

Testimony of Kevin M. Goldberg

On behalf of

Sunshine in Government Initiative
American Society of News Editors

On

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

Before the

Committee on the Judiciary
United States Senate

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Chairman Leahy, Ranking Member Grassley and Members of the Committee on the Judiciary,

I want to thank you for the opportunity to testify today on behalf of both the Sunshine in Government Initiative ("SGI"), a coalition of nine media organizations dedicated to promoting policies that ensure government is accessible, accountable and open, and one of SGI's members, the American Society of News Editors ("ASNE"), for whom I serve as Legal Counsel.

With some 500 members, ASNE is an organization that includes editors of daily news entities throughout the Americas. Founded in 1922 as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, and leadership development. ASNE launched Sunshine Week in 2005 and continues to serve, with the Reporters Committee for Freedom of the Press, as a co-coordinator of this important effort that is generously funded by the John L and James S Knight Foundation and Bloomberg News.

FOIA and the OPEN Government Act: A Mixed Bag of Mainly Unrealized Expectations.

I am glad to be submitting this testimony because I feel a sense of responsibility that we are even discussing this topic today. As a participant in the conversations leading to passage of the Openness Promotes Effectiveness in our National (OPEN) Government Act, I clearly recall how optimistic we all felt almost *eight years ago* when we set out to reform the federal Freedom of Information Act (FOIA) for the 21st Century. Those 2007 amendments to FOIA noted Congress should remain an active participant in ensuring agencies comply with FOIA's requirements:

Congress should regularly review section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), in order to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the fundamental 'right to know'.

A year later our optimism grew when President Obama took office, proclaiming on January 21, 2009 that his Administration would be:

[C]ommitted to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.

Five years after the passage of those amendments, and despite the President's decree, there remains significant, often heated, discussion as to whether these aspirations have turned into reality.

The impact of the OPEN Government Act has been a very mixed bag. Some elements have worked; others have fallen completely flat. Some provisions ultimately didn't go far enough. It may not surprise you when I say that most of the original goals of the OPEN Government Act – and FOIA itself – simply haven't been realized. For the majority of FOIA requesters, FOIA processing appears unchanged; in the words of what I understand to be Senator Leahy's favorite Grateful Dead song, it remains a "Black Muddy River" that "simply rolls on forever."

Clearly the Administration has promoted openness through such efforts as the Justice Department's FOIA.gov site and the internationally-focused Open Government Partnership. The Administration has reinstated the presumption of openness that Congress intended and so many of us see when reading the text of FOIA. The Administration, too, has set a clear goal for agencies to reduce backlogs.

At the same time, these strong efforts only go so far. Enforcing the law has always been challenging. FOIA remains a law with few teeth and little bite.

And too often agencies devote resources to backlogged requests at the expense of other aspects of their FOIA duties. This occurs even though there is exciting new technology that could reinvent both how agencies manage FOIA requests while also guaranteeing that agencies remain accountable; but they, like FOIA compliance generally, need active support from Congress and the White House to ensure their promise is realized.

While pessimism has overshadowed our earlier optimism, it has not purged it. That's why I'm glad to work with this Committee to start the process of getting us back on the right track – to finish what we started eight years ago.

Specifically, *the* starting point for the OPEN Government Act was Senator Cornyn's desire to put teeth into the federal FOIA by creating an enforcement mechanism like he enjoyed as the Attorney General of Texas. Though not everybody may agree with the oft-repeated mantra by his fellow Lone Star stater that "everything's better in Texas," we sure thought Senator Cornyn was onto something.

But the effort to insert a strong enforcement mechanism for FOIA was quickly diluted. As often occurs, once the door was opened, several other changes were ushered in. These provisions can generally be divided into "substantive disclosure provisions," which might be described as those intended to make the government adhere to the letter of the law, and "procedural processing provisions" which might be described as attempts to make the system work better.

The OPEN Government Act Created Tools to Give Requesters Some Leverage, but the Administration’s Unwillingness to Commit to Transparency Shows Further Enforcement Mechanisms Are Needed.

On the substantive disclosure side, the strongest enforcement tool has always been the right to judicial review. But litigation is expensive for all litigants, especially individuals without corporate backing. That’s why our ultimate hope for the OPEN Government Act could be boiled down to two goals: (1) the law would give requesters a way to avoid protracted litigation and (2) the law would compensate those who still must endure litigation.

Open Government Act Success Stories: OGIS and the “*Buckhannon Fix*”.

We continue to believe that the new Office of Government Information Services (OGIS) created by the OPEN Government Act and housed in the National Archives and Records Administration has offered some initial positive assistance as a litigation avoidance tool. It has also held agencies accountable and changed agency mindsets regarding disclosure. If anything, this office needs more power and resources in order to perform an enforcement role. OGIS has helped avoid bigger disputes when agencies fail to communicate and resolve processing issues that arise. However, we would like agencies to be more receptive to mediation. This would free OGIS to tackle substantive disputes. It would also allow OGIS to offer interpretive guidance to agencies via advisory opinions and independent recommendations.

Another successful change made in 2007 – fixing what Senator Cornyn called the “Buckhannon Tax” – has emboldened the requester community to fight back against excessive government secrecy. This change broadened those instances in which a litigant could receive attorney’s fees from the government when required to pursue an adverse FOIA decision in court.

As Senators Leahy and Cornyn are well aware, for several years requesters were discouraged from bringing suits against the government in part due to the 2002 Supreme Court decision (unrelated to FOIA but later extended to apply to FOIA litigation) in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*. The number of lawsuits declined, but not because cases were settled or requests were granted. Rather, potential litigants simply didn't sue. Buckhannon effectively created a loophole that allowed the government to avoid paying legal fees by offering some or all of the records in a settlement prior to the issuance of a final court order.

Since 2007, however, federal court litigation of FOIA issues has steadily increased. According to a study released by the Transactional Records Access Clearinghouse on December 20, 2012, there were 720 FOIA lawsuits filed in federal court in Fiscal Years 2011-2012, up from 562 filed in Fiscal Years 2007-2008, before the attorney's fee provisions of the OPEN Government Act took hold.

While one might say that increased litigation is a failure, we view this as clear evidence that requesters are emboldened to take advantage of the strongest enforcement mechanism within the law: the ability to turn to the independent federal judiciary to resolve the dispute. This fix made it harder for the government to play the waiting game, drawing out the process, stalling at every turn, and emotionally and financially frustrating the requester until the requester simply gave up.

One recent example further shows how important this change has been. When famed civil rights photographer Ernest Withers died in October 2007, a reporter from the Memphis Commercial Appeal requested records relating to Withers from the FBI. Just enough was

disclosed to confirm a tip that Withers had been an FBI informant during the civil rights era, but the agency refused to disclose an even larger amount of information. Last month the Commercial Appeal and the FBI reached a settlement that will result in disclosure of a significant amount of information about the FBI's surveillance of civil rights leaders. The Commercial Appeal will receive \$ 186,000 in attorney's fees as a result of the settlement. Given that the Commercial Appeal might have faced chasing those records down the rabbit hole without any prospect of financial reimbursement, it is unclear that the paper would have prosecuted its claim before 2007. In this instance, the "system" worked: the Administration took an ill-advised position regarding the disclosure of important records but the law held them accountable.

But this Administration continues, at times, to unrelentingly cling to information in ways that would appear to be directly contrary to the OPEN Government Act and its own leaders' stated goals in the area of government transparency. Perhaps it is not surprising that little has changed in the way of substantive disclosure when even the straightforward updates that Congress enacted have spread across federal agencies slowly. According to a study released on December 4, 2012 by the National Security Archive, only 43 of 99 Executive Branch agencies have revised their FOIA regulations to conform to the OPEN Government Act. Just to be clear on the math: that's less than 50 percent over five years later.

Continued Substantive Withholding and Reliance on (B)(3) Exemptions Remain a Problem.

But one would certainly expect more based on the President's own words from January 2009. One would definitely expect more given Attorney General Holder's March 19, 2009 "Memorandum for Heads of Executive Departments and Agencies," in which agencies were told

that FOIA should be administered with a clear presumption of disclosure. Attorney General Holder also told agencies that exemptions should only be applied if an agency reasonably foresees that disclosure would harm an interest protected by one of those exemptions or if disclosure is prohibited by law.

Yet, this memorandum has had little visible impact for many reporters and other citizens requesting information from the government. Agency annual reports reveal no clear evidence that agencies have changed their practices. FOIA's text already has the right balance between the presumption of openness and strong national security protections. But the Administration still may be encouraging secrecy by rejecting transparency in tough cases.

One example is the refusal to release photographs showing the treatment of detainees by U.S. troops at Abu Ghraib prison in Iraq (a decision that was overturned by the United States Court of Appeals for the Second Circuit). We can also point to the withholding of Office of Legal Counsel memoranda. But perhaps one of the more egregious examples is a recent change in position by the U.S. Marshals service with regard to the release of federal booking photos (more commonly known as "mug shots"), which runs contrary to long-standing and established precedent within the area covered by the United States Court of Appeals for the Sixth Circuit that such records cannot be withheld under FOIA. So despite the words on paper, the reality is that FOIA still lacks enforcement.

And where the Administration has affirmatively embraced transparency, the actions seem to come with an asterisk. For several years now, the Administration has pointed to the disclosure of the Secret Service's White House Visitor Logs as Exhibit A to support its claim of unprecedented transparency. However, it still fights against any legal basis within FOIA that

requires the Secret Service to release these names, thus reserving the right for it or future Administrations to change course at any time.

The continuing problem of withholding under the exemption found in 5 U.S.C. 552 (b)(3) (information exempted under other statutes) remains one of the biggest substantive impediments in the Act. Executive branch agencies or special interests attempt to pitch these exemptions to congressional committees. Committee members and staff who are focused on the substantive issues often show little to no concern for transparency and oversight on those issues. The Sunshine in Government Initiative has counted over 250 such statutes already in existence, preventing access to seemingly harmless from the location of historical caves to the losing bids filed to obtain federal contracts, all of which would be useful to the public in a variety of ways. Congress attempted to slow the proliferation of these exemptions in 2009 by requiring a specific citation to 5 U.S.C. 552 in order for the exemption to be effective. The idea behind this provision was to make it easier for parties wishing to oppose the proposed (b)(3) exemption to actually find it without sifting through every line of every bill introduced in Congress. However, this has been only moderately successful. We continue to find (b)(3)'s tucked into much larger bills, and we have been able to find them earlier in the legislative process and are therefore more effective in addressing transparency and the needs for confidentiality. But finding these bills still takes time and Congress has done a poor job of reviewing these proposals to ensure they make good policy.

Congress Should Build on the Administration's Successful Use of Technology to Improve on Still Sluggish Processing of Requests.

The procedural side also reveals a mixed bag, though this time the root causes and possible answers go beyond just enforcement issues. We see great potential for technological

advances to improve FOIA processing; we are simply not sure whether that potential will be fully realized.

The Attempt to Hold Agencies to the Twenty Day Response Time Did Not Work.

The major enforcement element from the OPEN Government Act – one which merely sought to compel faster FOIA processing – simply has not been successful. The requirement that agencies respond to requests within twenty days or lose the right to collect certain fees, has been riddled with exceptions and, frankly, wasn't all that strong to begin with. We have not seen any change in the agencies' practices as a result of this "enforcement mechanism." The twenty day deadline failed to cause agencies to respond quickly.

Let me give you an illustration of that failure. On March 7, 2011, Citizens for Responsibility and Ethics in Washington (CREW) requested records from the Federal Election Commission relating to correspondence between three FEC Commissioners and outside individuals and entities. It also sought calendars and agendas for these commissioners and all written *ex parte* communications sent to an FEC ethics officer. Within a day, the FEC gave a relatively standard response acknowledging receipt of the request and granting a waiver of search and review fees. It did not indicate whether it would grant or deny the request; it certainly did not provide the records themselves. On May 24, 2011, CREW filed a lawsuit in the United States District Court for the District of Columbia which ruled for the FEC, stating that "[i]n the event [an] agency intends to produce documents in response to [a] request, the agency need only (1) notify the requesting party within twenty days that the agency intends to comply; and (2) produce the documents 'promptly.'"

The case is now on appeal to the United States Court of Appeals for the District of Columbia Circuit. The FEC is one of the few agencies that represents itself in federal court in FOIA litigation but -- astonishingly -- the Department of Justice filed an amicus brief supporting the FEC's position that even a standard issue "we have your request" constitutes a response under FOIA. In other words, the official position of the Justice Department is that any communication with a requester satisfies the twenty day response requirement. This shows complete and utter disdain for the law and begs for Congressional clarification regarding the twenty day deadline.

A Better Answer Lies with Technology – Especially That Already In Use by Some Agencies.

But enforcement or not, the issue has always been a lack of resources. While we understand that Congress is unlikely and probably unable to allocate more money to FOIA processing, we believe encouraging the Administration to focus – and perhaps forcing it to improve – on the area where the Administration has shown its greatest success will be the most efficient and effective way to move FOIA forward.

The Administration has not gotten enough credit on the procedural processing side for all it has done in terms of harnessing technology to make processing more efficient. The new records management edict recently approved by the Administration to transition to digital recordkeeping by 2020 will pay huge dividends for FOIA requesters as records are easier to search, duplicate and produce in a useable format. The Administration rightly recognizes that FOIA processing – in fact, all records management and administration – has been hindered by the incredible number of paper records which take up space and are difficult to maintain and produce. Efforts to address this can go further and Congress can assist the efforts in this areas.

Digitizing and better organizing the government's records is just one step. It is clear that the FOIA system itself is bogged down by the sheer number of requests and the sheer lack of resources available to process those requests. There were 631,424 requests processed across government in Fiscal Year 2011. But the FOIA backlog at the end of the fiscal year was 83,490 requests, which represents a slight increase from the prior fiscal year. The oldest pending request at the end of fiscal year 2011 was filed with the National Archives and Records Administration on September 28, 1992.

However, two FOIA-related technology projects provide the most direct way to unburden this system.

The first of the two, the Justice Department's FOIA.gov website, is intended to give the public a sense of how well or poorly federal agencies are keeping up with their FOIA responsibilities. FOIA.gov is a step in the right direction. The site provides good guidance for requesters starting out, links to federal agency FOIA offices and data on how well or poorly agencies are fulfilling their FOIA responsibilities. We urge the Department to continue to improve the analytic tools available through FOIA.gov and improve the quality of data from agencies.

But, as Justice Department officials told the Government Accountability Office last year, the Justice Department never intended FOIA.gov to be a tool for agencies to manage their FOIA requests. That's why a separate project to do exactly that merits full support.

The new "FOIA Online" system being created by the Environmental Protection Agency (EPA) with the Department of Commerce and National Archives and Records Administration promises to be a cost-efficient, build-once shared system for agencies to accept, process and

respond to FOIA requests with a release-for-one, release-for-all approach. It came online on October 1, 2012 and the number of participating agencies can be counted on two hands. It's a good start, but FOIA Online needs to rapidly expand. Unfortunately, its development has not attracted the support that its benefits would merit.

This is tragic. FOIA Online can help reduce backlogs in several ways. First, it will increase "proactive" disclosure of frequently requested records. Passed as part of the 1996 "Electronic Freedom of Information Act Amendments" or "E-FOIA," proactive disclosure of frequently requested records has been one of the most unfulfilled promises of the Freedom of Information Act. The law requires that agencies make available without request:

[C]opies of all records, regardless of form or format, which have been released to any person ...and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.

The idea behind this provision was to take pressure off the system by removing the low-hanging fruit. Every record that is voluntarily produced is one less record that must be requested, processed and delivered.

The lack of a clear definition for "frequently requested records" however, means agencies do not provide records in this manner. FOIA Online creates a mechanism to automate proactive disclosure. If a record has been requested and produced via FOIA Online, it will automatically become part of an online database of records that can be searched and obtained by anyone. Because these are documents that are already public, there should be no concern that any exemptions apply. They should be public for one and for all, immediately.

The process will also be streamlined for individual requesters filing new requests. The FOIA Online system builds on one of the requirements created in the OPEN Government Act:

that each agency create a tracking system to allow individuals to track their requests throughout the process. FOIA Online can automate this function.

The EPA's early data demonstrated that significant benefits are reaped from the system from the moment a request is filed. Whereas it takes approximately twenty minutes for the request to be manually entered into most of the proprietary software used by the various agencies today and another ten minutes to generate a letter acknowledging the request, FOIA Online automates this as well, generating an instantaneous confirmation.

Here are some fun facts to put that time savings into perspective. If one looks at the 651,254 requests filed in Fiscal Year 2012 and multiplies that number by 30 minutes per request, the result is a savings of 325,627 person-hours that could be better spent on substantive processing tasks. Another way to look at that second number is that it equates to 162.8 full-time employee equivalents – you'd effectively be creating 163 new FOIA officers by using this new system.

The system also makes it easier for intra-agency conversations to occur. One of the biggest delays in FOIA processing occurs when one component of an agency must check with another component to determine if records exist that are responsive to a particular request. This is also one of the areas in which the agencies get a free pass, as the twenty day response time is legally tolled when an agency component must check with other components in order to respond to a request.

The FOIA Online system provides multiple benefits here. One request can effectively be sent to each component at the same time. Furthermore, when components or agencies that must interact are using different processing software, the process slows down even more; use of FOIA

Online would allow components or agencies to “talk” to one another more efficiently. It will also circumvent agency attempts to delay response or even delivery of records by taking advantage of the tolling provisions, putting some teeth back into the law.

Creating, maintaining, growing and promoting FOIA Online will cost money, but it is money that agencies can divert from more expensive proprietary software licenses. The government can both avoid costs immediately as agencies join FOIA Online, and spend less money fulfilling its FOIA responsibilities.

Congressional Action Items.

Against this backdrop of moderate success, greater disappointment and vast potential, we offer a few modest proposals for Congressional action.

Changes to Enhance Substantive Disclosure.

On the substantive enforcement side, we hope that Congress can strengthen the Office of Government Information Services and do more to hold agencies directly accountable. Congress should find a way to allocate more money to OGIS. It should increase the office’s authority to hold other agencies accountable. It must be clear that OGIS has the power to speak independently.

However, given more independence and greater resources, OGIS itself must be held accountable to fulfill its mission. It is not enough to force agencies to answer the phone. It is not even enough to bring agencies to the table for occasional mediation. OGIS must be directed to exercise its advisory opinion power so as to build a record that requesters can use to themselves hold agencies accountable in the future. Ideally, these advisory opinions would have some value

should the requester still have to go to court. The existence of an advisory opinion from OGIS could create a rebuttable presumption that the records should be released; or it could ensure some measure of statutory damages or attorney fees if continued agency obstinacy forces litigation.

There must be some form of individual accountability at the agency level when the law is violated. Current enforcement provisions are conducive to excess secrecy: there is little to motivate the individual FOIA officers to fulfill the law's mandate of "disclosure, not secrecy".

Congress should examine whether it can force – or at the very least encourage – agencies to incorporate information disclosure into every federal government employee's overall performance review. These should be independent assessments that assist in identifying those employees who are doing things well and calling out those who do not. The Office of Information Policy's mandate is to "encourage" agency compliance with FOIA, and they do that. But FOIA needs more than encouragement. It needs enforcement and it needs accountability.

Codifying the standard for FOIA withholding laid out by Attorney General Holder in his March 2009 memorandum – that requests should only be disclosed if there is foreseeable harm that would result from their disclosure -- would also help here. We realize this will not suddenly snap agencies into compliance but it might make individuals within government recalibrate their "default setting" to the law's stated goal of "disclosure before secrecy". Plus there would be the added bonus of giving requesters who must go into court some leverage against the tendency of judges to defer to agency decisions to withhold information whenever an exemption applies.

Changes to Enhance Processing.

On the procedural side, Congress should throw the full force of its oversight and its power of the purse behind FOIA Online. This is the future of FOIA processing. Let FOIA

Online adapt as more agencies are integrated. Solutions built for one agency should be used by all agencies. FOIA Online recycles existing taxpayer technology investments. It saves money.

Congress should require agencies to switch to FOIA Online as their existing software contracts expire. Don't let agencies continue their current, wasteful ways. Compel them to do better. If it isn't ready to go all in on FOIA Online, Congress should increase the sample size of the present experiment to confirm that the service really is more efficient. It should specifically target those agencies that most frequently interact with the Department of Commerce, the EPA, the Federal Labor Relations Authority, the Merit Systems Protection Board, the National Archives and Records Administration and the Department of Treasury (the agencies currently using FOIA Online) to see whether inter-agency interaction is enhanced by this system. If, as we expect, these agencies see the benefit, Congress should immediately and fully back FOIA Online and demand that the Administration do the same.

By saving money on FOIA software licenses, diverting some of it to joining FOIA Online and giving the rest back to taxpayers, agencies will likely improve their implementation of FOIA. The Administration and Congress should fully back this effort.

The proposals we suggest are necessary to avoid finding ourselves back here five to six years from now, summing up an unchanged – or perhaps degraded – Freedom of Information Act with the lamentations of one of my personal icons, Bruce Springsteen: “somewhere along the line we slipped off track. Going one step up and two steps back”.

Mr. Chairman, we appreciate working with you to ensure transparency moves *two steps forward* for every single step back. Thank you for the opportunity to testify today before this Committee and I look forward to answering your questions.