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"The Freedom of Information Act: Perspectives from Public Requesters"

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Chairman, Ranking Member, and Members of the Committee,

Thank you for the opportunity to testify today on the Freedom of Information Act ("FOIA"). The FOIA statute is an amendment to the original public records provisions of the Administrative Procedure Act. As such, it is part of a series of checks to the growing federal bureaucracy. As the Supreme Court has explained, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[1] Transparency advocates often quote Justice Brandeis's dictum that "Sunlight is said to be the best disinfectant."[2] But less quoted is Brandeis's statement "electric light the most efficient policeman". In our cloud and AI-based world of public information, modernized government should mean modernized transparency.

It is also important to think about FOIA in terms of where it sits within the codebooks. Title 5, where FOIA is codified, also includes a series of mechanisms that allow Congress to check the bureaucracy. These include the Hatch Act, the Government Reports Act, the creation of the Office of Special Counsel, the creation of the Merit Systems Protection Board, the Privacy Act, the Federal Advisory Committee Act, the Ethics in Government Act, the Inspector General Act, the Regulatory Flexibility Act, and the Congressional Review Act.[3] Thus FOIA is essential not simply to journalists and public interest groups, but it contributes to the congressional oversight goal of holding the federal bureaucracy accountable.

I will focus my testimony on three critical areas where reform is needed: (1) the proactive disclosure requirements of FOIA, (2) pattern or practice claim review, and (3) the effectiveness of the administrative process and reducing litigation costs.

I. Proactive Disclosure

[1] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).
[2] LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT, 92 (1914).
[3] Hon. Steven J. Menashi & Daniel Z. Epstein, *Congressional Incentives and the Administrative State*, 17 NYU J.L. & LIBERTY 172, 181–82 (2024).

FOIA was designed to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[4] Proactive disclosure under the Freedom of Information Act (FOIA) obligates agencies to publicize information notwithstanding the existence of a particular request or when certain records are frequently requested.[5] As mentioned, FOIA originated from the APA, particularly its provisions now codified at 5 U.S.C. § 552(a)(1)(A)-(E). Many practitioners think that public disclosure of, e.g., "statements of general policy or interpretations of general applicability formulated and adopted by the agency" requires a FOIA request to be made; but the context of these mandatory disclosures – the Administrative Procedure Act – informs their sui generis nature from the rest of the statute. FOIA's judicial review provisions are unique to agency failures to produce records in response to requests; there should be no reason to think that language originally reviewable under the APA is no longer reviewable under that statute.[6]

Consider that 5 U.S.C. § 552(a)(1) states that a person may not be adversely affected by any matter required to be published in the Federal Register if it has not been published, unless they have received actual and timely notice of its terms. Agencies like the Federal Trade Commission or the Food and Drug Administration often have interpretations of general applicability (i.e., these interpretations apply in all cases of agency action) for how to implement various statutes, particularly as it regards agency enforcement priorities. Because those interpretations of general applicability are rule-like, FOIA requires them to be noticed to the public, specifically to be published in the Federal Register. When a regulated party lacks such notice, FOIA states that the regulated party should not be adversely affected by the lack of public disclosure. Whether these textual requirements must be met through the judicial review provisions of the APA or the FOIA statute itself has never been clarified by legislative text.[7] A strong argument exists that judicial review under FOIA is insufficient for the requirements established in 5 U.S.C. § 551(a)(1). Subsection (b) of FOIA allows agencies to claim exemptions to withhold requested records from the public. It would be odd to see Federal Register publications littered with withholdings.

There are solutions to these problems. Issued in 2019, Executive Order 13892 used this legal interpretation as a basis for mandating public disclosure of a whole host of agency decisions. It was rescinded on January 20, 2021, but would strongly serve the public interest if codified by Congress. Agencies generally comply with proactive disclosure requirements, including using searchable electronic reading rooms to

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[4] Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (quoting Rose v. Dep't of the Air Force, 495 F.2d 261, 263 (2d Cir. 1974)).

[5] *E.g.,* 2016 FOIA Improvement Act.

[6] *See Citizens for Resp. & Ethics in Washington v. United States Dep't of Just.,* 846 F.3d 1235, 1238 (D.C. Cir. 2017) (affirming dismissal on grounds that the APA provides no remedy to force an agency to meet its "reading-room" obligations).

[7] *See New York Legal Assistance Grp. v. Bd. of Immigr. Appeals,* 987 F.3d 207, 209 (2d Cir. 2021) (explaining that the Senate Report to the 1974 Amendments suggested that the judicial review provisions of FOIA should apply to 5 U.S.C. § 552(a)(1)).

post frequently requested records. But even greater transparency could be achieved by using technology to allow requesters to search for specific keywords within a set of documents as relevant documents may be in the thousands, if not hundreds of thousands, of pages. While I am not a technology expert, it is imaginable that agencies create APIs that allow the FOIA community to input data and run it through AI document software to make key findings.

II. Pattern or Practice Claims

A pattern or practice claim under FOIA is established when a plaintiff demonstrates the agency defendant has consistently failed to comply with FOIA's requirements, typically in the form of chronic delays and backlogs in responding to requests.[8] In order to establish the claim, a plaintiff must show that the agency's violations are not isolated incidents but part of a broader, ongoing agency policy or practice that impairs the plaintiff's lawful access to information.[9]

However, pattern or practice claims alleging systematic delays or denials are difficult to win. Violations of statutory deadlines can inform a pattern or practice cause of action, but past delays alone are insufficient unless they demonstrate a likelihood of future harm.[10]

This standard places a heavy burden on plaintiffs and underscores the need for legislative clarity. In a world of increasing backlog with FOIA processing, agencies may strategically delay complex or politically salient requests to avoid political risk with disclosing documents.[11] It is hard to show that such agency delay was the result of an intention to unreasonably delay processing versus a recognition that the FOIA workload takes time to process.

Congress should clarify that when agencies engage in a pattern or practice of withholding documents or delaying processing, they are acting in an arbitrary and capricious manner subject to judicial review. Otherwise, courts will conclude that given agency backlogs, processing delay is not unreasonable and withholding of relevant documents may simply be expected.

Of course, because pattern or practice claims are only successful when plaintiffs can provide evidence of persistent agency failures to comply with FOIA, they require enormous legal resources that most public interest requesters lack. To succeed in a pattern or practice case, plaintiffs must provide evidence, through affidavits or examples of similarly situated requesters being denied information access, either of which requires the hiring or employment of lawyers.

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[8] Nightingale v. U.S. Citizenship and Immigration Services, 507 F.Supp.3d 1193 (2020)).
[9] Hajro v. U.S. Citizenship and Immigration Services, 811 F.3d 1086 (2016)).
[10] Judicial Watch, Inc. v. DHS, 895 F.3d 770 (D.C. Cir. 2018).
[11] Am. First Legal Found. v. Becerra, No. CV 24-1092 (RC), 2024 WL 3741402, at *2 (D.D.C. Aug. 9, 2024) (finding "it was CDC's practice to delete former lower-level employees' email accounts (and any emails remaining in those accounts) thirty days after the employee's departure from the agency").

The standard of review for a pattern or practice claim (which some courts describe as a policy or practice claim) is whether the agency's ongoing failure to comply with FOIA will impair the requester's future access to information. In addition to identifying intentional delay as arbitrary and capricious, Congress should also clarify that any such practice is itself the sort of rule of general applicability that must be publicly noticed in the Federal Register. Agency noncompliance with public notice requirements should entail some form of sanction or penalty on the agency.

III. Administrative Fixes and Costs

Litigation remains a costly yet frequently necessary tool for FOIA requesters. According to the Department of Justice's annual FOIA litigation reports, the number of FOIA lawsuits has steadily increased over the past decade, largely due to agency delay or non-responsiveness.

Congress sought to respond to these problems by providing a plaintiff with attorney's fees whenever the plaintiff "substantially prevail[ed]" in a case.[12] Yet such determinations give courts discretion to determine whether a plaintiff, typically in a summary judgment posture, won enough claims to have substantially prevailed. Due to such uncertainty, small organizations or individuals filing FOIA requests often end their process at the administrative stage.

Thus, for these requesters, the administrative exhaustion process is crucial for their rights to be advanced. Because agencies are allowed to charge fees to requesters before conducting database searches and reproduction of documents, establishing public interest and media representative fee waivers is an important tool for requesters without a litigation budget.[13] Of course, while the courts recognize that fee waiver applications should be liberally construed in favor of noncommercial requesters, such as researchers, journalists, and public interest watchdog groups,[14] such waivers do not guarantee that agencies will conduct thorough searches or provide responsive records, meaning that requesters will still have to go through an administrative appeals process to seek records when withholding has occurred.

As my co-panelist Professor Kwoka has written, the majority of FOIA requests come from commercial entities, not civic watchdogs. This commercialization of FOIA has meant that public interest requesters are often pushed into a backlog. As Kwoka recommends, technology – and I would add AI-informed search tools – can be a critical way to provide requesters robust, technology-enabled access to information that can reduce backlogs and litigation costs.

As such, Congress should clarify the standard for "substantially prevailing" to mean whenever an agency is judicially compelled to take some action it refused to do during the administrative process. Concerning the administrative process, Congress

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[12] McKinley v. Board of Governors of the Federal Reserve System, 647 F.3d 331 (D.C. Cir. 2011); *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008).
[13] Southeastern Legal Foundation, Inc. v. United States Environmental Protection Division, 181 F.Supp.3d 1063 (2016).
[14] Cause of Action v. Federal Trade Com'n, 961 F.Supp.2d 142 (2013).

has established the Office of Government Information Services (OGIS) at the National Archives. From my experience, OGIS's resources are limited and taxed, limiting its activities to simply notifying agencies of an issue without robust attempts to mediate disputes. A congressional direction to OGIS to have more teeth in its negotiations with agencies can help avoid litigation and provide remedies to the requester community.