknowledgement of leadership, for robust implementation and real penalties, such as increased oversight or required reporting on shortcomings, for failure to comply.
- (2) *Codify Open Government Reforms*: Congress should advance open government legislation to lock into statute improvements made by the Obama administration and address problems that have eluded administrative solutions. Agencies should be required to produce and regularly update plans for open government, as is currently done under the Open Government Directive. Spending transparency could be strengthened by passing legislation like the DATA Act. Agencies should also be required to proactively disclose information about rulemaking and enforcement, reports and testimony to Congress, and lobbying and special interest influence. And declassification should be simplified and streamlined to speed processing and reduce costs.

2. Generally speaking, how successful have federal agencies been in adhering to statutory requirements for agency action on FOIA requests?

Unfortunately, federal agencies have not been consistently successful in complying with the statutory requirements. In FY 2012, one third of agencies had average processing times for simple requests longer than the statutory 20-day deadline. This list of slow processing agencies included USAID (163 days), the State Department (88 days), and the Department of Homeland Security (72 days). Given that DHS receives a significantly larger number of FOIA requests than any other agency, their slow processing is particularly troubling.

Additionally, FOIA litigation has increased in the last few years. While the improved ability to recover attorney's fees under the OPEN Government Act of 2007 may have influenced this, it is likely also an indicator that agency compliance remains a problem and that requestors feel the need to take matters to court to enforce agency compliance.

Agencies have had mixed success in complying with administrative FOIA goals. The 2009 Open Government Directive instructed agencies with significant FOIA backlogs reduce their backlogs by 10 percent each year. But of the 11 cabinet agencies with more than 500 backlogged requests in fiscal year (FY) 2009, only three met the 10 percent 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. There was no year in which every agency met the assigned goal. As of the end of FY 2012, nearly 60,000 backlogged requests remained in these 11 agencies – a total reduction of 8.8 percent compared to FY 2009. This is a significant reduction, but markedly less than the administration’s goals, and still considerably short of full compliance with the law.