

**Testimony for the
U.S. Senate
Committee on the Judiciary
Senator Patrick Leahy, Vermont, Chairman**

**on
“The Freedom of Information Act:
Ensuring Transparency and Accountability in the Digital Age”**

by

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Mr. Chairman, members of this committee, I am pleased to be here during Sunshine Week to talk about the Freedom of Information Act, our bedrock law for ensuring government openness and accountability.

This hearing comes at a momentous time for FOIA. Last week’s Supreme Court ruling narrows the overbroad interpretation of FOIA’s Exemption 2, which allows the federal government to withhold information “related solely to the internal personnel rules and practices of an agency.”¹ Lower court rulings have allowed federal agencies to use this as a catch-all exemption to hide information well beyond personnel matters. Now, thanks to the Court’s 8-1 decision, this is no longer acceptable.

We should celebrate this victory but the last several years show that agency culture and longstanding practice on FOIA are not easily upended, even when confronted with new policy and legal interpretation. Indeed, President Obama has delivered in many respects on his promise to have the most transparent administration in the nation’s history, but the results on FOIA remain disappointing.

That’s not because of FOIA policy—the administration has the right policy. Attorney General Eric Holder’s FOIA memorandum, issued at the president’s direction, gives federal agencies a simple instruction: “In the face of doubt, openness prevails.”² And the Office of Management and Budget’s Open Government Directive instructs agencies to reduce significant backlogs of pending FOIA requests by 10 percent each year.³

The problem is in the implementation. Federal agencies in the year after the Holder memo increased their use of legal exemptions to keep more records secret, according to the Associated Press.⁴ There is also evidence that agencies have reduced backlogs through administrative maneuvers, not by providing requested information.⁵ And the Justice Department continues to defend expansive agency interpretations of FOIA exemptions, including in the case that the Supreme Court just overturned.⁶

The question we face now is this: How do we turn good policy into reality? I suggest three steps:

- First, require automatic Internet disclosure for most information.
- Second, build a searchable online database where the public can track FOIA requests and view agency responses.
- Third, improve the quality of information used to assess FOIA implementation.

Let's take these one at a time.

Requiring automatic disclosure

When FOIA became law in 1966, then-Attorney General Ramsey Clark simply and profoundly summarized its core principles in these words:

- That disclosure be the general rule, not the exception
- That all individuals have equal rights of access
- That the burden be on the Government to justify the withholding of a document, not on the person who requests it
- That individuals improperly denied access to documents have a right to seek injunctive relief in the courts
- That there be a change in Government policy and attitude⁷

These principles still guide us today but they should be updated for the digital age. Disclosure should be the general rule not just in response to requests but as a matter of course. And it should be done through the Internet—so everyone has actual access, not just the right to access. Government should bear the burden of justifying withholding not just information but also its dissemination via the Internet. Building on Ramsey's final point, we need a change in government policy and attitude to expand automatic electronic disclosure.

The more information provided automatically through the Internet, the fewer FOIA requests government receives. Automatic disclosures not only reduce administrative burdens and costs; they improve the speed and quality of agency responses to FOIA requests that do come in.

The administration deserves credit for expanding Internet disclosure. The Open Government Directive instructed federal agencies to "proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA." Agencies were specifically required to disclose at least three new "high value datasets" through the web portal Data.gov, which has registered more than 300,000 government datasets since its creation in May 2009.

There is also far more information available on federal spending than when President Obama took office. Recovery Board Chairman Earl Devaney recently noted the game-changing nature of Recovery.gov. "For so many years, information on program spending was buried in the bowels of government," he wrote in a blog post. "Just ask any news reporter or watchdog group that has filed an FOIA request and waited patiently, perhaps for a year or longer, before the government

provided the information. There's no need to file an FOIA request to get what you want from the Recovery Board.”⁸ Recovery funds are expiring but this approach to tracking and reporting spending promises to live on through USASpending.gov and other new online resources such as the IT Dashboard.

We should now take the same approach for other types of government records, including information related to regulation, legal actions, credit programs, budget decisions, government performance, ethics disclosures, and more. Americans still too often have to resort to FOIA requests for information that should already be in the public domain. It is not enough to direct agencies to proactively disclose information through the Internet—such discretion results in inconsistent disclosure and fractured presentation. Instead, we should set specific standards for what agencies must automatically disclose, and establish central portals, like Recovery.gov, where the public can find related information across agencies. The administration can do this on its own but congressional action may be necessary to add teeth.

Opening FOIA requests and responses

FOIA itself would benefit from automatic Internet disclosure. The public, in most cases, cannot see what FOIA requests have been submitted to federal agencies or what information was provided in response to requests. Only a handful of federal agencies and offices post their FOIA logs showing requests they have received, and even fewer provide their responses.⁹

The administration is preparing to launch a “FOIA Dashboard” that will provide “report cards” on agency compliance with FOIA.¹⁰ The website, to be located at FOIA.gov, will show the number of FOIA requests received, granted, and denied by each agency—information already available through annual agency FOIA reports. This should make it easier for the public to understand and compare agency performance under FOIA but a compilation of aggregate data is unlikely to be a game changer like Recovery.gov.

For that, we need access to specific requests and responses. The Center for American Progress in November recommended that President Obama issue an executive order requiring federal agencies to automatically publish their FOIA requests, as well as information provided in response to requests, through a centralized, searchable, online database.¹¹

New technologies and recent FOIA advancements make this imminently doable. Indeed, the Mexican government already has such a system in place.¹² And the executive branch should be well-positioned thanks to the Leahy-Cornyn OPEN Government Act of 2007, which requires agencies to assign tracking numbers to FOIA requests and provide information on the status of each request through a telephone line or Internet service.¹³

A searchable FOIA database would have benefits for both the public and government. Before filing FOIA requests, members of the public could search for responses related to the information they are seeking. If the information is already provided, they wouldn't have to go through the hassle of filing a FOIA request, and agencies wouldn't have to respond to a duplicative request, reducing administrative burden and cost.

The database would also function as a window into agency FOIA compliance. Not only would we be able to see the number of requests granted or denied; we would be able to evaluate whether specific responses fulfilled the law's requirements. A centralized system, moreover, would make it easier to track interagency referrals of FOIA requests, which are a frequent source of lengthy FOIA delays.

How to administer this tool and put it to use would be another matter to consider. As one possibility, a "FOIA Board," similar to the Recovery Board, could be established to take responsibility for the website and provide oversight. An independent body, armed with this information, could push for better FOIA responses and provide interagency coordination to break the logjam of endless referrals.

Assessing FOIA implementation

To fully evaluate FOIA implementation, however, we need still more information. Annual agency FOIA reports provide useful data on requests granted and denied, reasons for denials, response times, backlogs, and more. But the Department of Justice does not disclose the number and percentage of FOIA denials it chooses to defend. Nor do agencies report what they have done to comply with the Holder memo and other FOIA policies, or how much money they spend on FOIA implementation. This information is needed to assess whether Justice Department lawyers are heeding the Holder memo, whether agencies are doing anything different as a result of the administration's new policy, and whether resources are adequate for timely and forthcoming FOIA responses.

The Holder memo changed instructions for Justice Department lawyers deciding whether to defend agency denials of FOIA requests. The previous policy issued by the previous administration's attorney general, John Ashcroft, promised agencies a legal defense "[w]hen you carefully consider FOIA requests and decide to withhold records, in whole or in part."¹⁴ The Holder memo states that the Justice Department "will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."

By this language, Justice Department lawyers should be less likely to defend FOIA denials. But the department refuses to provide data to assess whether this is true, and the anecdotal evidence suggests that it isn't.¹⁵

This should change not only so we can assess Justice's compliance with the Holder memo but also to send a message to other federal agencies about their compliance. Agencies will be able to learn what is unacceptable by reviewing the cases Justice refuses to defend. And they will be more likely to grant requests if they see Justice may not offer a defense.

This message appears to be needed, judging by the National Security Archive's Knight Open Government Survey, which reviews implementation of the administration's FOIA policy. The archive, which just released its second annual survey results, has encountered tremendous difficulty answering this simple question: What changes have agencies made in guidance, training materials, or practices as a result of the administration's new FOIA policy? Indeed, the

archive had to submit FOIA requests to obtain this information. Only 13 out of 90 agencies surveyed for last year's report provided documentation showing that changes were made.

After these results were reported, the White House issued a memo directing agencies to "update all FOIA guidance and training materials to include the principles articulated in the President's Memorandum" (which directed the Holder memo). Now about half the agencies report concrete changes—an improvement, to be sure, but still way behind schedule.

Perhaps not surprisingly the archive finds "no clear upward trend in agency discretionary disclosures" under FOIA. In 2009 just four of the 28 agencies that handle most FOIA requests both released more documents under FOIA and denied fewer FOIA requests. In 2010 five agencies met these benchmarks—and they were entirely different agencies than 2009, again suggesting no clear trend.

These findings highlight the stubbornness of agency culture and disposition toward FOIA. But money is likely another contributing factor. If staffing and other resources are inadequate, FOIA responses may be slow and unforthcoming regardless of agency disposition. Last year's White House memo also asked agencies to "assess whether you are devoting adequate resources to responding to FOIA requests promptly and cooperatively, consistent with the requirements for addressing this Presidential priority."

These assessments, if they occurred, have not been disclosed in annual agency FOIA reports—budget numbers may be provided but there is little about whether resources are adequate. Nor do many agencies detail FOIA-related spending in their budget requests to Congress; instead, FOIA spending is counted with spending on public relations or other responsibilities. Agencies should be asked to publicly answer three simple questions at the end of every fiscal year: What did you spend on FOIA implementation? For what purposes did you spend this money (defending denials or fulfilling requests, for example)? And was this money adequate to meet the objectives of current FOIA policy?

Conclusion

As we look forward at how we can expand openness and accountability, we must also make sure we don't backtrack. Two Senate bills introduced last month would broadly criminalize any disclosure of classified information to unauthorized people.

To be sure, protecting vital government information from improper disclosure is an important priority, but these proposals sweep too broadly. There is a serious risk that the bills, if enacted, would have a chilling effect on those who engage in legitimate activities, including informing the public about vital national security decisions. Government officials might come to fear that their everyday words and actions would later be used against them. We have come this far without an official secrets act, and cannot afford to sacrifice our hard-won progress to shortsighted doubts.

If the Freedom of Information Act teaches us one thing, it's that the free flow of information is essential to a democratic society.

Indeed, our system depends on an engaged citizenry that has the necessary information to hold government accountable and to participate in the policymaking process. We know from experience that government is smarter, more responsive, and more ethical when its actions are open to public scrutiny. As former Supreme Court Justice Louis Brandeis famously said, sunlight is “the best of disinfectants.”

FOIA has provided sunlight but in the digital age it can provide even more. Seizing this opportunity requires not just wise policy but follow through and everyday commitment—from the administration and from Congress.

Mr. Chairman, as I know firsthand, your commitment cannot be questioned—and this hearing is more evidence of that. I am honored to be here today. Thank you for the opportunity to testify. And thank you for your leadership.

Endnotes

¹ *Milner v. Dep't of the Navy*, No. 09-1163 (U.S. Mar. 7, 2011).

² Eric Holder, *The Freedom of Information Act (FOIA)* (Department of Justice, 2009).

³ Peter R. Orszag, *Open Government Directive* (Executive Office of the President, 2009).

⁴ Sharon Theimer, “AP Review: Use of FOIA Exemptions Rose in 2009,” Associated Press, March 16, 2010, available at <http://www.firstamendmentcenter.org/news.aspx?id=22715>.

⁵ For example, some agencies have reportedly asked requesters to reaffirm interest in their requests. If a requester does not respond by a set date, agencies remove the case from their backlog.

⁶ The Court’s ruling returned the case to lower courts to decide whether the information could be withheld through other exemptions, such as “information compiled for law enforcement purposes.”

⁷ Ramsey Clark, *Attorney General’s Memorandum on the Public Information Section of the Administrative Procedure Act* (Department of Justice, 1967).

⁸ “Chairman’s Corner,” available at: <http://www.recovery.gov/News/chairman/Pages/08Feb2011.aspx>

⁹ Data provided to American Progress by Anne Weisman, chief counsel, Citizens for Responsibility and Ethics in Washington, March 6, 2011.

¹⁰ Office of Information Policy, *Chief Freedom of Information Act Officer Report for 2011* (Department of Justice, 2011).

¹¹ Center for American Progress, “The Power of the President: Recommendations to Advance Progressive Change” (2010).

¹² “INFOMEX Gobierno Federal,” available at <https://www.infomex.org.mx/gobiernofederal/home.action>.

¹³ *Honest Leadership and Open Government Act of 2007*, Public Law 110-81, 110th Cong. (September 14, 2007).

¹⁴ John Ashcroft, *The Freedom of Information Act* (Department of Justice, 2001).

¹⁵ David Sobel, Testimony before the House Subcommittee on Information Policy, Census, and National Archives, “Administration of the Freedom of Information Act, Current Trends,” March 18, 2010, available at http://www.eff.org/files/filenode/foia/sobel_foia_testimony_03_18_10.pdf.