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ENSURING AN INFORMED CITIZENRY: EXAMINING THE ADMINISTRATION'S EFFORTS TO IMPROVE OPEN GOVERNMENT

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ANSWERS

MISCELLANEOUS SUBMISSIONS FOR THE RECORD

ENSURING AN INFORMED CITIZENRY: EXAMINING THE ADMINISTRATION'S EFFORTS TO IMPROVE OPEN GOVERNMENT

WEDNESDAY, MAY 6, 2015

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 9:34 a.m., Room 226, Dirksen Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

Present: Senators Cornyn, Tillis, Leahy, Klobuchar, and Franken.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, U.S. SENATOR FROM THE STATE OF IOWA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Chair GRASSLEY. Good morning. We are going to examine what this Administration has done to fulfill its promise of open government.

President Obama began his presidency with assurances on transparency. As we do regularly, it is our opportunity to take stock of where things stand not only on FOIA, but throughout the year we do this several times on other issues.

There is perhaps no better tool that Americans have to help ensure open government than FOIA. Enacted almost 5 decades ago, the purpose of the law is to help keep folks in the know about what the government is doing. No doubt an informed public helps to guarantee a more accountable government.

The Judiciary Committee has a long and bipartisan history of helping protect the public's right to know and ensuring that government effectively administers FOIA.

Earlier this year the Committee reported the FOIA Improvement Act of 2015 to the full Senate for consideration. The bill codifies the, quote-unquote, "presumption of openness" standard so that agencies proactively disclose more information. Among other reforms, the bill makes it easier for the public to submit FOIA requests and improves the electronic access to records.

As many of you know, Ranking Member Leahy and Senator Cornyn have been FOIA leaders for many years and I appreciate the hard work that they put into this bill, and I happen to be a cosponsor.

Last year, thanks to their efforts, the Senate passed an almost identical bill by unanimous consent, and, of course, in the Senate, that is not an easy task. Unfortunately, we ran out of time at the end of the year and were unable to get the bill to the President's

desk. I am hopeful—hopeful that will not be the case this year and that the Senate will soon pass meaningful and much needed reforms.

Legislative reforms can only go so far. Experience shows that many in government continue to operate with an instinct of secrecy. This has been the case under both Democrat and Republican Administrations, as both have failed up to live to the letter and, more importantly, the spirit of FOIA.

President Obama gave me high hopes for the change in the status quo. He pledged, quote, "a new era of open government," end of quote, one where transparency is the rule and not the exception. On his first full day in office, the President called for agencies to administer FOIA, quote, "with a clear presumption, in the face of doubt, openness prevails," end of quote.

Unfortunately, over 6 years later, we continue to see this Administration operating under a do-as-I-say-and-not-as-I-do approach to transparency, similar to previous Republican and Democrat Administrations.

Recently, the Office of Information Policy Director Melanie Pustay, who is with us here today and a senior White House official, wrote in USA Today that the Administration, quote, "continues to demonstrate its commitments to improving open government and transparency," end of quote.

But the very next day, ironically, the first day of Sunshine Week, the White House announced it was removing regulations that for 35 years had subjected its Office of Administration to FOIA requests. According to the White House, this decision is consistent with court decisions holding that the office is not subject to FOIA.

As one open government advocate put it, quote, "You have a President who comes in and says 'I am committed to transparency and agencies should make discretionary disclosures whenever possible,' but he is not applying it to his own White House," end of quote.

This is just one of many examples that lead me to question the President's declaration that his Administration is the most transparent in history, which was my expectation. Again, I want to be fair to this President. If he goes by what every other President has done, both Republicans and Democrats have these shortcomings.

The numbers, I think, also speak for themselves. The Center for Effective Government recently released its annual Access to Information Scorecard, which grades Federal agencies' FOIA performances. While there were some glimmers of hope, the overall results indicate there is much room for improvement.

I am particularly concerned with the State Department's FOIA operation. According to Scorecard, the State Department processed only 17 percent of FOIA requests it received in 2013. For the second year in a row, the State Department was the lowest scoring agency by far, with performance that was, quote, "completely out of line with other agencies."

These results seem to confirm an ongoing issue with the State Department's ability to manage agency information and process FOIA requests.

In 2012, State Office of Inspector General issued a report concluding that, quote, "The Department's FOIA process is inefficient

and ineffective" and that its records management practices, quote, "do not meet statutory and regulatory requirements," end of quote.

Just recently the IG released another report outlining State Department's failure to properly archive e-mails as official records. Out of over 1 billion e-mails sent by agency employees in 2011, just over 61,000 of those were properly archived. It is impossible not to acknowledge that former Secretary Clinton's exclusive use of a private e-mail account to conduct official policy—exclusive use of private email account conduct of official State Department Business.

According to Jason Baron, the former Director of Litigation and National Archives and Records, quote, "A Federal employee or official choosing to carry out communications using non-dot.gov address, without making timely transfer of those records to an appropriate governmental system, compromises the ability of an agency to adequately respond to FOIA requests."

No doubt these failures undermine FOIA and have serious consequences for our oversight and for documenting U.S. diplomatic history. And as Secretary Kerry acknowledged, the preservation of records and the public's access to those records are, quote-unquote, "interrelated principles."

I agree. After all, if a record cannot be found, it cannot be disclosed.

I want to know where the breakdowns occur. I want to hear what State Department has done and plans to do to address these serious concerns.

Further, is this an isolated incident? If not, then how widespread are these issues and what can be done to turn the tide?

Finally, I want to know what steps the Administration is taking to ensure the public's right to know, which the President himself said is central to, quote, "the effective functioning of our constitutional democracy," end of quote.

These, along with many others, are important questions that need to be answered and I am glad to have today's hearing. I am looking forward to hearing from our witnesses today who I am sure can shed quite a bit of light on these matters.

I want to thank all for being here today.

[The prepared statement of Chairman Grassley appears in the appendix. Page 77]

Chair GRASSLEY. I now turn to my friend, Senator Leahy, for his remarks.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman.

This is an important hearing on one of our most cherished open government laws, the Freedom of Information Act, FOIA. For nearly half a century, FOIA has taken our great American values of openness and accountability and put them into practice by guaranteeing access to government information.

This Committee, as the Chairman noted, has a long tradition of working across the aisle when it comes to protecting the public's right to know. We have done this during both Democratic and Republican Administrations.

Senator Grassley and Senator Cornyn have been important partners in these efforts and our collaboration the three of us working together with others, has resulted in enactment of several improvements to FOIA, including the OPEN Government Act, the OPEN FOIA Act.

We are moving in the right direction. That is the good news. The bad news is obstacles to the FOIA process remain in place and progress has come much too slowly.

For the second year in a row, the Center for Effective Government graded the responsiveness of 15 Federal agencies that process most of the FOIA requests. Some agencies did show improvement from last year, but the results are disappointing.

Not a single agency received an A grade. Only two agencies received a B grade. The rest fell below a C. We have to do better than this. Two agencies, including the State Department, testifying before us today, received a failing grade for the handling of FOIA requests.

According to the report, only 7 percent of FOIA requests the State Department received were responded to within the 20 days required, 7 percent. The State Department denied FOIA requests in their entirety almost 50 percent of the time.

I do not know how anybody could find that acceptable. I recognize the number of FOIA requests has increased over the years, but that is not a reason to fall down on the job.

If we need more resources, then ask for them. I am on the Appropriations Committee. I will vote for more resources for answering FOIA requests. You are not going to solve it by money alone. We have to fundamentally change the way we think about FOIA.

Our very democracy is based on the idea that our government should not operate in secret and we should embrace that. While it is not always popular, transparency is fundamental to the values on which our country was founded.

That is why I worked with Senator Cornyn to craft the FOIA Improvement Act of 2015. Both Senator Cornyn and I said at the time we want this—the strongest act possible, whether it is a Democratic or Republican Administration, because no matter which party is in control, they will want to tout their successes, but they are usually pretty reluctant to talk about any failures.

Ours is a comprehensive bill. It will codify what President Obama laid out in his historic 2009 memorandum requiring Federal agencies to adopt a presumption of openness when considering the release of information under FOIA.

This policy was first put into place by President Clinton. It was repealed by President Bush, and President Obama reinstated it. It was one of his first acts in office.

By codifying the presumption of openness, Congress can establish a transparency standard that will remain for future Administrations of either party and agencies to follow. It embodies the very spirit of FOIA. If fully complied with, it would do more to improve the effectiveness of FOIA than any other reform.

I hope we can pass the FOIA Improvement Act without further delay. It had the unanimous support of the Judiciary Committee in February. It is nearly identical to legislation which was passed by the full Senate last year.

There are no objections on the Democratic side to move forward with this legislation. I hope we can bring it before the full Senate for consideration and we can pass this important bill.

Thank you, Mr. Chairman.

[The prepared statement of Senator Leahy appears in the appendix. Page 80]

Chair GRASSLEY. A couple of housekeeping things before I introduce the panel. After I ask my questions, I am going to turn the gavel over to Senator Cornyn to finish the meeting. I have letters that were submitted on behalf of Information Governance Initiative, as well as ARMA International, which I would ask unanimous consent to be included in the record.

[The letters referred to follow]

Chair GRASSLEY. As always, the record will remain open 1 week for the submission of written questions for either one of our panelists, any of our panelists, and other material that people want to put in.

Senator LEAHY. Mr. Chairman, I would ask consent, because I will not be here, that my questions be introduced for the record and that the witnesses be requested to answer them.

Chair GRASSLEY. Yes. Please respond to all the questions, but particularly to the Ranking Member, because he is a leader in this area of openness in government.

Our first witness, Melanie Pustay, Director, Office of Information Policy, Justice Department. Her office has statutory responsibility for directing agency compliance with FOIA. Before becoming director, she served 8 years as deputy director and has worked extensively on open government issues with government officials.

Nikki Gramian is Acting Director of the Office of Government Information Services, the Federal FOIA ombudsman office. She joined the office after 7 years at the Department of Homeland Security IG, where she supervised a FOIA team that processed many sensitive, high visibility requests.

Joyce Barr is State Department's Assistant Secretary for Administration, as well as Chief FOIA Officer. As Assistant Secretary, she is responsible for the day-to-day administration of various functions ranging from logistics to records management and privacy programs. She has been a member of the Foreign Service for over 35 years, serving in posts around the world, including U.S. Ambassador to the Republic of Namibia.

Welcome and thank you for all being here today. You will each have 5 minutes to make your opening statement and, of course, your complete written testimony will be included in the record.

I am going to go in the order of Ms. Pustay, Ms. Gramian, and then Ms. Barr. Would you proceed, please?

STATEMENT OF MELANIE ANN PUSTAY, DIRECTOR, OFFICE OF INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Ms. PUSTAY. Thank you. Good morning, Chairman Grassley and Ranking Member Leahy and members of the Committee.

I am pleased to be here today to discuss the FOIA and the Department of Justice's ongoing efforts to encourage agency compliance with this very important law.

There are several areas of success that I would like to highlight today. Despite receiving continued record high numbers of FOIA requests and operating at the lowest staffing levels in the past 6 fiscal years, agencies have continued to find ways to improve their FOIA administration. Seventy-two out of 100 agencies subject to the FOIA ended Fiscal Year 2014 with low backlogs of fewer than 100 requests.

Processing nearly 650,000 requests, the government also continued to maintain a high release rate of over 91 percent. Agencies overall also continue to improve processing times.

OIP has for a number of years encouraged agencies to focus on their simple track requests, with the goal of processing them within an average of 20 working days. I am pleased to report that this past fiscal year, the government's overall average was 20.5 days for these requests.

There are also many achievements that are not easily captured by statistics. Agencies continue to proactively post a wide variety of information online in open formats. They are making discretionary releases of otherwise exempt information, and they are utilizing technology to improve FOIA administration.

The Department of Justice continued to work diligently throughout the year to both encourage and assist agencies in their compliance with the FOIA. I firmly believe that it is vital that FOIA professionals have a complete understanding of the law's legal requirements and the many policy considerations that contribute to successful FOIA administration. As a result, one of the primary ways that my office encourages compliance with the FOIA is through the offering of a range of governmentwide training programs and the issuance of policy guidance.

In 2014 alone, my office provided training to thousands of individuals through a variety of programs. In addition, we issued guidance on a range of topics, including comprehensive guidance on the FOIA's proactive disclosure provisions. That guidance includes strategies for identifying frequently requested records and encourages agencies to post records even before receipt of a single request in accordance with the President's and Attorney General's FOIA directives.

I am also particularly pleased to highlight for you today the substantial progress that we have made on a number of initiatives to modernize the FOIA. First, in collaboration with the 18F Team at GSA, we have been working on the creation of a consolidated online FOIA service to be added to the resources that are available on FOIA.gov. This consolidated service will allow the public to make a request to any agency from a single website and will include additional tools to improve the customer experience.

Second, OIP has been working on the potential content of a core FOIA regulation. We formed an interagency task force to tackle this project. We have met with civil society organizations to get their input and our team is now hard at work drafting initial language. We look forward to continuing our engagement with both

civil society and our agency colleagues as we all collaborate on that project.

Third, in an effort to improve internal agency practices, OIP launched a new series of best practices workshops starting with the important topic of improving timeliness and reducing FOIA backlogs. These workshops provide a unique opportunity for agencies to learn from one another and to apply innovative solutions more broadly across the government.

Finally, just this past March, we completed our commitment to enhance FOIA training by making standard e-learning resources available to all Federal employees. Embracing Attorney General Holder's message that ″FOIA is everyone's responsibility″, these new training resources target the entire spectrum of Federal employees, from the newly arrived intern to the senior executive.

These training resources are available to all agency personnel anywhere in the world and at no charge. They address the FOIA's many procedural and substantive requirements and they also emphasize the importance of good communication and good customer service.

Given how important training is to successful implementation of FOIA, I am particularly proud that OIP was able to provide these resources to all government employees.

In closing, in the face of many challenges this past fiscal year, agencies have achieved success in many areas. But still there is more work to be done and we will continue our efforts to encourage and assist agencies going forward.

We look forward to working with the Committee on these important matters. Thank you.

[The prepared statement of Ms. Pustay appears in the appendix. Page 32]

Chair GRASSLEY. Thank you, Ms. Pustay.

Now, we will hear from Ms. Gramian.

STATEMENT OF NIKKI N. GRAMIAN, ACTING DIRECTOR, OFFICE OF GOVERNMENT INFORMATION SERVICES, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, COLLEGE PARK, MARYLAND

Ms. GRAMIAN. Good morning, Mr. Chairman, Ranking Member Leahy and members of the Committee. I am Nikki Gramian, Acting Director of the Office of Government Information Services, known as OGIS, a component of the National Archives and Records Administration, known as NARA.

As acting director, it is my great honor to appear before you to share our observations on the current State of the Freedom of Information Act and update you on OGIS' activities.

It has long been OGIS' observation that access to records under the FOIA is linked to and greatly enhanced by good records management. OGIS recognizes that when an agency achieves excellence in records management, FOIA and records management programs succeed.

Linking improvements to the FOIA with improvements in records management programs is an OGIS best practice.

I am pleased to also share that since OGIS' last appearance before this Committee, NARA has hired two additional OGIS staff

members to work on our review mission. The review team members are now on board and in Fiscal Year 2014, OGIS launched a formal agency assessment program. This program will assess individual agency FOIA programs by reviewing the agency's FOIA regulations, Website, and FOIA request files.

In addition, the program will survey and conduct onsite interviews with agency FOIA professionals and produce a report at the conclusion of each agency assessment.

OGIS' assessment reports are not designed to provide grades, rankings or include a comprehensive tally of every aspect of the agency's FOIA program. Rather, the reports are intended to provide thoughtful and practical analysis in a readable and useful format.

Since its establishment, the review team has completed reviews of two of NARA's FOIA programs. Reviews are currently underway of six components of the Department of Homeland Security. We are very excited about this robust new review framework.

As shared in our 2014 testimony before this Committee, OGIS is working closely with the Department of Justice and the Administration to implement the five FOIA-related commitments included in the second Open Government National Action Plan. Specifically, OGIS, with the support and guidance of NARA, is supporting the FOIA Advisory Committee.

In May 2014, the Archivist of the United States, David Ferriero, appointed 20 members to the FOIA Advisory Committee. The members are split evenly between those who work within the government and those who do not.

The advisory committee is looking at what FOIA oversight mechanisms currently exist. In addition, the committee is identifying the barriers to proactive disclosure and studying how agencies can use data about FOIA requests to improve proactive disclosure practices.

Finally, the committee is discussing whether and how to reform the methods by which agencies assess fees in the FOIA process.

Although we do not have newer recommendations to share at this time, I want to update you on our continued work.

OGIS continues to request that agencies update their system of records notices, known as SORNS, to include routine uses that allow OGIS and the agency to discuss and share information about an individual's FOIA request. Currently, the absence of an appropriate routine use creates a logistical challenge for our review work and our capacity to provide efficient and effective mediation services.

During an agency assessment, our review team will evaluate a sample of agency FOIA case files against the FOIA's requirements and the selected DOJ and OGIS best practices. If the agency has updated its SORNS to include a routine use for the disclosure of records to OGIS, the agency is permitted to share case files without taking additional steps.

However, the absence of an appropriate routine use requires additional administrative steps OGIS and the agency must take to share information.

In addition, in the course of our mediation work, when an appropriate routine use is not available, our practice is to seek the individual's consent to allow OGIS and the agency to share informa-

tion. However, it can be an obstacle when an agency is seeking our assistance with a requestor with whom communications have broken down.

Finally, I would like to inform you that OGIS' additional activities in the last year are outlined in our annual report and written testimony.

I appreciate the opportunity to appear before this Committee and thank you for your support that you have shown to the Office of Government Information Services.

[The prepared statement of Ms. Gramian appears in the appendix. Page 40]

Chair GRASSLEY. Thank you, Ms. Gramian. Now, Ms. Barr.

STATEMENT OF HON. JOYCE A. BARR, ASSISTANT SECRETARY, BUREAU OF ADMINISTRATION, U.S. DEPARTMENT OF STATE, WASHINGTON, DC

Ms. BARR. Chairman Grassley, Ranking Member Leahy, and members of the Committee, good morning.

Thank you for the invitation to appear before you today and for your advocacy for improving transparency to the public.

I am Joyce Barr. I serve as Assistant Secretary for Administration, as well as Chief FOIA Officer, for the Department of State.

Part of my current mission is to respond to requests under FOIA, as well as to manage and maintain official records at the State Department. The State Department is committed to openness. It is critical to ensuring the public trust, as well as to promoting public participation in and collaboration with the U.S. Government.

Meeting our commitment to openness is very challenging. We currently face a large backlog of over 18,000 FOIA requests. We know this is unacceptable and are working to reduce it.

In the past year, we achieved a nearly 17 percent reduction in our backlog of initial requests and nearly 23 percent reduction in our appeals backlog by streamlining case processing. We made progress, but more is needed.

There are several reasons for the backlog. Since 2008, our caseload increased over 300 percent. In Fiscal Year 2008, the State Department received fewer than 6,000 new FOIA requests. Fiscal year 2014, we received nearly 20,000. Since the beginning of this fiscal year, we have already received nearly 14,000 new requests.

Many of these cases are increasingly complex. The State Department is often the public's main destination for information and documents related to national security issues. Other national security agencies are partially, if not completely exempt from the FOIA. As a result, requesters often come only to the department to request information on any and all national security issues.

These complex requests require multiple searches throughout many of our 275 missions around the world. They involve the review of classified material or highly sensitive material, and we must coordinate with other Federal agencies.

They generate large volumes of paper and electronic materials that must be reviewed by State and interagency subject matters across the Federal Government.

We get a lot of complaints about delays and our goal is to do everything we can to complete each request as quickly as possible with as much information as possible.

You may already know that Secretary Kerry reinforced this point in his March letter to our Inspector General. In that letter, as you acknowledged, Mr. Chairman, the Secretary explained that he recognized the work that has been done and that the department is already acting on a number of challenges to meet its preservation and transparency obligation.

He has asked the IG to review and ensure that we are doing everything we can to improve and to recommend concrete steps that we can take to do so.

I am here as the department's senior FOIA official to assure you that we are committed to working cooperatively with the IG and any recommendations that may follow.

My testimony for the record includes information about related issues, like our FOIA Website and Presidential libraries.

Again, the Department of State is committed to public access to information.

Mr. Chairman, I thank the Committee for the opportunity to testify today and would be pleased to address questions that you or any other member of the Committee may have on FOIA within the State Department.

Thank you.

[The prepared statement of Ms. Barr appears in the appendix. Page 46]

Chair GRASSLEY. Thanks to each of you, especially for keeping within your allotted time. It helps us manage time better here. I appreciate it very much.

I am going to start with you, Ms. Barr. I think I need to emphasize that we are talking about the State Department. This is a governmentwide problem. It just happens that maybe things are a little more obvious in the State Department of changes needed to be made for FOIA.

The 2012 IG report concluded that the State Department's FOIA process is, quote, "inefficient and ineffective." The same report concluded that its records management practices, quote, "do not meet statutory and regulatory requirements," end of quote.

The report cites a lack of oversight, performance monitoring and enforcement. Because of these failures, a substantial number employees' e-mails were not being properly recorded.

I am afraid the problems have not been resolved. We now have a subsequent IG report released this March showing continued problems in the State records management operation, with only a tiny fraction of employees' e-mails being properly recorded in the archiving system.

My question to you. Why has there apparently been no improvement in the State records management operation since that 2012 IG report? And maybe more importantly, then leading into my second and third questions, were any actions taken after the 2012 report to improve oversight, performance and compliance with the recordkeeping obligations? If so, then why—if those things did take place, why did they fail to resolve the issues?

Ms. BARR. Thank you for that question. When that OIG inspection started, I had been on the job for less than 6 months and it was one of the first major issues that I had to face.

It was very difficult for me to read that report and find out that I had a serious problem in that section. So I took a number of actions. I made it a priority. I met with the team. I looked at what the staffing and what the resources were. At that time, I was able to provide more people to help in that section.

One of the other issues that we had is that we had a lot of vacancies in key positions. I made sure that that was taken care of and, in fact, right after the report—we got the first draft of the report, we had hired an absolutely fantastic director that made a huge difference in how we operated.

We implemented more training. We tried to improve lines of communication because it had been brought to our attention that there was a morale problem in the section. That was a priority with me and I made sure that supervisors had proper training, that they made sure that they provided good guidance for their subordinates.

Now, part of what we tried to accomplish in this section is responding quickly and appropriately when we get these FOIA requests in and we have done—I think we have made great strides. Most of the recommendations have been closed to the satisfaction of the IG and we continue to work with them on that.

There are a couple of things that have made it difficult for us to completely resolve some of our problems with keeping up. As noted in the testimony by my colleague in the Department of Justice, our requests have continued to skyrocket. We have over 18,000 requests that we processed in 2014, but things keep rolling in while we are trying to get on top of it.

This type of work is very exacting. When we get a request in, it is not just our individual review, but making sure that we task that out to all of our embassies, to different bureaus within the State Department, that we get responses and good materials back. We review it again, perhaps send it out again through the interagency. Then it comes back for release.

While we have gotten better at streamlining and training and being responsive, more work has come in.

With regard to the second OIG report that you are referring to, we are working on responses to that right now and those are not yet complete and I do not have a detailed response for you.

I would not say that we have done nothing. I would say that we are better, but we need to further improve to really get on top of that and that is one of the reasons we are working closely with the Department of Justice, as well as NARA, to not only improve our individual systems, but to be part of a governmentwide response to address some of the things that you said earlier about the public needing and wanting more transparency.

Chair GRASSLEY. Senator Cornyn. I will leave you here to take charge. Maybe there are a couple of questions I was going to ask you can ask for me.

Senator CORNYN. Sure.

Chairman GRASSLEY. Thank you.

Senator Cornyn [presiding].

Thank you, Mr. Chairman. Thanks for convening this hearing today. Thank you, to all of the witnesses, for being here.

I think this is a critical hearing. I wish we gave this the sort of attention that I think it deserves. There is this idea out there that the Freedom of Information Act is something we do for the press. That is a fundamentally flawed way to look at it, from my perspective.

This is about the public's information that was generated by people who work for the government and information that was generated by their tax dollars. I believe there should be a presumption that the information that is held by the U.S. Government should be open and accessible to the public.

I certainly understand the sensitivity of some of the information you mentioned, for example, Ms. Barr, and the importance of going through that to make sure that the sensitive, classified and other sensi—other information is preserved.

I just do not understand why we should tolerate the poor record of response by agencies like the State Department. I respect the job you are trying to do, Ms. Barr, and it sounds like you are understaffed and under-resourced. But the 37 out of 100 that the State Department has gotten on your Scorecard for FOIA is an embarrassing failure of the agency and I do not know how we could call it anything different.

What really bothers me is when people plan in a premeditated and deliberate sort of way to avoid the Freedom of Information Act and Federal Government Requirements that require them to make public information available to the public. Of course, we are all familiar with the news accounts of what happened with former Secretary Clinton.

Ms. Barr, did either you or Under Secretary for Management Patrick Kennedy know that Secretary Clinton was operating exclusively on a personal and private e-mail server?

Ms. BARR. I have no information on that, sir. I was not aware of that.

Chair CORNYN. Are you aware of anybody else in the U.S. Government who is operating on a private, personal e-mail server in a way that defeats the very purpose of our freedom of information laws? Are you aware of anybody else who is operating in such a manner?

Ms. BARR. I am not personally aware of that, sir.

Chair CORNYN. Well, prior to the recent return—and I think that was in 2014, October 2014—of some of Secretary Clinton's official e-mails, how did the State Department process Freedom of Information requests for information that was held by Secretary Clinton?

Ms. BARR. As I mentioned earlier, we get thousands of requests and we process them—we have a specific protocol for processing them.

The e-mail is not the only way we capture information about what the Secretary does. We have documents that are in the form of memos, briefings, agendas, et cetera, that are also——

Chair CORNYN. Would you actually call Secretary Clinton and say there has been a request under the Freedom of Information Law and do you have any documents that are responsive to that?

Ms. BARR. What we do is when a process comes in, we task, first, ourselves in the department for information that might be applicable.

Chair CORNYN. I am asking how would you access the private e-mail?

Ms. BARR. Because we have other archive systems, like Everest, where we process all of the paper. If the Secretary is going on a trip and we have asked people to provide documents and background information for that trip, we collect it in that system, and that is——

Chair CORNYN. I understand that. I am asking about her e-mails on her personal e-mail server. How would you access that?

Ms. BARR. Well, we have them now, sir.

Chair CORNYN. In response to a Freedom of Information request.

Ms. BARR. Well, we have them now, sir.

Chair CORNYN. Do you have all of them?

Ms. BARR. We have the e-mails that she has released to us, all of the official ones.

Chair CORNYN. Do you know what percentage that represents of all the e-mails she has on her server?

Ms. BARR. No, I do not.

Chair CORNYN. You do not have any way of verifying that you have all of the official e-mails that she processed on her personal e-mail account.

Ms. BARR. We have been told that she has provided those to us.

Chair CORNYN. Who told you that?

Ms. BARR. The Secretary.

Chair CORNYN. So you are taking her word for it. I am sorry, yes?

Ms. BARR. [Nodded head] Yes, sir.

Chair CORNYN. My time is up, but maybe we can get a chance to do another round since it is just Senator Tillis and myself.

Senator TILLIS. Senator Cornyn, continue with this line of questions, if you want.

Chair CORNYN. Thank you very much. Ms. Barr, I understand it was not until October 2014 when the first attempt to retrieve the official e-mails was made by the State Department. Can you verify that date, October 2014?

Ms. BARR. Could you give me some context to that, sir?

Chair CORNYN. I would just cite news reports because that is the only source of my information. I am just asking you to verify it, if you can. According to news reports, the State Department did not request return of official records maintained by Secretary Clinton on her private account until October 2014.

Can you verify those reports in the news?

Ms. BARR. I know that we actually asked four former Secretaries of State for their e-mail records.

Chair CORNYN. I am talking about Secretary Clinton.

Ms. BARR. Yes. We did send a letter last year asking for those e-mails.

Chair CORNYN. Was that the first request that you, as the Chief Freedom of Information Officer at the State Department, had made to her for these private e-mails?

Ms. BARR. As far as I am aware, sir, yes.

Chair CORNYN. That is the first time. Why did the agency wait nearly 2 years after Secretary Clinton left office to first request those official e-mail records?

Ms. BARR. Well, sir, I do not have specific information on that, but I can say that the Secretary has asked the Inspector General to review that and I hope that through that review we will find out more information that can give us—inform us as to what we should have done, what happened, and from that take lessons to make sure that records about the Secretary do not get separated from the larger collection at the department.

Chair CORNYN. Is Secretary Clinton going to make available to the Inspector General all of the e-mails that were collected on her private e-mail server so the Inspector General can objectively look at them and decide whether Secretary Clinton's separation of official from personal e-mails is indeed accurate and correct?

Ms. BARR. I am not really privy to how the Inspector General is shaping his investigation.

Chair CORNYN. Do you know how Secretary Clinton provided for security of this information? We are all well aware that cyber attacks are rampant and some State sponsors of cyber attempts to steal information that is both sensitive intelligence and other information that presumably would be on Secretary Clinton's e-mail server. Are you aware of any attempts to secure that server in a way that would protect that information from cyber criminals and intelligence efforts by our adversaries?

Ms. BARR. No, I do not have information.

Chair CORNYN. Would that concern you?

Ms. BARR. Perhaps.

Chair CORNYN. Perhaps. I would hope it would concern all of us, because as you point out, the Department of State has access to very sensitive information and, of course, as a member of the President's Cabinet, presumably even information from other Cabinet members, maybe communication from the President himself would be subjected to theft by cyber criminals, and we know there are State sponsors of that sort of activity that would love to learn the innermost deliberations and communications of the President with his Cabinet.

That would concern you—you say perhaps and I will just tell you it concerns me a lot.

Are you concerned—and I will conclude on this and turn it over to Senator Tillis for now—that there would be a premeditated and deliberate attempt by a member—by a high level official in the U.S. Government to set up a personal e-mail system in a way that would circumvent all of the laws that Congress has passed to enforce the public's right to know, including the Freedom of Information laws? Does that concern you?

Ms. BARR. I just want to paraphrase. You are asking me if I would be concerned if a Cabinet member deliberately set up an e-mail account to circumvent the laws.

Chair CORNYN. That is correct.

Ms. BARR. In theory, yes.

Chair CORNYN. In theory.

Ms. BARR. Yes.

Chair CORNYN. Senator Tillis?

Senator TILLIS. Thank you, Senator Cornyn.

Ms. Gramian, I want to start with you and go back to some of the foundational problems we seem to have in terms of record-keeping. I think the Inspector General just this year indicated that there were some billion e-mails sent by agency employees, but only about 61,000 of them were properly archived.

Back early in my career, I worked in records management and did record scheduling, retention scheduling, identifying classifications of documents, and making sure that they were properly maintained and disposed of. So if you are not the right person to answer this question, anyone else can chime in.

How on earth could we have a records management operation in one of the most important areas of government seem to be so bush league? I mean, this just does not happen in the private sector where critical records are actually maintained, categorized and managed proactively. It seems like they are void of that.

Am I missing it? How do you get the variable between 1 billion and 61,000 and think that someone is confident in managing the records retention programs?

I kind of poisoned the well with the question.I21Ms. GRAMIAN. As you correctly stated, sir, I am not the right person. But I know that part of NARA is looking into this issue and the Archivist of the United States has previously testified about the problems with e-mail.

Senator TILLIS. To me, the reason I directed the question to you, being associated with OGIS, is that there are a lot of tools available to make this archiving almost as seamless and as automatic as possible.

Either there was a conscious decision not to use the tools that they should have available or the people that were in charge had no idea what they were doing and what tools were available.

From an IT perspective, why on earth would these not have been a part of an automated program for retention and disposition within whatever the retention schedule should have been for certain classifications of documents on e-mail?

Ms. GRAMIAN. I know that the National Archives is leading on the capstone program and in 2016, I believe all agencies are required to be in line with this particular situation.

I do not have the answer for that, but I am happy to obtain the additional information you request.

Senator TILLIS. Thank you. This is for anyone on think panel. Are there any policies in place that say that you really should not be consolidating your records that you create in the normal course of business of doing your job on a private server where you are responsible for the retention and security of it? Do we have any specific policies that were violated as a result of this or do we need to pardon these policies to make something that is pretty obvious well documented?

Ms. GRAMIAN. I understand National Archives has issued policy and guidance on this particular situation and my understanding is that individuals who are using personal e-mails are required to copy their official e-mails, as well.

There are situations when this may occur and that is how to remedy it.

Senator TILLIS. Ms. Barr, within the Department of State, if we had a mid-level department director work for the department for a couple of years and come back into the department and say, "You know what? I just decided to put all of my stuff on a private server," would they be subject to any disciplinary action?

It would seem like at the lower level, if someone did that, that it would be a violation of common sense, if not a violation of policy. Would they—that be OK for someone to do that provided that when you finally say, "OK. Well, now we need to see those e-mails" and they send it back to you?

What kind of recourse would you have for somebody like that in the organization?

Ms. BARR. This is a theoretical question that you are asking me.

Senator TILLIS. Yes. I am just asking whether or not the practice that we are discussing here that Senator Cornyn—is it OK? Are we sending a message to anyone in the office that as long as you promise to give them back when we need them, that it is OK to have them hosted on private servers?

Ms. BARR. I think that the actions that we have taken in the course of recovering this—these e-mails have made it very clear what people's responsibilities are with regard to recordkeeping. We have done—we continue to do training, but we have sent department notices, telegrams. We have talked to directors. I think that—I think the message is loud and clear that that is not acceptable.

Senator TILLIS. It is a completely unacceptable process going forward and it should have been retrospectively.

Ms. BARR. Going forward, yes, sir.

Senator TILLIS. Retrospectively, the reason we have arrived at those policies is now we realize it was a bad—I think a bad decision made on the part of other people. Secretary Clinton is one of them, there may be others. It was just a bad decision that really raised—one of the reasons why you are probably experiencing the threefold increase in requests is that these kinds of things just absolutely undermine the confidence of the American people.

It was a bad decision. I hope that we go so far as to say if you do this in the future, you get fired, and the department takes a very definitive stand that it is unacceptable particularly for someone at the top—if the person at the top is doing it, then you can pretty much count on the reality that over some period of time, people at every level of the agency have, and it undermines your ability to do what you need to do.

I do not envy you for having to take the responsibility for providing records requests. As Speaker of the House, I was inundated with them. I understand how complicated it is and the work that you have to do to protect privileged information, secret and classified information.

I think that a part of the reason why you are dealing with this are the acts of some people that have undermined their confidence in being able to get the information they deserve.

Thank you for being here and for your hard work. If I get a chance, I have got some other questions on streamlining the process and other things to service the FOIA requests.

Thank you, Mr. Chair.

Chair CORNYN. Senator Franken?

Senator FRANKEN. Thank you, Mr. Chairman.

I will pick up on this because it seems like one of the issues, Ms. Barr, has been that Congress has been slow itself to update and to modernize Federal laws relating to government transparency, such as the Federal Records Act.

It was not until 2014, after Secretary Clinton had left the State Department, that we required agency employees using personal e-mail accounts for official purposes to make sure a copy went to their own work e-mail account; is that right?

Ms. BARR. Yes.

Senator FRANKEN. Yes. It strikes me that that is one of the many instances in which Federal law lags behind the technology. In general, I think this is an issue that Congress needs to grapple with. We have really yet to modernize the Federal Government's Privacy Act or commercial privacy laws, for that matter, and we have yet to truly modernize FOIA, which is one of the reasons I support Senator Cornyn's and Senator Leahy's FOIA Improvements Act.

In your view, are there any other areas where Congress needs to take steps to ensure that the State Department's practices and policies reflect current use of technology?

Ms. BARR. First, we are actively working to meet the deadline that my colleague from NARA mentioned about making sure that we have an electronic system that can cope with the types of requests we get.

The one thing I would probably need more of, I mean, we always want people and resources, is maybe more time. Twenty days is very quick and if we had more time to respond before we could be sued to get that information, that might be very helpful.

Senator FRANKEN. Thank you. Does anybody else have a comment on that, because it is kind of a broad question? No?

[No Response]

Senator FRANKEN. I know that the Chairman talked a little bit about Secretary Clinton's use of e-mails. I just want to point out a couple of things.

Colin Powell admitting to using personal e-mail to conduct business while Secretary of State and admitted to not preserving any of those e-mails, but no one is accusing him of breaking the law. And I think, as we pointed out, that the law really did not change on preserving those or sending those to the State Department e-mail until 2014, as you acknowledged, Ms. Barr.

There was nothing improper, even unusual with Secretary Clinton selecting which e-mails to preserve and there was nothing improper about deleting those that were personal. Under the guidelines issued by the National Archives, every employee is responsible for determining which of their e-mails to preserve as Federal records and which to delete, and that is how the system works.

Nevertheless, talking about the State Department, Ms. Pustay, it seems that the State Department has struggled for some time now to provide appropriate, timely responses to FOIA requests.

IN your position, you have the opportunity to examine the compliance practices of the various Federal agencies and help them achieve full implementation.

Are there particular qualities, characteristics or features of the State Department that you think have made it particularly difficult

or challenging for the agency to comply with FOIA and have contributed to its disappointing record? To what extent is that record a function of the agency's structure, its substantive focus, its culture, its resources or other factors?

Ms. PUSTAY. I think that one thing that distinguishes the State Department, of course, in terms of challenges is the worldwide nature of their work and the many agencies that have a stake in the records that they create. Those things are—they are not unique to the State Department, but they are particularly challenging to State.

The State Department also faces challenges much as the other large departments have faced the past few years in terms of rising numbers of requests, increased complexity of requests, and decreased staffing. This past fiscal year, the government overall was operating with the lowest staffing levels in 6 years. So those things are necessarily going to pose challenges to all Federal agencies administering the FOIA.

What we have done is we have really tried to focus on the importance of backlog reduction and improving timeliness as a cornerstone of the Attorney General's FOIA guidelines. As I mentioned, we chose this—that topic for our very first best practices workshop, because what we are trying to do at my office is help and assist agencies in facing these challenges.

We have the challenges, but then the question is what can we do to overcome them. We have been issuing guidance on best practices for reducing backlogs. We are encouraging greater use of technology in processing requests. We encourage agencies to have agreements with one another to cut down on the need to have consultations.

There are a number of different approaches that all need to be taken collectively to help tackle backlogs and improve timeliness.

Finally, what we have been doing every year is assessing agencies on how they do in reducing backlogs and improving timeliness. We assess agencies both on the numbers of requests in their backlog, if they have a backlog, and on the age of the oldest requests, because we think backlog reduction has two elements.

Senator FRANKEN. What is the age of the oldest request at State?

Ms. PUSTAY. I do not know what it is for State. What we do is have a distinct goal that——

Senator FRANKEN. What is the longest outstanding one you have seen, just for kicks?

Ms. PUSTAY. In the whole government? In the whole government, the oldest ones are from the 1990's.

Senator FRANKEN. I think that is one I filed.

[Laughter.]

Senator FRANKEN. I am sorry. I have run well over my time, but if you have more to offer on that.

Ms. PUSTAY. I think it is really important for agencies to set a distinct goal of closing their 10 oldest requests, because only by systematically doing that every year can you have the age of the backlogs get much closer to the current time.

Senator FRANKEN. Thank you. I apologize for jumping in and out, but I am in a HELP hearing, as well. Thank you, Mr. Chairman.

Chair CORNYN. Thank you, Senator Franken.

I know we have another panel. Senator Tillis, do you have any other questions you would like to ask verbally of this panel or can we go to the next panel?

Senator TILLIS. No, Mr. Chair. I will submit some for the record, but I am particularly interested in seeing what systematic changes are being done, what resources you have had to allocate to it, just the processes. We will hold that for the record.

Chair CORNYN. I would like to, on behalf of Senator Grassley, he asked me to ask one more question on his behalf, Ms. Barr.

Apparently, in June 2013, Chairman Grassley wrote to the State Department regarding its use of special government employee designations, including for Ms. Huma Abedin, a senior advisor to Secretary Clinton.

His concern was for potential ethics issues, and a number of media outlets have made FOIA requests on this topic. In June 2013 and March 2015, Chairman Grassley requested copies of e-mail communications between Ms. Abedin and her private employer while at the State Department and as of today he has not received a response from the State Department.

On behalf of Senator Grassley, can you tell us when can the Committee expect to receive the documents requested and will the department be searching the e-mails from Secretary Clinton's private server for responsive documents?

Ms. BARR. I have no information on that for you, sir, but I can certainly take that back.

Chair CORNYN. I would appreciate it and I am confident Senator Grassley would appreciate a prompt response. That was June 2013 and March 2015 when he made those requests. So some of them are quite old.

Thank you very much for joining us. We will now ask the second panel to take their places.

Our second panel is composed of Karen Kaiser and Thomas Blanton. Ms. Kaiser is the General Counsel for The Associated Press. Prior to that, she was associate general counsel for newsroom legal matters.

As general counsel, she advises The Associated Press newsroom globally on all editorial matters, including subpoena defense, government investigations, reporters' privilege, news gathering and source issues, libel defense, prepublication review, Freedom of Information Act issues, and other access issues.

Thomas Blanton is Director the National Security Archive at George Washington University, which was founded in 1985 by journalists and scholars to serve as a check on government secrecy.

He served as the Archive's first director of planning and research beginning in 1986 and became deputy director in 1989 and executive director in 1992.

I want to extend the Committee's welcome and thanks to both of you for being here with us today.

Each of you will be given 5 minutes to make opening statements and then I am sure Senator Tillis and I and perhaps some other Senators who may join us will have some questions for you.

Ms. Kaiser.

STATEMENT OF KAREN KAISER, GENERAL COUNSEL, THE ASSOCIATED PRESS, NEW YORK, NEW YORK

Ms. KAISER. Good morning. Chairman Grassley, Ranking Member Leahy, and members of the Committee, thank you for inviting me to testify today about ways to improve open government and thank you for your longstanding and unwavering commitment to the public's right to know.

My name is Karen Kaiser and I am the general counsel for The Associated Press, the global, independent news organization. I am testifying today on behalf of AP and the Sunshine in Government initiative.

AP's mission is simple and straightforward—to inform the world. AP journalists frequently rely on the Federal FOIA and State open records laws in their reporting. Most years, our journalists file many hundreds, if not more than 1,000 requests under these laws and we challenge denials of that right to access.

Our requests often lead to important stories that could not have been told without reliance on our country's robust freedom of information laws and the principles of transparency that are its backbone.

As this Committee well knows, FOIA is a powerful tool that allows any person to learn what public officials are doing, how tax dollars are being spent, and what decisions are being made.

FOIA opens the government to the people and it is through that transparency that we achieve accountability, a core element of our democracy.

However, despite promises of greater transparency at the outset of this Administration, most agencies are not abiding by their obligations. Earlier this year, AP filed a lawsuit against the State Department for its failure to respond to six requests covering Hillary Clinton's tenure as Secretary of State, including one request made 5 years ago.

The State Department missed all its statutory deadlines and even its own self-created deadlines. The requests, importantly, concerned not only e-mails, but documents, correspondence, memos, calendars on some of the most significant issues of our time, such as the Osama bin Laden raid, surveillance practices, material on some of Clinton's longtime aides, and an important Defense contractor.

These are documents that the public has a right to see and which the agency is required to release. Yet, the only way to force the agency to comply with its regulations and its requirements was to sue them.

The State Department, as we have learned, receives a large number of requests, 19,000 or 20,000 last year, but I think anyone will agree that no matter the backlog, 5 years is too long to wait. And this is just one example.

Non-responsiveness is the norm and the reflex at most agencies is to withhold information, not to release it.

A recent AP study of FOIA compliance showed an alarming increase in both the backlog and in denials; 39 percent of requests processed last year were denied in whole or in part and even more were rejected for procedural reasons.

This bill could hardly be timelier. The changes proposed in S. 337 are vital to making FOIA work better, to driving the agencies to decisions that better align with FOIA's goals, and to ensuring that our government operates from a presumption of openness.

The ultimate beneficiary, of course, is the American public.

To start codifying the presumption of disclosure is critical. With this step, Congress cements the purpose of the act and ensures that FOIA remains strong across Administrations. Importantly, this change does not alter the substantive scope of the exemptions or the agencies' ability to withhold truly exempt material where disclosure would cause a foreseeable harm.

Rather, the reform captures the intent of FOIA. Writing the presumption into the law thwarts the dilution of transparency.

Second, the legislation will allow OGIS to speak forcefully in substantive disputes and make recommendations that inform changes in a way that captures the forward-looking approach that Congress had in mind when it enacted OGIS in 2007.

By establishing a modern, integrated FOIA portal to intake, track and process requests, requesters will gain better access to information and agencies will enjoy freed resources. Mandating the posting of frequently requested documents saves agency time in processing multiple requests for the same material.

Finally, we need some limitations on Exemption 5, the exemption for deliberative process. Despite being discretionary, this exemption is frequently used as a catch-all by agencies.

In conclusion, it is our fundamental belief that public officials need to be accountable to the people they serve and that the public has a right to witness the government in operation. If secrecy is not challenged, we risk a departure from the principles of open government, accountability, and robust debate that form the foundation of our democracy.

We need to strengthen the laws that support transparency and the reforms that are sought here today will keep government transparent and accountable and this country as a beacon of light.

Mr. Chairman, Senator Leahy and members of the Committee, thank you very much for allowing me to speak here today and thank you for your commitment to FOIA. I look forward to answering your questions.

[The prepared statement of Ms. Kaiser appears in the appendix. Page 55]

Chair CORNYN. Thank you, Ms. Kaiser.

Mr. Blanton.

STATEMENT OF THOMAS S. BLANTON, DIRECTOR, NATIONAL SECURITY ARCHIVE, THE GEORGE WASHINGTON UNIVERSITY, WASHINGTON, DC

Mr. BLANTON. Thank you very much, Senator Cornyn, Mr. Chairman. It is a real honor for me to be here both with the Associated Press, that has been such an effective user and advocate of the Freedom of Information Act and also one of the founders of Sunshine Week we celebrated earlier this year.

My own little organization, we are veterans of about 50,000 Freedom of Information requests across the government. We brought the White House e-mail lawsuit back against every President from

Reagan through Obama that forced the White House to save those e-mails and ultimately make them available to the public.

We have got some hands-on experience. We have done 14 governmentwide audits of how agencies actually respond using Freedom of Information requests to test that response. We have won awards like the Emmy Award and the George Polk Award and the James Madison Award, and I was really proud earlier this year to see you, Senator Cornyn, joining that incredible list of open government advocates. Much deserved and I applaud your work on S.337 and the work this Committee has done to really move the Freedom of Information Act forward.

Today we are really talking about the good, the bad and the ugly. The good—it is not just Clint Eastwood who does this—the good is there are some historic breakthroughs in open government, mostly in the data area. The Veteran's Administration, a veteran used to have to file a Freedom of Information request to get their service records or their medical records. Now there is an online button they can go to and get that stuff instantaneously, saves the whole system, helps the veteran, helps the public, helps the taxpayer. That is efficiency.

The Medicare cost data, like from hospitals, we found out that George Washington University charges twice what Georgetown Hospital charges for the same hip replacement. This is absurd and it should help us reform our health care system.

These are breakthroughs. They come from Freedom of Information pressure. They come from the President's open government directive. They come from congressional oversight and attention to the agencies. They come from—some of the agencies have been given space to jump into the gap and show some leadership. That is the good.

The bad is, as you have heard today, the Freedom of Information Act just is dysfunctional. We and the Associated Press and many others are still making headlines out of our results from FOIA requests and yet none of would say that it is working because we wait months, years, 5 years. We have to bring lawsuits.

The State Department, for one, has set up a system where if you do not sue, you can wait 7 years. We finally had to sue over some records from Secretary Kissinger's tenure that we have been waiting on appeal for 7 years.

That is an absurd situation. Then you read the State Department chief FOIA officer's report and they say, "Oh, we are going to have to move some of our resources into FOIA litigation support."

This becomes the endless loop. It means that they are going to slow down requests on the front end and create more litigation on the back end.

I think the ugly of today is the e-mail records preservation and it is not just State Department, it is across the government. We have lost a generation of e-mail. The government should have been on notice dating back to 1993 when we won against the White House that they needed to save their e-mail and then sort it out later using computer power which is expanding all the time.

I think for the purposes of this hearing, I just wanted to make a couple of comments on previous testimony. I really endorse what

Associated Press had to say. I had huge problems with what the Justice Department had to say.

You have got the Justice Department saying we have got a 91 percent release rate, and yet the headline on the Associated Press story of those same statistics is, and I quote, "U.S. Sets New Record for Denying, Censuring Government Files." Now, who is right? Well, I place my money on the Associated Press because you get behind those numbers and you see what the Department of Justice is talking about, 91 percent, they are leaving out nine of the 11 reasons the government does not respond. They say no records or there is a fee issue or there is a referral to another agency.

Just the ones that get released, yes, that release rate runs at about 50 to 60 percent. Right there you see a big disjuncture and the need for this kind of hearing and this kind of oversight.

The Justice Department is proud that they are finally giving some proactive guidance to agencies to get documents out to the public, but this is years late. This is 5 years after the President and Attorney General said that is what the agencies ought to do.

The Justice Department is claiming credit for expanding foia.gov, but we looked at those plans and it is nothing like the kind of FOIA portal that my colleague here has just described and that we all need and every requester needs.

I am glad to see that they are underway with doing government-wide regulations. Our audits that we presented to this Committee show that they did not pay attention back in 2007 when the Cornyn-Leahy bill changed the standards. It should have changed the regulations. Half the agencies never did it.

On the State Department, she wants more time. She wants 5 years. I am sorry. More time is not going to do it. What the State Department has got to do, they have got increasing requests because they have got a former Secretary running for President. There is a lot of public interest in these records. They need to create a SWAT team that goes in, reviews all of the Secretary's calendars, reviews her memcons and telcons, and gets those e-mails out the door. None of them are supposedly classified. We ought to be able to see them in a month or 2. And it is up to, I think, this Congress and to those of us on the outside to hold them to it.

Finally, I would just point out that the crisis in the e-mail records management, the State Department has $1 billion IT budget. The chief information officer directly supervises $750 million. It is not resources. It is will. It is leadership. It is saying to your people we have got this nice little SMART system—that is the acronym for their archiving e-mail system—but their implementation was awfully dumb, because they did not tell their folks they had to use it.

It is not hard. You go look online, you can look in the Foreign Affairs manual, there is a simple click, these are the instructions, click to convert to archive button. You can do that on any e-mail, it is up to you. They should tell everybody to do it. There needs to be some leadership here.

Those are my basic comments on what was said earlier. I welcome your questions and I applaud this Committee's attention to these really pressing open government issues.

[The prepared statement of Mr. Blanton appears in the appendix. Page 63]

Chair CORNYN. Thank you, Mr. Blanton. I think Senator Leahy said it well. This is not a partisan issue and as you point out, there are problems with compliance that go back many Administrations.

As somebody who is a conservative, I think instead of more laws and regulations, what we need is greater transparency and greater accountability, because I think I understand a little bit about human behavior and when people realize that what they are doing is going to be exposed to public scrutiny, most of us change our behavior or modify our behavior.

I think this is really a critical issue and I am just in despair, frankly, at what you are telling us; not that you are telling us, but the facts, and that is that there is this culture of noncompliance and secrecy and passive-aggressive behavior and people are not embarrassed about it and they do not see any reason to change.

We need to change the culture here in Washington, DC where the rhetoric is matched by the actions of the U.S. Government across the board through Republican and Democratic Administrations.

Ms. Kaiser, beyond the threat of a lawsuit, are there any other remedies available to requesters in dealing with a noncompliant agency? Are there other tools that you think would be useful in compelling the production of information?

Ms. KAISER. Ccertainly strengthening OGIS and its ability to conduct mediations and issue advisory opinions even in the absence of mediation would go a long way to helping requesters, because currently there really is very little resource other than litigation.

As we know, OGIS is a very powerful tool and its use can be strengthened. Currently, OGIS cannot force an agency to the table to mediate. So we need them to have some ability to issue advisory opinions and help even in the absence of mediation.

Chair CORNYN. I know Senator Grassley—Leahy and I felt strongly, and based on my experience as a State Attorney General, that an ombudsman would serve a very beneficial purpose because of the repetitive, redundant requests, and I am glad to see now that some agencies are posting the most frequently requested information so as to obviate the need for additional Freedom of Information requests.

There is a lot we can do to make things better——

Ms. KAISER. Absolutely.

Chair CORNYN [continuing]. if we can just, as I said, change some of the attitudes and the culture.

You mentioned in your written testimony that some agencies, Ms. Kaiser, forward Freedom of Information requests to political appointees so that they can be screened by the political appointees before the agency that has custody of the document actually produces it in compliance with the law on a timely basis. Does that delay or cause other problems with compliance, in your view?

Ms. KAISER. Absolutely. Not only does it cause a delay, but it also is improper. I mean, FOIA is a very independent mechanism for the public to gain access to government records. It is not a means to try to set any type of political agenda or political reaction in terms of what can be released and what should not be released.

It is improper and it also causes delay. Every level, every extra level of review will cause a delay in this instance.

Chair CORNYN. It really strikes me as a blow at the fundamental idea of open government. If a political appointee can nix the production of a compliant—a document that meets the request and there is no legal prohibition to the release of the document, then it ought to be released, because we all understand that not all this stuff is going to be complementary. Some of it may be a little embarrassing. Some of it might, if revealed, cause government agencies to change their behavior in a way that helps the public.

It is very, very important and I hope you will continue to work with us, all of us on this Committee, to try to look for other ways to help improve compliance.

It is just not acceptable to hear a witness say it is just too hard, we just cannot do it, and we ought to be applauded for chipping away at a huge backlog. I have a lot of sympathy for Ms. Barr. I think she did a good job as a witness, but she has been put in an impossible position where the State Department is just—it is a 37. That is a failing grade in any school I went to.

I have some more questions for Mr. Blanton, but let me ask Senator Tillis if he has questions.

Senator TILLIS. Thank you, Mr. Chair.

Ms. Kaiser, I kind of like being on the asking end of a question dialog with somebody from the Associated Press.

[Laughter.]

Senator TILLIS. I wanted to follow up, just something that Senator Cornyn said prompted me to ask.

In instances where we do believe that requests for information are going before political appointees, presumably with in the department, are you all aware of any instances where maybe those have rolled out of the department to higher levels where other people are influencing the processing and the result of any Freedom of Information requests for this Administration or any other one?

Ms. KAISER. Unfortunately, I am not currently aware of that. I would be happy to get back to you with some more detail on that.

Senator TILLIS. Thank you. Either for Mr. Blanton or Ms. Kaiser. You were talking about the—I was trying to get at—I have a background both in terms of records management and then in IT in terms of normal practices or common practices, I should say, in business. One question I have when you are talking about the SMART system, why would we even allow someone to determine whether or not they should opt in to archiving?

Why should we not be recording a specific event when they opt out and to let that be used? So that the presumption is if it is being created in the normal course of business, it is a business record that the government should generally assume that they need to keep. Do you agree with that?

Mr. BLANTON. Yes, sir. I would also say this was the big fight with our whole White House e-mail lawsuit and ultimately we won and the way it worked was they save it all and they sort it out later. And especially with the declining cost of computer storage and the rising power of algorithms and searching, this is actually what the National Archives of the United States should be in the business of doing.

Not—you can sit there and have many angels dancing on the head of the pin about what level in the bureaucracy should the e-mail get saved, but I am with you on this. I think if it is created on government time, on government machines for government business, it ought to be saved. If there are privacy issues or a Social Security number buried in that record, it is not difficult to create a search algorithm to sort those things out and leave that privacy piece aside.

That is what they ought to be doing, but instead you have—in my prepared testimony, I talked about decades of sort of dereliction of duty. Our National Archives, with the connivance of the Office of Management and Budget, agreed to have a print-to-file strategy for saving e-mail from the 1990's all the way to today.

One of the reasons they could not find Secretary Powell's e-mails is apparently not many of them got printed out and stuck in a box somewhere, and the same problem I think they are running into with every current e-mail.

It is a whole mindset change that has to happen and I think this Committee being on this case will help move that forward.

Senator TILLIS. Are there any areas that in your good, the bad and the ugly construct, maybe taken a different way, are there any agencies that seem to be doing things particularly well that we can learn from?

Mr. BLANTON. Yes, there are. All the agencies that are part of the FOIA online portal, which was originally built by the Environmental Protection Agency, with help from Commerce and other folks, they are doing Freedom of Information Act the way it ought to be done, a one-stop-shopping, single point of contact, posting the records after they get released.

I have to say State has taken a beating this morning, but I want to say one positive thing about them. In our latest audit, looking at this issue, as Senator Cornyn said, the only way out of this resource trap is for agencies to get ahead of the curve. Post the records in advance if there is a chance there is going to be a FOIA request for them.

I would go even further and it comes from teaching a bunch of college students issues about the cold war, which is from their point of view, if it is not online, it does not exist. And what agencies ought to think of is a presumption of openness or anything that gets released through the Freedom of Information Act should just be put online unless there is a good reason not to, like a Social Security number or the like.

If we can get to that point—we went through and we audited 165 agencies this year and found 17 of 165 were e-stars. They were posting their stuff online, making it easy for citizens to use, making it efficient for themselves to find their own records, and they were not getting stuck in how many times the thing had to be requested before it went up.

I think that is one of the few problems with the bill, the Cornyn-Leahy bill currently is it still has that old has to be requested three times language. I think in the Internet age, that is not the language we need to go for.

The presumption of openness means, I think, a presumption of posting. There are 17 agencies out there that are doing it right. It

is not a matter of resources. When State Department built that excellent online reading room, not a single new dollar was appropriated. It was out of current budget.

That is one thing I think that Freedom of Information shop at State deserves some real credit for.

Senator TILLIS. It seems to me—I know that some of the discussion is around, well, let us update our policies and provide some direction to the agencies so that they can tighten up their information, retention and management efforts, but it just seems to me if we have a good benchmark out there, people that are getting it right, that that becomes the standard. It is not optional for an agency to do it. This is a standard you have to meet.

I would support more specific direction from Congress to that end, because then I think it will help with consistency, make it easier for you to interact, because there is a common engagement model and I think a more reliable way to get to the information.

I also believe that a lot of this information should just be put out there through a portal before it is ever requested.

Mr. BLANTON. Amen.

Senator TILLIS. I mean, simply, one of the ways that Ms. Barr will be able to solve her problem—that is why I wanted to ask some process questions—is to eliminate the base that she ultimately has to review. Put a lot of it out there presumptively that it is open to the public, searchable. The private—printed e-mails can be easily digitized. They can be through character recognition brought back online, subject it to indexing. Those are the sorts of things that we should require so that we get that information out there, reduce the queue, so that they are really only spending their time on the things that truly are sensitive.

Here sensitive is is it politically sensitive versus is it sensitive in terms of the—whether it is a Democrat or Republican—sensitive in terms of the content of the document for privacy, security, national security.

Thank you.

Chair CORNYN. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Senator Cornyn. I stopped by earlier, but we had another hearing in Commerce. I come here at the end, but I wanted to thank both of our witnesses.

Following up on some of Mr. Blanton's statements, I was just listening in, on how you could have a more open portal, Ms. Kaiser, do you want to talk about what progress has been made? He mentioned some of the work at the State Department. Then what kind of online portal would you like to see?

Ms. KAISER. Sure. Well, the online portal that we endorse is the one that I believe is currently in the current legislation. It is an integrated system that allows one portal for the intake, tracking and processing of requests for all the agencies, and I think something like that not only greatly increases efficiency, but as noted before, the documents will already be out there and searchable for any other requester.

It definitely saves time on the back end for the FOIA officers who need more time and more resources. What is currently being proposed with the FOIA online portal is the right move.

Senator KLOBUCHAR. I know you have filed lawsuits in this area, the AP has, other news organizations. How well does the mediation process work with the Office of Government Information Services?

Ms. KAISER. We have not tried it with the lawsuit that we filed. We went straight to litigation on this one because we had been waiting for so long for these records that it made no sense to add another layer to that process.

My experience in the past has been that, unfortunately, OGIS was not able to bring an agency to the table for mediation. Unfortunately, unless the agency is willing to come to the table for mediation, we have very little recourse in forcing them to mediate.

There are some limitations with that system.

Senator KLOBUCHAR. Did you want to add something, Mr. Blanton?

Mr. BLANTON. Just to add that I think the legislation that is pending that was passed unanimously by this Committee and which we have endorsed would really help strengthen OGIS in some extremely useful ways. It will give OGIS independent reporting up to Congress, which it needs. It will send a signal of real backing. It will give them some more leverage to make the agencies come to the table.

Frankly, if you look around the world at the ombuds or information commissioner function, ours is one of the weakest in the world in terms of budget, staff and power. The information commission in Mexico can overrule an agency and order the release of documents and does so through an online portal that is very robust.

We need to get there, I think, in our country and it is a shame that we have fallen behind even our neighbors in our Freedom of Information Act, which used to be one of the best in the world.

Senator KLOBUCHAR. Thank you, Mr. Blanton.

Ms. Kaiser, one last question. Are there any other changes you would like to see to the FOIA process in order to improve access for the press and the public besides what we just talked about with the portal and how the situation is working with mediation lawsuits?

Ms. KAISER. That is a great question. There is probably a lot more that we would like to see. I think starting first off with the presumption of disclosure is the most important and somehow getting the agencies to abide by their requirements under the law is the first and most important item we would like to see.

We could have all the wonderful laws on the books and the presumptions of disclosure written in, but if the agencies do not abide by their requirements, we are in a bad position.

I would like to see some more force behind getting the agencies to abide by their requirements under the law.

Senator KLOBUCHAR. Thank you. I do not know if you know, but my dad got his start with the Associated Press in the Bismark, North Dakota office, which once won a Pulitzer for Dust Bowl reporting. It was quite a while ago. Then he went on from there to the Star Tribune. He had a really good career with the AP for a long time both in North Dakota and then in Minneapolis.

Thank you for your work and thank you, Mr. Blanton.

Senator CORNYN. Thank you, Senator Klobuchar.

Mr. Blanton, let me ask you about Exemption 5 and the sunset that is proposed. National Security Archive has been a strong supporter of imposing a sunset on that provision, which the FOIA Improvement Act would do. Can you explain the importance of that provision, in your opinion?

Mr. BLANTON. The fifth exemption is the one that covers deliberative process, the backroom discussions in the bureaucracy. It also covers attorney-client privilege and I think it has been one of the real holdups, that people have seen inside the government any attempt to limit the exemption as a threat to attorney-client privilege.

Instinctively, every lawyer in this room will bristle at that. That is not the point here, because I think the record shows courts are completely deferential to attorney-client privilege. The problem is that the other part of the exemption, deliberative process, has become what a former staffer of this Committee, John Podesta, called the "withhold if you want to" exemption.

The bureaucrats have applied it to just about anything, to draft histories 30 years old, to discussions of a draft resolution at the United Nations 20 years ago on Rwanda. It is just really abused.

In the first 2 years of the Obama administration, it looked like the rate of the use of that exemption was dropping. It dropped from in the 60's—60,000 times down to 50,000 times, and the Obama administration claimed it as credit and said, look, this shows that the presumption of disclosure is working.

The last 3 years it has zoomed back up and by our count, although this year's reports, the numbers are not precisely there, but between the Associated Press reporting and our calculation, we think the use of B5 may have hit an all-time record last year, over 80,000 invocations. This is a totally discretionary exemption.

The Presidential Records Act puts a 12-year limit on the use of that exemption to cover Presidential records. For those of us on the outside, it boggles our mind that Presidents get only 12 years, but the bureaucrats basically have infinity today unless you pass the S. 337 and put a sunset on it.

The sunset, no damage is going to be done. We have had an experiment these last 35 years with the Presidential Records Act putting a sunset on the exemption. We do not have a spate of lawsuits. We do not have reopened litigation. We do not have problems. We have a little embarrassment, like the Stephen Breyer issue, that memo that came out of a junior White House lawyer saying this guy Breyer is not really qualified to be on the Supreme Court. So the attorney was embarrassed, had to apologize to Justice Breyer, who made a joke about it, we all got amused and we got a lesson in open government and accountability, and that is what we need.

Chair CORNYN. Mr. Blanton, let me ask you a hypothetical question.

Mr. BLANTON. Yes, sir.

Chair CORNYN. A government employee decides, as a matter of their personal convenience, not to use their government e-mail, but rather to set up a personal e-mail account and to use that for both official business and personal business.

If every government employee decided to do that, what would that do to the Freedom of Information Act and the public's right to know?

Mr. BLANTON. That is the end of the Federal Records Act and the Freedom of Information Act and it is an enormous challenge and it is wrong. It is wrong because in the specific instance, you had the head of a Federal agency doing it who is responsible under the Federal Records Act for records systems that preserve agency records. It is wrong.

Was there a specific prohibition? No. I think Senator Franken was correct that that specific prohibition you had 20 days to move the stuff over to a work system, that was not in place yet.

It was wrong. Yet I would point out the irony. It is actually more of a tragedy because it is a commentary on our whole record-keeping system. That we are probably going to end up with more saved, preserved e-mails from those materials handed over by Ms. Clinton because she had them on a private server than if she had kept them all on a State.gov system, because the State.gov system was totally broken, and that is a tragedy.

That is a commentary on recordkeeping and something we have got to change and we are just—but is the irony of this current discussion that we are going to have more of those e-mails I think in the public domain as a result.

Chair CORNYN. Thank you very much. I know Senator Tillis has some additional questions.

Senator TILLIS. No more questions.

Chair CORNYN. Well, thank you. Thank you for your participation today and, more importantly than that, thank you for your ongoing efforts to help us help the public enforce their right to know what their government is doing on their behalf and with their hard-earned tax dollars.

Thank you very much.

Mr. BLANTON. Thank you very much.

Ms. KAISER. Thank you.

Chair CORNYN. This hearing is adjourned.

[Whereupon, at 11:11 a.m., the hearing was concluded.]

Witness List

Hearing before the
Senate Committee on the Judiciary

On

"Ensuring an Informed Citizenry: Examining the Administration's Efforts to Improve Open Government"

Wednesday, May 6, 2015
Dirksen Senate Office Building, Room 226
10:00 a.m.

Panel I

Ms. Melanie Ann Pustay
Director
Office of Information Policy
U.S. Department of Justice
Washington, D.C.

Ms. Nikki N. Gramian
Acting Director
Office of Government Information Services
National Archives and Records Administration
College Park, MD

The Honorable Joyce A. Barr
Assistant Secretary
Bureau of Administration
U.S. Department of State
Washington, D.C.

Panel II

Ms. Karen Kaiser
General Counsel
The Associated Press
New York, NY

Mr. Thomas S. Blanton
Director
National Security Archive
The George Washington University
Washington, D.C.

Department of Justice

STATEMENT OF

MELANIE ANN PUSTAY
DIRECTOR
OFFICE OF INFORMATION POLICY

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AT A HEARING ENTITLED

"ENSURING AN INFORMED CITIZENRY: EXAMINING THE ADMINISTRATION'S EFFORTS TO IMPROVE OPEN GOVERNMENT"

PRESENTED
MAY 6, 2015

Melanie Ann Pustay
Director
Office of Information Policy
Before the Senate Judiciary Committee
Washington, D.C.
May 6, 2015

Good morning, Chairman Grassley, Ranking Member Leahy, and Members of the Committee. I am pleased to be here today to discuss the Freedom of Information Act and the Department of Justice's ongoing efforts to encourage agency compliance with the statute as well as with President Obama's Memorandum on the FOIA and Attorney General Holder's FOIA Guidelines. The Department of Justice is strongly committed to the President's and Attorney General's vision of open government. My office, the Office of Information Policy (OIP), has undertaken a range of initiatives this past year designed to assist agencies in improving their FOIA administration. Today I would like to highlight some of those efforts, provide an overview of key FOIA statistics and agency successes from this past fiscal year, and outline some of the exciting new initiatives we are undertaking that are designed to help further improve FOIA in the years ahead.

OIP takes very seriously its obligation to encourage agency compliance with the FOIA. We believe that the foundation of any FOIA program are personnel who have a complete understanding of the FOIA's legal requirements and the policy considerations set out in the President's and Attorney General's FOIA Memoranda. Accordingly, one of the primary ways OIP encourages compliance with the FOIA is through the offering of a range of government-wide training programs and the issuance of policy guidance that assists agencies in their implementation of the law. In 2014 alone, my Office provided training to thousands of individuals through a variety of training programs, including seventy-six specialized presentations given at the request of various agencies, which were designed to meet their specific FOIA training needs.

In addition to providing training on all aspects of the FOIA, OIP also issues policy guidance to agencies on the proper implementation of the law and the President's and Attorney General's FOIA Memoranda. All of the guidance issued by OIP can be found on the Guidance page of our website. Just this past March, OIP issued new guidance addressing proactive disclosures. In this guidance, OIP emphasized that when agencies make proactive disclosures they are enhancing transparency by ensuring that certain key information about the operations and activities of the government are readily and efficiently made available to everyone. In addition to discussing the FOIA's proactive disclosure requirements, the new guidance addresses ways in which agencies can take further steps to increase proactive disclosures in keeping with the President's and Attorney General's FOIA directives. The guidance provides information on methods of disclosure, strategies for identifying "frequently requested" records, and tips on ensuring that posted information is usable. To assist agencies even further, OIP included as part of its guidance a "Proactive Disclosure Checklist."

In 2014 OIP issued a series of guidance to agencies on ensuring timely determinations on requests for expedited processing, reducing backlogs and improving timeliness, and providing

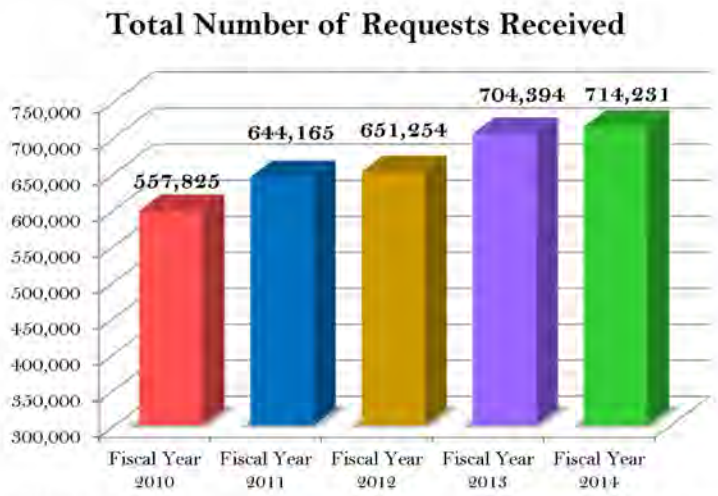
status information to requesters. As in years past, OIP also issued guidance for further improvement based on our review and assessment of agencies' 2014 Chief FOIA Officer Reports. That guidance highlighted the importance of agencies: 1) ensuring that their FOIA professionals receive substantive FOIA training, 2) adding distinct steps to their FOIA processes to identify potential discretionary disclosures, and 3) taking an active approach to making proactive disclosures.

As you know, last month we celebrated the sixth anniversary of Attorney General Holder's FOIA Guidelines. Issued during Sunshine Week on March 19, 2009, the Attorney General's FOIA Guidelines address the presumption of openness that the President called for in his FOIA Memorandum, the necessity for agencies to create and maintain an effective system for responding to requests, and the need to improve timeliness and to work to reduce backlogs. The Guidelines also direct agencies to promptly and proactively make information available and they emphasize the importance of agencies using "modern technology to inform citizens about what is known and done by their Government." Finally, stressing the critical role played by agency Chief FOIA Officers in improving FOIA performance, the FOIA Guidelines direct all Chief FOIA Officers to review their agencies' FOIA administration each year and to report to the Department of Justice on the steps taken to achieve improved transparency.

OIP uses the Chief FOIA Officer Reports as a vital tool in our efforts to promote accountability and encourage agency compliance with the FOIA and the President's and Attorney General's FOIA Memoranda. Each year OIP has developed guidelines for agency Chief FOIA Officer Reports. While we have maintained five key topical areas for agencies to address, each year OIP has modified the specific questions asked of agencies to build on the responses of previous years. As a result, the Chief FOIA Officer Reports have become a valuable resource for tracking and documenting agencies' efforts to improve all aspects of their FOIA administration over the past six years. I highly recommend that the Committee review these Reports, which are available at http://www.justice.gov/oip/chief-foia-officer-reports-2015, to see the broad array of activities that agencies have undertaken to improve their FOIA administration.

In 2014, for the fourth straight year, OIP conducted a formal assessment of agencies' FOIA administration by scoring all ninety-nine agencies that are subject to the FOIA on a series of milestones tied to each of the five key areas addressed in the Attorney General's FOIA Guidelines. OIP uses a wide range of milestones to capture a broad spectrum of FOIA activity, from applying the presumption of openness, to increasing use of technology and improving timeliness. We post the assessment each year on the Department's website, along with a summary of agency activity and guidance for further improvement. As agency implementation of the Attorney General's FOIA Guidelines has matured, OIP has continually refined the milestones that are assessed. We have also engaged with civil society organizations to identify new milestones to be included in the assessment. This collaboration has been very productive and we greatly appreciate the ideas and suggestions we have received. For the 2014 assessment OIP used twenty-four separate milestones. We expanded our scoring system for those milestones from three scores to five, gave overall scores for each assessed section, and added narrative information to provide greater context to the milestones.

We are currently in the process of reviewing and assessing agencies' 2015 Chief FOIA Officer Reports, which were posted this past March. Based on our initial review of those reports and our review of agency Annual FOIA Reports for Fiscal Year 2014, it is clear that agencies have persevered through a difficult year of tight resources in an effort to meet the ever-increasing demands of their FOIA administration. This past fiscal year marks another record high in terms of the numbers of requests received by agencies. During Fiscal Year 2014, agencies received 714,231 requests, which rose from the previous high of 704,394 requests received in Fiscal Year 2013. Since Fiscal Year 2010, the number of FOIA requests received by the government has increased each year.



In addition to the ever-increasing numbers of incoming requests, Fiscal Year 2014 posed other challenges for agencies' administration of the FOIA as well. During Fiscal Year 2014, the government overall reported its lowest staffing levels dedicated to FOIA in the past six fiscal years and agency FOIA offices began the year with a nearly three-week government shutdown during which time no requests could be processed. Taking into account that the government processed 647,142 requests during Fiscal Year 2014, we roughly estimate that this three-week period could have resulted in over 32,000 more FOIA requests being processed.

As a result of these challenges and the record high number of incoming requests, the government's overall backlog of pending requests increased. Given the importance of reducing backlogs, in 2014 for the first time my Office directed any agency that had a backlog of more than 1,000 pending requests which had not reduced that backlog by the end of the fiscal year, to include in its Chief FOIA Officer Report a plan for achieving backlog reduction. For the 2015 Chief FOIA Officer Reports, agencies were required to respond to this question again, and those agencies that formulated plans in 2014 were asked to describe their efforts in implementing those plans.

While there were a number of challenges that agencies worked through during Fiscal Year 2014, there were also several areas of success that I am pleased to highlight. First, the majority of agencies (72 out of 100) were able to maintain low backlogs of fewer than 100 requests. Notably, fifty-nine of these agencies had a backlog of less than twenty requests, including twenty-nine that reported having no backlog at all.

Further, when processing requests for disclosure, the government continued to maintain a high release rate of over 91%, marking the sixth straight year in which the government's release rate was above 90%. This means that records were released, either in full or in part, in response to 91% of requests where the government was in a position to make a disclosure determination. Notably, the government also continued to improve its processing times for both simple and complex track requests. OIP has for a number of years focused on agency efforts to process simple track requests within an average of twenty working days. This past fiscal year, the government overall reported an average of 20.51 days to process its simple track requests.

Agencies also continued to make marked improvements in a number of areas that are not easily captured by statistics. As evidenced by the 2015 Chief FOIA Officer Reports, as well as from prior years' Reports, agencies continue to embrace the President's and Attorney General's FOIA directives by proactively posting information online. In addition to the various examples of proactive disclosures noted in agency Chief FOIA Officer Reports, many agencies also describe the steps they have taken to make the information they post online more useful to the public. More and more agencies are posting information in open formats whenever possible and taking steps to make the information easier to find on their websites. In addition, agencies are taking steps to publicize their proactive disclosures on social media and other platforms to ensure that the public is aware of their availability. These efforts fully embrace the President's message for agencies to "use modern technology to inform citizens about what is known and done by their Government."

In response to the Attorney General's 2009 FOIA Guidelines, agencies have also continued to look for opportunities to make discretionary releases of information when processing records. A range of examples of discretionary releases made by agencies just this past year can be found in the 2015 Chief FOIA Officer Reports. These examples include information that could have been withheld under Exemptions 2, 5, 7(D), and 7(E) of the FOIA, with Exemption 5 material forming the majority of the discretionary releases. Of course, exemption use will fluctuate from year to year depending on the types of records that are requested and the numbers of requests that are processed. Further, the number of times an agency uses exemptions in responding to a request does not correspond with the volume of information withheld. Keeping this in mind, it is still noteworthy that during Fiscal Year 2014, the government overall reduced by 14% the number of times it cited to Exemption 5. As has been the case for many years, the most cited exemptions in Fiscal Year 2014 were the FOIA's privacy exemptions, Exemptions 6 & 7(C). When exemptions were used by agencies, the privacy exemptions were used 53% of the time. Notably, the number of times Exemption 5 was cited amounts to less than 13% of the government's entire usage of FOIA exemptions.

As to Exemption 2, the Department of Justice has been working with a number of agencies impacted by the Supreme Court's ruling in *Milner v. Department of the Navy*, 131 S. Ct. 1259 (2011), which substantially narrowed the scope of that exemption. Through those efforts we developed a thoughtful legislative proposal that does not sweep too broadly, but at the same time provides sufficient protection against circumvention of the law and the safeguarding of our national security. That proposal was recently submitted to Congress by the Department of Defense as part of its FY16 Defense Authorization Act proposal.

In addition to enhancing transparency through proactive disclosures and discretionary releases of otherwise exempt material, agencies continue to look for ways to increase their use of technology for the benefit of FOIA administration. As agencies receive more requests every year it has become even more important to find efficiencies through the use of new technologies. One area in which we have found technology to be particularly beneficial is the use of tools and applications that assist with the core tasks of processing FOIA requests, such as technology that assists in the search and review of documents, shared platforms that allow for simultaneous review and comment on documents, and electronic capabilities that automatically identify duplicative material. Automating many of the internal processes for handling FOIA requests can bring great benefits in efficiency. While some of these tools can sometimes be difficult for agencies to acquire, many agencies have reported that they are taking steps to utilize more advanced tools in order to build efficiencies in their FOIA programs.

As you can see, while facing many challenges, agencies have found a number of ways to improve their FOIA administration. I am particularly pleased to highlight for you today the substantial progress we have made on five initiatives to further modernize FOIA as part of our commitments under the United States' Second Open Government National Action Plan (NAP). Our first initiative is the creation of a consolidated online FOIA service that will allow the public to make a request to any agency from a single website and that will include additional tools to improve the customer experience. OIP has been working closely with the General Services Administration's 18F Team on this commitment and the development of a new resource to be added to the features available on FOIA.gov, the government's comprehensive resource on FOIA.

As you know, the Department launched FOIA.gov during Sunshine Week 2011 as the flagship initiative under our first Open Government Plan. FOIA.gov provides the public educational material about how the FOIA works, where to make requests, and what to expect through the FOIA process. Explanatory videos are embedded into the site and there is a section addressing frequently asked questions. The videos alone have received well over 2.5 million visitors. We also include a glossary of FOIA terms and list the contact information for each agency's FOIA Requester Service Centers and FOIA Public Liaisons. The site includes links to the over 100 FOIA offices that use online portals, making it easier for requesters to begin their request process right from FOIA.gov.

In addition, FOIA.gov serves as a visual report card on agency compliance with the FOIA by graphically displaying all of the data from agency Annual FOIA Reports and allowing users to compare the data by agency and over time. The site alerts the public to FOIA news posted by the Department of Justice and spotlights examples of FOIA releases made by agencies. As an

additional resource, the site encourages the public to first look to see what is already publicly available on agency websites before submitting a FOIA request. A search feature is provided to the public where they can use keywords to find records posted on any government website. With our continued focus on encouraging agencies to post documents proactively, enhancing the public's ability to locate that posted information is critical. We look forward to continuing to enhance the features on FOIA.gov to further improve the customer experience.

The second NAP initiative that we have been working on focuses on reviewing the feasibility and potential content of a core FOIA regulation. There are many steps in the FOIA process that are generally shared across agencies. By standardizing these common aspects we can potentially make it easier for requesters to understand the FOIA process while at the same time making it easier for agencies to publish new regulations. In 2014, OIP launched this project by meeting with both agencies and civil society to get their initial input from the very start. We then formed an interagency taskforce which began the process of exploring the streamlining of agency FOIA regulations. As part of our process we have analyzed current agency FOIA regulations in comparison to a "model FOIA regulation" provided to us by civil society. Based on that analysis, our team is now hard at work drafting initial language for a potential common regulation. We look forward to continuing our engagement with civil society as we collaborate on this project.

Our third NAP initiative is designed to improve internal agency FOIA processes by leveraging best practices and successful strategies across the government. In 2014, OIP launched a series of Best Practices Workshops. Each workshop focused on a specific topic in FOIA administration where agency representatives with particular success in that area shared their best practices and successful strategies. These workshops, which we will continue in the years ahead, provide a unique opportunity for agencies to learn from each other and to apply innovative solutions more broadly across the government. After each workshop my Office published the best practices discussed, as well as any related guidance and resources, on a designated page of our website as a reference for all agencies. Since its launch, we have had five very successful workshops on the topics of reducing backlogs and improving timeliness, proactive disclosures, implementing best practices observed by requesters, utilizing technology to improve FOIA processing, and FOIA customer service. The series has been well received by agencies and we look forward to continuing our workshops with new topics in 2015.

As part of a fourth NAP initiative, I have been serving as a government member of the newly formed FOIA Federal Advisory Committee. The FOIA Advisory Committee has met four times (June 24, 2014, October 21, 2014, January 27, 2015, and April 21, 2015) and discussed a range of issues related to FOIA administration, including assessment of fees under the statute and proactive disclosures.

Finally, the fifth initiative is one that OIP is very proud to have successfully completed. The commitment was to enhance FOIA training by making standard e-Learning resources available for all federal employees. As I mentioned at the start, I believe that it is vitally important that all agency personnel, and not just FOIA professionals, have the proper training to understand the important role they play in implementing the FOIA. Just in time for Sunshine Week, after a year of preparation, my Office released a suite of new e-learning FOIA training

resources. These resources target the entire spectrum of federal employees, from the newly arrived intern to the senior executive, to ensure that all employees know their obligations and responsibilities under the law.

The new training resources include:

- An infographic that serves as a resource on FOIA basics for all employees new to the federal workforce;
- A brief video designed specifically for senior government executives, which provides a general overview of the FOIA and emphasizes the importance of their support to their agency's FOIA program;
- An in-depth e-Learning training module specifically designed for FOIA professionals, which addresses all the major procedural and substantive requirements of the law, as well as the importance of good customer service; and
- A separate e-Learning training module for all other federal employees that provides a primer on the FOIA and highlights ways in which they can assist their agency in administering the law.

This new suite of FOIA training tools not only provides important resources for all agencies, but it reemphasizes the important message from the Attorney General's FOIA Guidelines that "FOIA is everyone's responsibility."

In closing, I want to thank you for the opportunity to be here today to discuss agencies' administration of the FOIA and all of our efforts here at the Department to encourage compliance with this important law. The Department of Justice looks forward to working together with the Committee on matters pertaining to the government-wide administration of the FOIA. We are fully committed to achieving the President's and Attorney General's vision of open government. While this past fiscal year presented many challenges for agencies, we have accomplished a great deal since the issuance of the President's and Attorney General's 2009 FOIA directives. Our work is not done, however, and OIP looks forward to continuing to work diligently to help agencies achieve even greater transparency in the years ahead. I would be pleased to address any question that you or any other Member of the Committee might have on this important subject.

TESTIMONY OF NIKKI GRAMIAN

ACTING DIRECTOR OF
THE OFFICE OF GOVERNMENT INFORMATION SERVICES

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

ON

"ENSURING AN INFORMED CITIZENRY: EXAMINING THE ADMINISTRATION'S EFFORTS TO IMPROVE OPEN GOVERNMENT"

May 6, 2015

Good morning, Mr. Chairman, Ranking Member Leahy, and members of the Committee. I am Nikki Gramian, Acting Director of the Office of Government Information Services (OGIS), a component of the National Archives and Records Administration (NARA). As Acting Director, it is my great honor to appear before you to share our observations on the current state of the Freedom of Information Act (FOIA) and update you on OGIS's activities. Regarding the status of the search for a new OGIS Director, NARA is currently reviewing applications from qualified candidates for the position and will be scheduling interviews soon.

I want to start by noting the important interplay between records management and access. It has long been OGIS's observation that access to records under the FOIA is linked to and greatly enhanced by good records management. OGIS recognizes that when an agency achieves excellence in records management, its FOIA administration benefits, and both programs succeed. Linking improvements to the FOIA with improvements to records management programs is an OGIS best practice.

NARA provides key leadership in the area of records management. In coordination with the Office of Management and Budget (OMB) and as part of the Administration's broader Open Government Initiative, including the National Action Plan for Open Government, NARA plays a

key role in a multi-year, executive branch-wide effort to reform and modernize records management policies and practices. The 2012 OMB/NARA Managing Government Records Directive (M-12-18) has established important requirements for electronic recordkeeping, which will begin to take effect in 2016.

IMPROVING FOIA — ONGOING EFFORTS

OGIS has launched a number of new initiatives since former Director Miriam Nisbet last testified before this Committee in March 2014.

Administrative Conference of the United States Report

On April 28, 2014, the Administrative Conference of the United States (ACUS) issued its report, *Reducing FOIA Litigation Through Targeted ADR Strategies.* The study carefully analyzed disputes between FOIA requesters and agencies, and found that the unique aspects of both individual agencies and requesters make it extremely difficult – if not impossible – to generalize about which alternative dispute resolution strategy would be most useful in a particular situation. In the absence of such a "formula," the study recognizes the important role OGIS plays, and Congress' intent in establishing OGIS as an effective vehicle for reducing disputes and decreasing litigation.

The study also made a number of recommendations that we believe will help increase the use of alternative dispute resolution across the federal government, including that:

- Agencies approach OGIS for mediation services at any stage in the process if it appears that OGIS engagement may resolve the dispute;
- All agencies let requesters know about the availability of dispute resolution services by OGIS in their final response letters and on their website; and
- All agencies ensure that FOIA Public Liaisons receive necessary training in dispute resolution and support from agency leadership.

Establishment of Review Team

In her 2014 testimony, Ms. Nisbet discussed the Government Accountability Office's (GAO's) report on OGIS's work in carrying out our mission, as set forth in the FOIA statute. In its report, GAO recommended the office adopt a methodology and timeframe for reviewing agencies' FOIA policies, procedures and compliance. While OGIS has been carrying out our review mission in a number of ways since the office opened its doors in 2009—including by observing agencies' policies, procedures and compliance through our mediation cases, reviewing and commenting upon proposed agency FOIA regulations and reviewing government and non-government reports on FOIA, Ms. Nisbet acknowledged that we want to take additional steps to better fulfill our review mandate.

I am pleased to share that since OGIS's last appearance before this committee, NARA has hired two additional OGIS staff members to work on our review mission. The review team members are now on board, and in Fiscal Year (FY) 2014, OGIS launched a formal agency assessment program. This program will assess individual agency FOIA programs by reviewing the agency's FOIA regulations, website, and FOIA request files. In addition, the program will survey and conduct onsite interviews with agency FOIA professionals, and produce a report at the conclusion of each agency assessment.

OGIS's assessment reports are not designed to provide grades, rankings or include a comprehensive tally of every aspect of an agency's FOIA program; rather, the reports are intended to provide thoughtful and practical analysis in a readable and useful format. The reports will be posted on OGIS's website and shared with the reviewed agency, particularly its FOIA staff, Chief FOIA Officer and agency head.

Since its establishment, the review team has completed reviews of NARA's Operational FOIA and Special Access FOIA programs. Reviews are currently underway of six components of the Department of Homeland Security: the Federal Emergency Management Agency, the U. S. Coast Guard, the Transportation Security Administration, the Secret Service, U.S. Immigrations and Customs Enforcement, and U.S. Customs and Border Protection. While we are very excited about this robust

new review framework, we will also continue our previously existing review activities, which provide valuable insight into agency FOIA programs.

FOIA Advisory Committee

As shared in our 2014 testimony before this Committee, OGIS is working closely with the Department of Justice and the Administration to implement the five FOIA-related commitments included in the second Open Government National Action Plan. Specifically, OGIS, with the support and guidance of NARA, is supporting the Freedom of Information Act Advisory Committee. This federal advisory committee is made up of government and non-government FOIA experts who will develop consensus recommendations for improving FOIA administration and proactive disclosures. OGIS worked with the General Services Administration (the lead agency for the Federal Advisory Committee Act) to quickly get the committee up and running.

In May 2014, the Archivist of the United States, David S. Ferriero, appointed 20 members to the FOIA Advisory Committee. The members are split evenly between those who work within the government and those who don't. At its first meeting in June 2014, the Committee identified three areas upon which to focus its efforts: oversight and accountability; FOIA fees; and proactive disclosure. The Committee established subcommittees—each led by one government member and one non-government member—to examine these issues.

The oversight and accountability subcommittee is looking at what FOIA oversight mechanisms currently exist, including identifying both gaps in current oversight efforts and potential oversight best practices in state, Federal, and international programs. In addition, subcommittee members are examining how compliance audits might contribute to robust oversight. The proactive disclosure subcommittee is identifying the barriers to proactive disclosure and studying how agencies can use data about FOIA requests to improve proactive disclosure practices. The fees subcommittee is discussing whether and how to reform the method by which agencies assess fees in the FOIA process and reducing "fee animosity" between requesters and agencies.

Recommendations

The FOIA directs OGIS to recommend policy changes to Congress and the President to improve FOIA administration; in previous years, OGIS has presented those recommendations to the Committee as part of our testimony. OGIS has not issued new recommendations for 2015. Once a new director is selected, we will continue to work on a new set of recommendations under the guidance of the new OGIS Director.

Although we do not have new recommendations to share at this time, I want to update you on our continued work in this area. OGIS continues to request that agencies update their system of records notices (SORNs) to include routine uses that allow OGIS and the agency to discuss and share information about an individual's FOIA requests. Currently, the absence of an appropriate routine use creates a logistical challenge for our review work and our capacity to provide efficient and effective mediation services. During an agency assessment, our review team will evaluate a sample of agency FOIA case files against FOIA's requirements and selected DOJ and OGIS best practices. If the agency has updated its SORNs to include a routine use for the disclosure of records to OGIS, the agency is permitted to share case files without taking additional steps. However, the absence of an appropriate routine use requires additional administrative steps OGIS and the agency must take to share the information. For example, OGIS or the agency would have to obtain the consent of the individual to whom the records pertain for each of the case files OGIS would like to review; alternatively, the agency must conduct a page-by-page and line-by-line review of the case files to insure that only the information required to be released pursuant to the FOIA is given to OGIS.

In addition, in the course of our mediation work, when an appropriate routine use is not available, our practice is to seek the individual's consent to allow OGIS and the agency to share information. However, when an agency is seeking OGIS's assistance with a dispute, the agency must obtain consent from the requester before contacting us. This can be an obstacle, particularly in situations in which an agency seeks our assistance with a requester with whom communications have broken down.

OGIS also continues to work on its recommendation to streamline the process of requesting immigration-related records. OGIS worked with U.S. Citizenship and Immigration Services (USCIS) to convene an August 2014 stakeholder meeting that included immigration lawyers and FOIA

requesters as well as representatives of other agencies, including the Department of Health and Human Services, other Homeland Security components that deal with immigration related records, and the State Department. Through its mediation services, OGIS continues to work with USCIS, requesters, immigration lawyers and other agencies to help streamline the processing of immigration records.

OGIS UPDATE

Finally, I would like to update you on OGIS's additional activities in the last year, which are outlined in our annual report and include:

- working with agencies when the Office observes — through our mediation services — policies or procedures that OGIS believes are not consistent with FOIA law or policy or that may be different from practices occurring at other agencies.
- providing Alternative Dispute Resolution skills training to agency FOIA professionals with the goal of giving the professionals ADR tools to incorporate into their FOIA work. Since its first year, OGIS has trained more than 500 FOIA professionals in dispute resolution skills. Demand for OGIS training sessions is high, and OGIS regularly receives positive feedback from attendees on the usefulness of the training.
- offering best practices to agencies and requesters, publicized through our blog, The FOIA Ombudsman, which is updated weekly.
- reviewing agency FOIA materials, from agency websites to template letters.

I appreciate the opportunity to appear before this Committee and thank you for the support that you have shown to the Office of Government Information Services.

Statement of Joyce Barr

Assistant Secretary of Administration
U.S. Department of State

Before the
Senate Committee on the Judiciary

May 6, 2015

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

Good morning.

Thank you for the invitation to appear before you today. My name is Joyce Barr and I serve as the Assistant Secretary for Administration, as well as Chief FOIA Officer for the Department of State. I have been a member of the Foreign Service for over 35 years, serving in posts around the world, including an assignment as U.S. Ambassador to the Republic of Namibia. Thank you for your interest in and advocacy for improving transparency to the public. We share that goal at the Department and work every day to achieve it.

The Bureau of Administration provides a range of services to our embassies and facilities around the world, including property management, publishing and library services, contracting and procurement, travel and transportation.

Another part of our mission is to respond to requests under the Freedom of Information Act, as well as to manage and maintain official records at the Department of State. I appreciate the opportunity to provide an overview of the State Department's ongoing efforts to improve our FOIA processing and administration.

The State Department is committed to openness. We recognize that openness is critical to ensuring the public trust, as well as to promoting public participation in and collaboration with the U.S. Government. Therefore, we believe that transparency will make the Department stronger – it will strengthen our ability to achieve progress in U.S. foreign policy and national security, while promoting efficiency and effectiveness in the important work we do. This is why we continue to look for ways to improve our openness to the public, solicit greater feedback through public engagements on transparency issues, and encourage the public to participate in the business of U.S. foreign policy.

That said, meeting our commitment to openness is very challenging. As you may already know the State Department is currently facing a large backlog of over 18,000 FOIA requests. We recognize this backlog is unacceptable, and are working to reduce it. During the past year, we have achieved a nearly 17 percent

reduction in our backlog of initial requests, and a nearly 23 percent reduction in our appeals backlog, by finding ways to streamline our case processing. While we've made progress in reducing our backlog, we are seeking to make additional strides to reduce this further.

I should note there are several factors that contribute to this backlog. First, we are struggling to keep up with a large increase in FOIA requests. Since 2008, our caseload has increased over 300 percent. In Fiscal Year 2008, the State Department received fewer than 6,000 new FOIA requests. In Fiscal Year 2014, we received nearly 20,000. Since the beginning of this fiscal year in October, we have already received nearly 14,000 new requests.

Second, many of these cases are increasingly complex. The State Department is the public's first, and often the only, stop for information and documents relating to National Security issues. Other national security agencies are partially, if not completely, exempt from FOIA requests. As a result, requesters often come only to the Department to request information on any and all national security issues. These requests are often a mixture of complex subject matters regarding terrorism, wars, foreign government relations, security, diplomacy - and something we have seen more of recently - pending litigation against the U.S. Government.

These complex subject matters require multiple searches throughout many of our 275 Missions across the globe, often involving the review of classified or highly sensitive materials, as well as coordination with other federal agencies. In many of these cases, searches locate voluminous amounts of paper and electronic materials that must be reviewed by State and interagency subject matter experts at various agencies in the U.S. Government. Given that FOIA requests to the Department often relate to contemporary topics, our FOIA team must consult within State and with other interagency subject matter experts regarding sensitivities and whether the release of the information would harm U.S. national security, or potentially damage relations with a foreign country.

To assist in addressing both current FOIA requests and questions about older and pending requests, the State Department has a dedicated FOIA Public Liaison team working hard to answer questions and respond to queries about the status of specific requests. The most common complaint we receive from the public is related to delays in receiving timely responses. Not surprisingly, as the number of FOIA requests has increased, so has the number of public inquiries regarding the status of those requests, and we receive such inquiries on a daily basis. Our goal

is to do everything we can to complete each request as quickly as possible, with as much responsive information as possible.

You may already be aware that Secretary Kerry recently reinforced this point with his letter of March 25 to our Inspector General. In that letter, the Secretary explained that he recognizes the work that has already been done and that the Department is already acting on a number of challenges associated with meeting its preservation and transparency obligations. The Secretary asked for an outside look by the Inspector General to ensure we are doing everything we can to improve and to recommend concrete steps that we can take to do so.

I am here as the Department's senior FOIA official, to assure you that we are committed to continuing efforts to improve and work cooperatively with the Inspector General with his review and any recommendations that may follow. The Department's FOIA experts have already met with IG review team.

I would like to also take this opportunity to share with the Committee some of the unique State Department activities, in addition to FOIA, that inform the public about foreign policy, diplomatic relations, and State operations through the release of literally millions of pages of documents.

Website

We are very proud of our current website and urge everyone to visit FOIA.state.gov. Some of you and your staff may have already visited this website, but if you have not done so, I highly recommend taking a look. For the past few years, we have been posting completed FOIA productions on that site in situations where we have received more than one request for the same information. The site is searchable by key word, date, region, etc.

I'm told the State Department was the first U.S. Government agency to initiate a FOIA website nearly two decades ago. Since then, we have continuously striven to enhance our FOIA website, often working with constituency requester groups to design a site that provided what they needed and wanted. In fact, the National Security Archive has publicly noted that the State Department has one of the best FOIA websites of all federal agencies.[1] Today, we have an interactive site that provides a wealth of information to the public, including the ability to search and access thousands of previously released documents.

Opening the Historical Record of US Foreign Policy

[1] *See* http://nsarchive.gwu.edu/NSAEBB/NSAEBB505/

Decades before the Executive Order mandate, the Department established a program for the declassification review of its most sensitive permanent historical records, transferring them to the National Archives where they are available to the public. During the past five years alone, we have declassified nearly 26 million pages, bringing the long term total to literally hundreds of millions of pages of declassified foreign policy records available to the public at the National Archives. More than 95 percent of the entire collection was declassified for public access, with the remaining percentage representing mostly the equities of other agencies.

There are 2.3 million permanent historical records available online from State's corporate electronic archive, the oldest (dating back to 1973) and only enterprise-wide collection of substantive electronic records documenting a cabinet agency's mission and activities in the Federal government. Millions of cables, diplomatic notes, and other important foreign policy documentation are available online. These actions are consistent with the Department's objective to make available to the American taxpayer, in keeping with FOIA principles, the maximum amount of documents related to our country's foreign policy activities.

Foreign Relations of the United States (FRUS)

The FRUS series is the official documentary historical story of major U.S. foreign policy events and significant diplomatic activities - and the decision making surrounding them. FRUS volumes contain documents compiled by the Office of the Historian not only from the State Department's archives, but from the Presidential Libraries, the Department of Defense, the National Security Council, the intelligence community, and USAID. The series also provides insightful documentary editing. Since the inception of the FRUS in 1861 under Secretary Seward, the State Department has been informing citizens about formerly classified operations and events in our foreign relations - and doing so proactively long before any other entity in the Federal government was releasing such information. Since its inception, the Department has published 501 volumes; with 42 volumes published in the past five years.

Presidential Libraries

There are 14 Presidential Libraries open to the public that not only provide unique insight into the personal lives of our presidents, but also serve as a collection of the records related to an administration. The public can request access to these records. The State Department is the largest single equity holder of records in the Presidential Library system. During the past five years we have processed over 3,600 requests from the Libraries, reviewing over 51,000 pages for release.

Special Access under Executive Order 13526 and Pre-Publication Review

Executive Order 13526 provides former presidential appointees access to records originated, reviewed, signed or received during their tenure in office. It also allows for them to designate research assistants for this purpose. Many of the Department's former principal officers, including former secretaries, request access to publish books covering their respective tenure in office, thus providing unique insights into events, decision making, people, and diplomacy. As a condition of this access, the State Department reviews manuscripts produced as the result of this access to ensure that there is no classified information in the published product.

In sum, the Department of State is committed to the public's access to information. We are working every day to improve our efforts in this regard. Again, Mr. Chairman, thank you for the opportunity to testify before you today. I would be pleased to address questions you or any other Member of the Committee may have on FOIA within the State Department.

Testimony of

Karen Kaiser

General Counsel, The Associated Press

on behalf of

The Sunshine in Government Initiative

Before the

Committee on the Judiciary

United States Senate

on

"Ensuring an Informed Citizenry:

Examining the Administration's Efforts to Improve Open Government"

May 6, 2015

Chairman Grassley, Ranking Member Leahy, and members of the Committee,

Thank you for the opportunity to testify today about the Freedom of Information Act – FOIA. My name is Karen Kaiser and I am the general counsel for The Associated Press (AP). I am testifying today for the AP as well as the Sunshine in Government Initiative (SGI), a coalition of media associations of which AP is a member.

The Associated Press was formed in 1846 and it exists as a not-for-profit news cooperative. Its members are U.S. newspapers and broadcasters. AP operates in 280 locations in 110 countries, and serves a diverse array of newspapers, broadcasters and digital outlets. AP's core mission is straightforward: to inform the world. Our journalists frequently use the federal FOIA and state open records laws to keep the public informed of matters of critical importance.

The Sunshine in Government Initiative was formed nearly 10 years ago to promote policies and practices that ensure our government is open, accessible and accountable. SGI members are committed to helping address FOIA's obstacles with bipartisan, common-sense ways FOIA can work better for agencies and the public.

In addition to AP, SGI members include the American Society of News Editors, Association of Alternative Newsmedia, National Association of Broadcasters, National Newspaper Association, Newspaper Association of America, Online News Association, Radio Television Digital News Association, Reporters Committee for Freedom of the Press and Society of Professional Journalists.

Mr. Chairman, we appreciate your longstanding commitment to making federal agencies more open and responsive to the public, and we appreciate the chance to speak today about the state of transparency in the U.S. as well as to suggest ways to improve the process by which the public is able to access government records.

I would like to start by making a few points about the critical importance of preserving openness and transparency for government information. FOIA is a vital tool by which the public can learn what its government is up to; it is the means by which any citizen can learn what public officials are doing, how tax dollars are being spent, and what decisions are being made. FOIA opens the government to the public, and it is through that transparency that we are able to achieve accountability – a core element of our democracy.

The Associated Press is committed to this principle of access and is a leading and aggressive advocate of transparency and accountability in government. Requesting public records and fighting for access around the world has long been part of AP's DNA. Most years, our journalists file many hundreds if not more than a thousand requests under both the federal FOIA and state open records laws around the country. These requests result in important stories that the public would otherwise not have known. Here are just a few examples:

- An AP FOIA request to the Federal Emergency Management Agency showed that thousands of people who received government aid after Superstorm Sandy may be forced to give some or all of that money back, through no fault of their own, more than two years after the disaster.

- AP obtained records from the Veterans Affairs Department (VA) showing that VA doctors had determined that a gunman who later killed 12 people had no mental health issues despite serious problems and encounters with police during the same period.

- AP submitted public records requests to agencies in all 50 states, the District of Columbia and the U.S. military for an investigation revealing that at least 786 children died of abuse or neglect in the United States in a six-year span while they or their families had open cases with child protection agencies.

- An AP FOIA request to the Federal Aviation Administration (FAA) revealed efforts by the St. Louis County Police Department to restrict airspace during the violent street protests in Ferguson, Missouri, in order to keep away news helicopters.

- AP again used federal and state open records laws this year to investigate airfield perimeter security breaches at the top 30 airports by passenger volume in the United States. While requests to the Transportation Safety Administration remain outstanding, data obtained from the FAA and state agencies exposed significant security lapses at airports around the country.

These stories – and the accountability and changes that followed from AP's reporting – would not have been achieved without reliance on our country's robust freedom of information laws and the principles of transparency that are the backbone of those laws.

At the same time, obtaining documents through FOIA remains a slow and difficult process, and one which unfortunately is becoming increasingly arduous to use. Despite promises of greater transparency at the outset of this Administration, most agencies are not abiding by their obligations of openness under the law. We are witnessing a breakdown in the system – both on the procedural front, in the form of continual delays and agency non-responsiveness, and on the substantive front, with the vast over-use of exemptions and redactions.

A few examples are illustrative:

- Shortly after Malaysia Airlines Flight 370 went missing over the South China Sea in March 2014, AP asked the Pentagon's top satellite imagery unit, the National Geospatial-Intelligence Agency, for records showing what the U.S. was doing to help the search. Agencies are required to give at least a preliminary response to such questions within 20 days. More than one year later, after the largest and most expensive search in aviation history, the agency is telling us that it has too many FOIA requests to meet its deadlines. Unfortunately this is an all-too-familiar response we hear from many agencies.

- It takes the State Department about 18 months to answer – or refuse to answer – anything other than a simple request. That is five times longer than any other agency. In March of this year AP filed a lawsuit against the State Department for failing to turn over files in response to six requests covering Hillary Clinton's tenure as Secretary of State, including one request made five years ago, and the others made nearly two years ago. The State Department missed *all* its statutory deadlines, and even its own self-created deadlines. These requests concerned not only emails, but documents, correspondence, memos, and calendars on some of the most significant issues of our time, such as the Osama bin Laden raid, surveillance practices, documents relating to a defense contractor, and material on

some of Clinton's long-time aides. These are documents the public has a right to see and which the agency is required to release, yet the only way to force the agency to comply with the law was to sue them.

- President Obama has directed agencies not to withhold or censor government files merely because they might be embarrassing. Yet in government emails that AP obtained in reporting about who pays for Michelle Obama's dresses, the National Archives and Records Administration blacked out one sentence repeatedly from its documents, citing a part of the law intended to shield personal information such as Social Security numbers, medical files or personnel records. However, the government slipped and let it through on one page of the otherwise redacted documents. Here is what that one sentence said: "We live in constant fear of upsetting the WH [White House]." That was not a proper use of the privacy exemption.

- The Treasury Department recently sent us 237 pages in its latest response to our requests regarding Iran trade sanctions. This was in response to a request we submitted *nearly nine years ago*. Nearly all 237 pages were completely blacked out on the basis that they contained commercial trade secrets.

- AP reported in October 2014 on a U.S. government program in which the Department of Justice offered continued Social Security benefits to former Nazi SS guards to induce their voluntarily relocation from the U.S. without going through the formal deportation process. The AP report led President Barack Obama to sign the No Social Security for Nazis Act just two months later. The Social Security Administration (SSA), however, provided little help in response to several FOIA requests on the subject. Its responses included excessive delays, information that directly contradicted its own prior FOIA responses, and a gross misconstruction of the requests that seemed designed to negate the information's value to AP while simultaneously relieving the SSA of having to provide embarrassing information.

- Agencies sometimes even use FOIA as a tip service to uncover what stories news organizations are pursuing. Requests are routinely forwarded to political appointees at some agencies. At the agency that oversees the new health care law, for example, political appointees now handle the FOIA requests. This is plainly an improper use of FOIA.

These examples illustrate the wide sweep of the problems we face using the federal access laws. Non-responsiveness is the norm. The reflex of most agencies is to withhold information, not to release, and often there is no recourse for a requester other than pursuing costly litigation. This is a broken system that needs reform. Simply stated, government agencies should not be able to avoid the transparency requirements of the law in such continuing and brazen ways.

AP's frustration with the agencies' continued noncompliance with the law is shared by others. For Sunshine Week earlier this year, AP examined 100 federal agencies' own yearly data on how well they are keeping up with their obligations under FOIA. Although agencies must report annually to the Justice Department on their FOIA performance, it was difficult to collect this data from some agencies in time for Sunshine Week, set around the birthday of James Madison, who promoted open government at the founding of our nation. The analysis by AP's Ted Bridis, who heads our investigations team here in Washington, found to no one's surprise that agencies were having trouble keeping up with their FOIA requirements. Among its findings were the following:

- Federal agencies received approximately 715,000 FOIA requests in 2014, a new record.
- The government responded to about 647,000 requests, a four percent decrease from the prior year.
- The backlog of unanswered requests grew by 55 percent from 2013, to more than 200,000.
- Federal agencies more than ever censored materials turned over or fully denied access to records, doing so in more than 250,000 cases or 39 percent of all requests.
- On more than 215,000 additional occasions, federal agencies said they could not find records, a person refused to pay for copies, or agencies determined the request to be unreasonable or improper.
- Agencies cited exemptions including those for national security, personal privacy and trade secrets nearly 555,000 times last year, a new record. Exemption b(5) – the exemption for internal deliberations – was used over 71,000 times last year. Exemption b(5) is a discretionary exemption, which means that agencies should err on the side of release, even if the requested material could fall within the technical language of the exemption.
- In nearly one-third of cases, when someone challenged under appeal the administration's initial decision to censor or withhold files, the government reconsidered and acknowledged it was at least partly wrong. That was the highest reversal rate in at least five years.

This administration started in 2009 with a promise to be the most transparent administration ever. Yet these statistics speak to the opposite result. If agencies cannot make substantial progress so that FOIA will work better under an administration that has repeatedly stated its commitment to openness, then Congress should recognize that further action is needed. The United States sets the standards of openness and democracy to which other countries look for guidance. This country should set the example and be a beacon of light and transparency.

Kaiser Testimony
May 6, 2015

FOIA Reform Legislation

The legislation before you today, S. 337, is vital to making FOIA work better, to improving efficiencies for requesters, to reducing the troubling backlog, to driving agencies to decisions that better align with FOIA's goals, and to ensuring that our government operates from a presumption of openness. FOIA can be improved significantly with this legislation, and with the following fixes:

- **Codify the presumption of disclosure to cement the purpose of the Act and ensure that FOIA remains strong and consistent across administrations.** By codifying the foreseeable harm standard – and the presumption of disclosure mandated by President Obama in 2009 – into the statute itself, Congress would ensure that the government in this and future administrations follows the policy that in the face of doubt, openness should prevail. This policy is the foundation of the open records law; FOIA was created based on the concept that government should be open to the public. It is antithetical to the spirit of FOIA to err on the side of withholding. Yet agencies see the law as variable based on the administration then in power. For example, Attorney General Janet Reno issued FOIA policy requiring disclosure unless an agency could identify a specific and foreseeable harm. Attorney General John Ashcroft flipped that policy and advised agencies that the Department of Justice would defend all withholdings unless they lacked a sound legal basis. Attorney General Eric Holder reversed it back in 2009 by re-implementing the foreseeable harm standard. Perhaps it is not surprising that most agencies have a tendency to withhold; their guidance has not been consistent. This is not appropriate. The policies guiding compliance with the Freedom of Information Act should not fluctuate so greatly. This legislation achieves the admirable goal of stabilizing the governing policy, which will lead to less confusion, and a more uniform and correct application of the law.

  Importantly, the presumption of disclosure does not alter the substantive scope of the exemptions or the agencies' ability to withhold exempt material where disclosure would cause any foreseeable harm. It compels agencies to bring us back to the original intent of FOIA that information should be available to the public unless there is specific reason to withhold it. And it codifies the guidance that the agencies should have been following for the last six years – that a principle of transparency underlies this law. Codifying this guidance provides consistency across administrations and prevents the principles of FOIA from being diluted based on the administration then in office.

- **Make the Office of Government Information Services (OGIS) independent to help it achieve its stated purpose – implementing effective change and providing meaningful support for requesters.** The creation of OGIS in 2007 was a ground-breaking step in strengthening the law. It was intended to provide mediation services to resolve FOIA disputes rather than resort to costly litigation, and to review agencies' FOIA policies,

procedures and compliance. Yet those goals have been stifled by a system that does not allow OGIS to act independently.

Under current practice, OGIS lacks ability to force an agency into mediation, and does not write an advisory opinion without a completed mediation. That means that requesters are still left without meaningful recourse save litigation if an agency stalls on a request or over-redacts material. Further, with respect to its ability to issue recommendations to improve the process, OGIS must first send its draft recommendations to certain executive agencies and to the Office of Management Budget for review before it can go to the White House or to Congress. Those internal reviews are to ensure that any recommendations from OGIS are consistent with other agencies and with administration policy. Congress intended OGIS recommendations, however, to inform legislative and administrative improvements to policy and practices, not the other way around. The current approach negates the independence that was intended to be given to OGIS, and does not allow it to achieve meaningful results.

The current legislation strengthens the independent voice with which OGIS was meant to speak and clarifies that Congress wanted OGIS to issue advisory opinions and take other steps to ensure that existing disputes that come to OGIS provide lessons to help avoid disputes and problems in the future. While OGIS is not a FOIA police capable of ordering agencies to disclose information, the bill is an important step toward allowing OGIS to speak forcefully in substantive disputes and to make recommendations that inform policy change.

- **Establish a modern FOIA portal to intake and track requests, and mandate the posting of frequently requested documents, each of which will significantly reduce backlogs and enhance public access to records.** Establishing a modern and uniform FOIA portal and requiring agencies to post documents that have been requested on at least three occasions will do wonders to decrease the ever-growing backlog. An electronic system that allows requesters to make requests and receive status updates and responses from the same system that the agency uses to receive and process the requests would allow requesters to track progress without additional government involvement. Such a system would help agencies better monitor and manage their FOIA responses, allocate resources, and communicate with other agencies as needed. It would vastly improve the use of limited agency resources and would free up FOIA officers to respond to substantive requests in a timely manner. Further, by mandating the online posting of frequently requested documents, this legislation takes a clear and direct step to reduce the growing backlog and enhance record availability. Every frequently-requested document posted online saves the agency time in processing multiple future requests for the same material. Through this legislation, Congress takes concrete steps to tackle the daunting issue of delays.

- **Curtail the over-use of Exemption 5 withholdings.** By allowing agencies to limit the application of Exemption 5 to 25 years, without revealing classified, private or otherwise protected material, Congress would impose important limitations on an often-abused power to withhold internal deliberative information that would otherwise be of enormous educational and historic value. As this Committee noted in its Feb. 23, 2015, Report, enforcing this 25-year outer limit will help ensure that a proper balance is struck between FOIA's goal of transparency and avoiding the unintended consequences that might chill internal decision-making between government employees.

The current bill takes important steps to make FOIA work better. The ultimate beneficiary of these revisions is the American public. These improvements to FOIA will result in a more informed citizenry and a more transparent and accountable government.

Conclusion

In conclusion, Mr. Chairman, it is our fundamental belief that public officials need to be accountable to the people they serve, and that the public has a right to witness government in action. Yet we have found that too often, and in too many corners of this country, government officials and agencies are working against that value.

If secrecy is not challenged, we risk a departure from the principles of open government, accountability and robust debate that form the foundation of our democracy. We need to strengthen the laws that support transparency. The reforms sought here today are essential to support the tools necessary to keep government transparent and accountable to the public.

Mr. Chairman, Senator Leahy, members of the Committee, thank you very much for allowing me this opportunity to speak to you about these important issues today. And thank you for your commitment to FOIA, and to the liberties it does so much to protect. I look forward to answering your questions.

Statement of Thomas Blanton
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www.nsarchive.org

Before the United States Senate
Committee on the Judiciary

Hearing on "Ensuring an Informed Citizenry: Examining the Administration's Efforts to Improve Open Government"

Dirksen Senate Office Building, Room 226, Washington D.C.

Wednesday, May 6, 2015

Mr. Chairman, distinguished members of the Committee: thank you very much for your invitation to testify today about open government and the Freedom of Information Act. My name is Tom Blanton and I am the director of the independent non-governmental National Security Archive, based at the George Washington University.

At the Archive, we are veterans of more than 50,000 Freedom of Information requests that have changed the way history is written and even how policy is decided. Our White House e-mail lawsuits against every President from Reagan to Obama saved hundreds of millions of messages, and set a standard for digital preservation that the rest of the government has never yet achieved, as we know from the State Department. The Archive has won prizes and recognition ranging from the James Madison Award that Senator Cornyn deservedly received this year from the American Library Association – joining Senator Leahy in excellent company – to the Emmy Award for news and documentary research, to the George Polk Award for "piercing self-serving veils of government secrecy."

This year we completed our 14th government-wide audit of agency FOIA performance, with more recommendations like the ones this Committee included in the landmark Cornyn-Leahy amendments in 2007 and again last year with the excellent FOIA reform bill this Committee passed unanimously through the Senate. My statement today addresses each of these areas of open government performance, and the lack thereof.

But first, I want to say that it is an honor to be here today on this panel with the general counsel of the Associated Press. Not only was the AP one of the founders of the now-ten-year-old Sunshine Week, the AP consistently ranks among the most systematic and effective users of the Freedom of Information Act. I am especially grateful to the AP for taking on the number-crunching task of making sense of agency annual reports on FOIA, and providing a common-sense analysis that parts ways significantly from the official spin. The White House proudly repeats Justice Department talking points claiming a 91% release rate under FOIA. But the AP headline reads, "US sets new record for denying, censoring government files." Who is right? The AP is.

The Justice Department number includes only final processed requests. This statistic leaves out nine of the 11 reasons that the government turns down requests so they never reach final processing. Those reasons include claiming "no records," "fee-related reasons," and referrals to another agency. Counting those real-world agency responses, the actual release rate across the government comes in at between 50 and 60%.

In the National Security Archive's experience, most agency claims of "no records" are actually an agency error, deliberate or inadvertent. I say deliberate because the FBI, for example, for years kept a single index to search when a FOIA request came in, even though that index listed only a fraction of the FBI's records. But the FBI could say with a straight face, we conducted a full search of our central index, and found no records, and the requesters would go away. Only when we called them on their abysmally high rate (65%!) of no-records responses (most agencies were averaging closer to 10%), did the FBI change their process.

I say inadvertent because FOIA officers may not know where the documents are, and most often the requester doesn't either. This is why dialogue between the agency and the requester is vital, why a negotiating process where the agency explains its records and the requester in return narrows her request, makes the most sense. This is why the Office of Government Information Services is so important, to mediate that dialogue, to bring institutional memory to bear, and to report independently to Congress about what is going on. This is why the original Freedom of Information Act back in 1966 started with the requirement that agencies publish their rules, their manuals, their organization descriptions, their policies, and their released

records for inspection and copying. This kind of pro-active disclosure is essential, and our most recent audit showed "most agencies are falling short on mandate for online records."

I'll come back to that point, but let me first give you some of the big picture, since you are examining this administration's overall performance on open government. The tenth anniversary of Sunshine Week this spring prompted some tough questions: are we doing better than when we started that Week 10 years ago, or worse, or holding our own? As with so many multiple-choice questions, the answer is probably "all of the above," but I would also argue, mostly better – partly cloudy. My daddy of course once shoveled four inches of partly cloudy off the front steps, so we have a ways to go.

I would say for starters that many of the battles are very different today. For instance, our E-FOIA Audit of 2007, looking at the ten years of implementation after Congress passed the E-FOIA in 1996, found that only one of five federal agencies obeyed the law, posting online the required guidance, indexes, filing instructions, and contact information. Our agency-by-agency audit found that the FOIA phone listed on the Web site for one Air Force component rang in the maternity ward on a base hospital!

Now I would say almost all agencies have checked those boxes of the online basic information and the public liaison, not least because this Committee took the initiative with the 2007 FOIA amendments to put into the law the requirements for designated Chief FOIA Officers and FOIA public contacts, as well as reporting requirements, the ombuds office, and other progressive provisions.

The biggest shortcoming today, besides the endemic delays in response and the growing backlogs that the AP has so starkly reported, is that so few federal agencies (67 out of over 165 covered by our latest FOIA Audit) do the routine online posting of released FOIA documents that E-FOIA intended. We released these results for Sunshine Week this year, and I recommend for your browsing the wonderful color-coded chart we published rating the agencies from green to yellow to red, with direct links to each of the online reading rooms, or the site where they should be but aren't. This was a terrific investigative project by the Archive's FOIA project director Nate Jones and associate director Lauren Harper. The headline from their work is, nearly 20 years after Congress passed the E-FOIA, only 40% of agencies obey the intent of the law, which was to use the new technologies

to put FOIA documents online, and reduce the processing burden on the agencies and on the public.

The fact of endemic delays and growing backlogs makes proactive disclosure even more important. As I've argued before, the zero-sum setting of FOIA processing in a real world of limited government budgets means that any new request we file actually slows down the next request anybody else files. Not to mention our own older requests slowing down our new ones, especially if they apply to multiple records systems. The only way out of this resource trap is to ensure that agencies post online whatever they are releasing, with few exceptions for personal privacy requests and the like. When taxpayers are spending money to process FOIA requests, the results should become public, and since agencies rarely count how often a record may be requested, requirements like "must be requested three times or more" just do not make sense.

There should be a presumption of online posting for released records, with narrow exceptions. I have found in many of the classes I teach that if sources are not online, for this younger generation, they simply do not exist. Many examples of agency leadership – posting online the Challenger space shuttle disaster records or the Deep Water Horizon investigation documents, for example – have proven that doing so both reduces the FOIA burden and dramatically informs the public.

Our audit this year found 17 out of 165 agencies that are real E-Stars, which disproves all the agency complaints how it's just not possible to put their released records online. You can see the detailed listing of agencies in the charts, and there's no difference in terms of funding or resources or FTEs or any other excuse between the E-Stars and the E-Delinquents – the difference is leadership. And oversight. And outside pressure. And internal will.

The complaint we hear the most against online posting is about the disabilities laws, that making records "508-compliant" is too burdensome and costs too much for agencies actually to populate those mandated online reading rooms. In fact, all government records created nowadays are already 508-compliant, and widely-available tools like Adobe Acrobat automatically handle the task for older records with a few clicks. The E-Stars dealt with the problem easily. Complaining about 508-compliance is an excuse, not a real barrier.

Since the State Department comes in for so much deserved grief on FOIA and records management, I need to point out that here, State's performance on online posting is one of the very best. As an E-Star, State's online reading room is robust, easily searchable, and uploaded quarterly with released documents – which allows requesters a useful window of time with a deadline to publish their scoops before everybody gets to see the product. State accomplished this excellent online performance using current dollars, no new appropriations. State's FOIA personnel deserve our congratulations for this achievement. When Secretary Clinton's e-mails finally get through the department's review (which should not take long, since none are classified), State's online reading room will provide a real public service for reading those e-mails.

Taking the long view on open government also shows that some measures are night and day better than they were ten years ago or even five years ago, and these include some really big ones that we used to have to sue over (and often lose). For example, President Obama early on got rid of retrograde rules that put huge delay in the release of Presidential records, and the Congress last year followed up with deadlines that are now in law. The combination of FOIA pressure and President Obama's Open Government Directive has opened up Medicare's extraordinary data on hospital costs and medical procedure pricing – showing dramatic inconsistencies right here in Washington between say George Washington University Hospital and Georgetown Hospital right down the street. My bet is that the recent flattening of health care inflation – with huge positive implications for our budget deficits – comes at least in part from this new transparency.

The Obama administration has made a whole series of historic open government decisions, in addition to the "Day One" declarations on "presumption of disclosure" that this Committee is now trying to put into the statute. Just in the area of national security information that my own organization focuses on, I would point to real breakthroughs like declassifying the nuclear weapons stockpile, and opening the Nuclear Posture Review, and routine release of the intelligence budget, and the declassification of the highly controversial "torture memos" produced by the Office of Legal Counsel at the Justice Department. These were FOIA fights over years or even decades, now resolved on the side of openness and rightfully so.

I would even give the administration credit for rising to the challenge of the Snowden leaks by trying to get out in front of those stories instead of putting its head in the sand. Snowden leaked one of the wiretap court's secret orders, the one for all of Verizon's cell phone calls, and in response to the ensuing debate, the Director of National Intelligence and the wiretap court have declassified 40 of the court's opinions and orders. There's even a public docket at the wiretap court now. My assessment in the new book *After Snowden* (coming out this month from Thomas Dunne Books/St. Martin's Press) finds that the government has actually declassified more total pages in response to Snowden than have been published by the Snowden media outlets to date.

The most significant progress on open government has been in online access to government data. The consumer product safety complaints database is now public, after years of struggle by consumer groups to open that early warning system. Veterans used to have to file a FOIA request with the Veterans' Administration to get copies of their service records and health data, and now the VA has created a secure online one-stop access point to make that process so much more efficient, for the government, for the veteran, and for their medical providers. Compared to five years ago, we clearly have access to much more government information than ever before.

And we certainly have more open government levers to use than we did 10 years ago. Sunshine Week deserves some real credit for this, for helping us play both defense and offence. Leading the struggle is the transparency coalition OpenTheGovernment.org (I am proud to be a part of OTG's steering committee) building consensus and elevating issues. The Open Government Partnership action plan process has proven very useful in helping us pressurize agencies and the White House, and also find and work with the real reformers that do exist in there and want change. The Chief FOI Officers and liaison officers provision put into law by the Cornyn-Leahy amendments in 2007 gives us leverage and even allies at problem agencies and across the government.

I would also single out the Office of Government Information Services (OGIS), which though tiny in staff and budget and not nearly commensurate with the Sisyphean task of mediating FOIA conflicts, gives us a shot at changing agency FOIA responses other than just going to court. In comparison to the Mexican and Chilean information commissions, among many other such offices around the world, OGIS simply does not have the

clout – yet – to move agency behavior. OGIS does need more funding, more Congressional backing (as in your FOI reform bill, S. 337), and more leverage with agencies, and needs to publish its opinions and build a body of best practice in addition to the FOIA therapy it offers both to officials and requesters.

But at the same time, in the long view, some open government measures are just as bad or just disappointments. For example, when President Obama was a Senator himself, he partnered with Tom Coburn of Oklahoma on legislation meant to put all government contracts on-line, and while there has certainly been progress, we still don't have subcontractor data up there in usable form. Similarly, the National Declassification Center which we had high hopes for in terms of centralizing the previous daisy chain of infinitely referred decisions instead seems to have just outsourced those decisions back to the agency reviewers. So we've had few real gains so far in efficiency or rationality in the national security secrecy system.

Meanwhile, as the Associated Press reported based on the agencies' own data, Freedom of Information Act backlogs and delays are going in the wrong direction. The average citizen's experience with FOIA continues to alienate and frustrate. Even though FOIA results keep making headlines, none of those headline-writers would say FOIA is really working. That's the FOIA paradox – a dysfunctional process that keeps producing records worthy of front-page coverage.

One reason why FOIA does not work is the abuse of the most discretionary exemption in the FOIA, the fifth or "b-5" on deliberative process. This exemption also includes attorney-client privilege, and every lawyer in this room shivers at the idea of infringing on that. Yet, I would point out that the Presidential Records Act dating back to 1978 has eliminated the b-5 exemption as a reason for withholding records 12 years after the President in question leaves office. Through the PRA, we have conducted a 35-year experiment with putting a sunset on the deliberative process exemption, and the facts show us no damage has been done with a 12-year sunset. Yes, some embarrassment, such as the junior White House lawyer who vetted (and rejected) a certain Stephen Breyer for a Supreme Court nomination back in the 1990s. But no new spate of lawsuits. No re-opened litigation. No damage to the public interest. Embarrassment cannot become the basis for restricting open government. In fact, embarrassment makes the argument for opening the records involved.

We were greatly encouraged back in fiscal years 2010 and 2011 when the rate that agencies used the deliberative process exemption to withhold records was actually on a downward trend (from 64,668 invocations down to 56,267). In fact, White House lawyer Steve Croley cited the decline when he appeared at the Sunshine Week event back then at the Newseum, as evidence that the President's Day One orders on presumption of disclosure were working. We tried to reinforce this White House recognition by quoting one of the former senior staffers of this Committee, John Podesta, who went on to be a senior administration official, when he called b-5 the "withhold it if you want to" exemption.

But neither the White House nor the Justice Department mentions b-5 any more. That's because in FY 2012 the number jumped to 79,474, and then even higher in FY 2013, to 81,752. This year, the Justice Department does not even give the exact number of b-5 invocations in its summary, only a percentage. But you can do the numbers, and our calculator says "withhold it if you want to" is at an all-time high this year, invoked 82,770 times to withhold records that citizens requested.

This is the exemption that the CIA used – not national security classification – to withhold volume 5 of a 30-year-old internal draft history of the disaster at the Bay of Pigs, even though we pried loose the other 4 volumes, even though there was no sign of the CIA picking up the draft to revise it, even though the now-deceased author of the draft had even filed a FOIA request to get it released. It would "confuse the public," the CIA claimed, and a divided panel of the D.C. Circuit bought the argument. This is the exemption the Justice Department used to withhold its internal draft history of its Nazi-hunting, and the government's overall Nazi-coddling, involving governmental cover for hundreds of war criminals. This is the exemption the FBI used to censor most of the 5,000 pages it recently "released" on the use of the Stingray technology to locate individuals' cell phones. This is the exemption that the administration uses to keep the Office of Legal Counsel final opinions out of the public domain.

This exemption at least needs a sunset, like the Presidential Records Act provides. Personally, I would argue for stronger measures, like the public interest balancing test included in earlier versions of the Senate's bill last year. Courts are simply not going to infringe on attorney-client privilege, so there is no real danger (but lots of red herrings put out by FOIA reform

opponents) from such a balancing test. The threat of court review of the rest of the backroom discussions, plus a sunset, could actually limit the b-5 exemption to those matters that really do need deliberative space for government officials to work out. So we might well see a decline in the invocation of the exemption, the way the bureaucracy responded in those first two years when they thought the Obama White House was serious about a presumption of disclosure. That first impression soon passed, and now we do not even see White House support for the bipartisan legislation that would put the President's presumption into law. Nowadays, the exemption is the catchall CYA. Here, the House bill (H.R. 653) actually contains better language, not only a 25-year sunset, but also removing b-5 coverage from "records that embody the working law, effective policy, or the final decision of the agency." This would fulfill one of the original purposes of the FOIA, to prevent any recurrence of secret law.

That brings us to the FOIA reform legislation currently pending. The Archive's FOIA Project director Nate Jones published an excellent side-by-side analysis of the House and Senate bills on the Unredacted blog on February 4, 2015, so I would direct your attention there and not go into the detail here. See https://nsarchive.wordpress.com/2015/02/04/analysis-of-and-prospects-for-house-and-senate-foia-bills/.

Suffice it to say that both bills would be significant steps forward, and I commend this Committee, Chairman Grassley, Ranking Member Leahy, Senator Cornyn, for bringing S. 337 forward. These bills codify the presumption of openness, requiring records to be released unless there is a foreseeable harm or legal requirements to withhold them. Since this is the ostensible standard set in 2009 by President Obama and then-Attorney General Holder, the administration should be vociferously supporting the legislation. Instead, we have found out from subterranean opposition moves by various agencies, that in fact much of the bureaucracy has not been following the President's policy, and needs the Congressional mandate to do the right thing.

Both bills require agencies to update their FOIA regulations, a key failure established by the last several FOIA Audits that we have conducted. Half of the agencies have not even updated their regulations to meet the requirements set by the 2007 amendments, so it's not just the President that agencies are dissing, it's also the Congress. Both bills reinforce the 2007 amendments mandate that when agencies miss the deadlines, they can't

charge processing fees. Agencies ducked this requirement by calling most of their requests "unusual," and had Justice Department backing in trying to subvert Congressional intent. Both bills strengthen the Office of Government Information Services, and restrict the b-5 exemption. These are serious reforms that would help requesters, reduce litigation, and make the FOIA process more efficient and rational.

These bills should pass this year, and we will celebrate. What will not happen this year is that the government will preserve its e-mail, or other electronic records. This is an open government disaster in process, in full view, now that Mrs. Clinton's Presidential candidacy and e-mail practices have put the phrase "Federal Records Act" on the front pages where it is rarely found.

Agencies have been on notice since 1993, when we won the first court rulings that e-mail were records and were covered by the records laws, that printing e-mails to preserve them actually stripped them of value and information such as their links to other e-mail, and that the White House – despite all its claims of Presidential privilege – had to install a computerized archiving system to save its e-mail.

Yet almost 20 years went by before the Office of Management and Budget, with the National Archives and Records Administration, actually directed agencies to save their e-mail electronically. This was after we had to sue again in the George W. Bush administration, when whole days of White House e-mail went missing; and to the Obama administration's credit, they settled the case, put digital archiving back in place from the first day, and recovered millions of e-mails for posterity.

But the agencies hardly noticed. Both OMB and NARA suffered from two decades of dereliction of duty, until that 2012 directive. Until then, agencies could actually "print and file" as their preservation strategy. I predict you will be hearing agency pleas soon, if they haven't already started, for new funds for scanning those paper files into digital formats – maybe then, we'll find out if anybody actually printed and filed anything. I understand nobody can find any printed copies of former Secretary of State Colin Powell's e-mails from his four years in the State Department, and I wonder how many of Mrs. Clinton's actually survived in that form.

Even when OMB and NARA finally acted in 2012, agencies got a four-year grace period to start doing what the White House started in 1994. The deadline is December 31, 2016 for all federal agency e-mail records to be managed, preserved, stored electronically. Three years later, in 2019, agencies are supposed to be managing all their records electronically.

So let's come back to the State Department as our poster child of the day and ask how they're doing on this deadline. The State Department's Chief Information Officer, Steven Taylor, has been in office since April 3, 2013, and "is directly responsible for the Information Resource Management (IRM) Bureau's budget of $750 million, and oversees State's total IT/knowledge management budget of approximately one billion dollars." Previously, Taylor served as Acting CIO from August 1, 2012, as the Deputy CIO from June 2011, and was the Program Director before that for the State Messaging and Archival Retrieval Toolset (SMART).

The acronym may have been smart but the implementation was dumb. The recent State Department inspector general's report found that "employees have not received adequate training or guidance on their responsibilities for using those systems to preserve 'record emails.'" In 2011, State Department employees only created 61,156 record e-mails out of more than a billion e-mails sent – about 0.006 percent! In 2013, at which point Taylor had failed upwards to the CIO role, only the Lagos Consulate was really saving e-mails, some 4,922 compared to seven from the Office of the Secretary.

Now, the IG report did contain some caveats, such as the statement that those higher-ups like the Secretary actually "maintain separate systems" so perhaps more e-mails were saved. We eagerly await more data on the higher-level systems, which were not in place during Secretary Clinton's tenure. But I understand that the IG's office itself could not answer the question of how they saved their own e-mails.

And State is not alone in this preservation crisis. Back in 2008, the OpenTheGovernment.org coalition and Citizens for Responsibility and Ethics in Washington (CREW) surveyed the government and could not find a single federal agency policy that mandated an electronic record keeping system agency-wide. The same year the Government Accountability Office produced an indictment of the "print and file" approach, concluding that even the agencies recognize it "is not a viable long-term strategy" and that

the system was failing to capture "historic records "for about half the senior officials" surveyed.

So what we have here is a generation of lost e-mail records. From at least the point that the White House started having to save their e-mail electronically, the agencies should have done so as well. But no one tasked them to do so, OMB and NARA were missing in action, and the government opposed our efforts in the courts to spread the precedent government-wide.

Perhaps the greatest irony of Mrs. Clinton's use of a private server to host her e-mails is that she likely preserved more of her e-mails there than the State Department systems would have done had she exclusively used a state.gov account.

Preparing for this hearing, I read through the State Department's strategic plan, and other documents on its budget requests to the Congress. Nowhere do I find any provision, any planning, any line item that would address the OMB/NARA directive for managing records electronically. There is a December 2016 deadline, and a billion dollars already going into IT at the Department, but no apparent planning. Maybe it's just hidden by the b-5 exemption.

I am told that State spent over $100 million on the SMART system. State needs to order and train its employees to start using the system. In the Foreign Affairs Manual (online) you can find pretty straightforward instructions for how to convert existing e-mail into the system, just "click the Convert to Archive button." After some sustained training and consciousness-raising, the IG should check to see how many converts came over. Obeying the records laws, and the FOIA, should be a core requirement of every job description and performance review.

Finally, I understand that the State Department is now asking the Congress for a so-called "b-3" statute amending the FOIA to exclude "foreign government information" from the reach of the FOIA. This is a terrible idea. Right now, such information earns protection only if it is properly classified, meaning that its release would harm an identifiable national security interest. Even with this limitation, the State Department routinely abuses the designation. For example, last month we posted the censored State Department cable from April 1994 titled "US drops bombshell on the Security Council," with the passages about the bombshell whited-out on

classification grounds, as foreign government and foreign relations information. But we already had the details on the bombshell in the accounts by the British, Czech and New Zealand ambassadors on the Security Council, whose telegrams had all been released by their own governments under their access laws, showing the U.S. pushing for full pull-out of United Nations peacekeepers from Rwanda just one week into the 1994 genocide there. In retrospect, scholars and policymakers – including those ambassadors and the U.S. ambassador who sent the cable, Madeline Albright – all agree that the pull-out was a tragic mistake, that the peacekeepers should have been reinforced instead. Release of this cable would not have damaged U.S. national security in 1994, while the genocide was going on, and certainly does not do so today. In fact, release back then might have saved some lives.

Similarly, the State Department fought all the way to the Supreme Court in the *Weatherhead* case in 1998 to withhold as classified foreign relations material a British letter on an extradition case, only to have the Court moot the case upon finding that the letter had already been provided to the attorneys for the plaintiffs. No damage to U.S. national security at all.

A "foreign government information" exclusion as a b-3 exemption would effectively import into our laws the lowest common denominator of foreign countries' secrecy practices. Instead, the standard needs to be "foreseeable harm" to our own national interests, with a "presumption of disclosure." We can lower our standards so diplomats are more comfortable cozying up to dictators, or keep everyone on notice that ours is an open society, and that's where we draw our strength and our ability to address and fix problems.

But meanwhile, the Chief FOIA Officer report from State shows they are shifting resources over from FOIA processing to responding to FOIA litigation. To me, this sounds like an endless loop. Slow down the processing and you will certainly get more FOIA lawsuits.

What they need to do is create a SWAT team for records about Mrs. Clinton's tenure as Secretary. She is running for President, public interest is very high, delay and denial will only escalate the FOIA litigation, and this should be a top priority for the Department. The team needs to roll through the review of the 55,000 pages of Clinton e-mail and get all that public immediately. Then, with some experience from her most direct records, the team can proceed to review and release all her schedules and calendars,

senior staff meeting notes, memcons and telcons, for starters. All these records will be the subject of FOIA requests, and probably already are. Proactive disclosure is the only remedy to the State Department's problems with rising litigation over the Clinton records.

Again, I thank this Committee for its attention to open government, for its support of FOIA reform, and for holding this hearing today. I ask the Committee's permission to include this statement in the record, and to revise and extend these prepared remarks to include responses to the other witnesses today.

Thomas Blanton is the director (since 1992) of the National Security Archive at George Washington University (www.nsarchive.org), winner of the George Polk Award in April 2000 for "piercing self-serving veils of government secrecy, guiding journalists in search for the truth, and informing us all." He is series editor of the Archive's Web, CD-DVD, fiche and book publications of over a million pages of previously secret U.S. government documents obtained through the Archive's more than 50,000 Freedom of Information Act requests. He co-founded the virtual network of international FOI advocates www.freedominfo.org, served as founding co-chair of the public interest coalition OpenTheGovernment.org, and also served on the first steering committee of the international Open Government Partnership. A graduate of Bogalusa (La.) High School and Harvard University, he filed his first FOIA request in 1976 as a weekly newspaper reporter in Minnesota. He won the 2005 Emmy Award for news and documentary research, for the ABC News/Discovery Times Channel documentary on Nixon in China. His books include *The Chronology* (1987) on the Iran-contra scandal, *White House E-Mail* (1995) on the landmark lawsuit that saved over 220 million records, and *Masterpieces of History* (2010) on the collapse of Communism in 1989; his articles have appeared in *The New York Times, Washington Post, Wall Street Journal, USA Today, Boston Globe, Los Angeles Times, Slate, Foreign Policy, Diplomatic History* and in languages ranging from Romanian to Spanish to Japanese to Finnish (inventors of the world's first FOI law). The National Security Archive relies for its $3 million annual budget on publication royalties and donations from foundations and individuals; the organization receives no government funding and carries out no government contracts.

Prepared Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Committee on the Judiciary
Hearing on "Ensuring an Informed Citizenry:
Examining the Administration's Efforts to Improve Open Government"
May 6, 2015

Good morning. Today we'll examine what this Administration has done to fulfill its promise of open government. President Obama began his presidency with assurances of unprecedented transparency. It's time once again to take stock of where things stand.

There's perhaps no better tool that Americans have to help ensure open government than the Freedom of Information Act. Enacted almost five decades ago, FOIA's purpose is to help keep folks in-the-know about what their government is doing. No doubt an informed public helps to guarantee a more accountable government.

The Judiciary Committee has a long and bipartisan history of helping protect the public's right to know, and ensuring that the government effectively administers FOIA.

Earlier this year, the Committee reported the "FOIA Improvement Act of 2015" to the full Senate for consideration. This bill codifies the "presumption of openness" standard, so that agencies proactively disclose more information. Among other reforms, the bill makes it easier for the public to submit FOIA requests, and improves electronic access of agency records.

As many of you know, Ranking Member Leahy and Senator Cornyn have been FOIA leaders for many years. And I appreciate the hard work they've put into this bill, of which I'm a co-sponsor. Last year, thanks to their efforts, the Senate passed an almost identical bill by unanimous consent. That's not an easy task. Unfortunately, we ran out of time at the end of the year and were unable to get the bill to the President's desk. I'm hopeful that won't be the case this time around, and that the Senate will soon pass these meaningful and much-needed reforms.

But legislative reforms can only go so far. Experience shows that many in government continue to operate with an instinct of secrecy. This has been the case under Democrat and Republican administrations, as both have failed to live up to the letter and spirit of FOIA.

President Obama gave me high hopes for a change in the status quo. He pledged a "new era of open government"—one where transparency is the rule and not the exception. On his first full day in office, the President called for agencies to administer FOIA "with a clear presumption: In the face of doubt, openness prevails." Unfortunately, over six years later we continue to see this Administration operating under a "do as I say, not as I do" approach to transparency.

Recently, the Office of Information Policy Director Melanie Pustay and a senior White House official wrote in *USA Today* that the Administration "continues to demonstrate its commitment to improving open government and transparency." But the very next day—ironically, the first day of Sunshine Week—the White House announced it was removing regulations that for thirty-years had subjected its Office of Administration to FOIA requests. According to the White House, this decision is consistent with court decisions holding that the office isn't subject to

FOIA. But as one open government advocate put it, "You have a president who comes in and says, I'm committed to transparency and agencies should make discretionary disclosures whenever possible, but he's not applying that to his own White House."

This is just one of many examples that leads me to question President Obama's declaration that his Administration is the most transparent in history.

The numbers, I think, also speak for themselves.

The Center for Effective Government recently released its annual Access to Information Scorecard, which grades federal agencies' FOIA performance. While there were some glimmers of hope, the overall results indicate there's much room for improvement.

I'm particularly concerned with the State Department's FOIA operation. According to the Scorecard, the State Department processed only 17% of the FOIA requests it received in 2013. For the second year in a row, the State Department was the lowest scoring agency by far, with performance that was "completely out of line" with that of other agencies.

These results seem to confirm an ongoing issue with the State Department's ability to manage agency information and process FOIA requests. In 2012, the State Department's Office of Inspector General issued a report concluding that "the Department's FOIA process is inefficient and ineffective," and that its records management practices "do not meet statutory and regulatory requirements."

And just recently, the Inspector General released another report outlining the State Department's failure to properly archive emails as official records. Out of over 1 billion emails sent by agency employees in 2011, just over 61,000 of those were properly archived. And it's impossible not to acknowledge former Secretary Clinton's exclusive use of a private email account to conduct official State Department business. According to Jason Baron, the former Director of Litigation at the National Archives and Records Administration, "a federal employee or official choosing to carry out communications using a non-'.gov' address, without making timely transfer of those records to an appropriate governmental system, compromises the ability of an agency to adequately respond to FOIA requests."

No doubt, these failures undermine FOIA and have serious consequences for congressional oversight, and for documenting U.S. diplomatic history. And as Secretary Kerry acknowledged, the preservation of records—and the public's access to those records—are "interrelated principles."

I agree. After all, if a record can't be found, it can't be disclosed.

So I want to know where the break-downs occurred. I want to hear what the State Department has done, and plans to do, to address these serious concerns. Further, is this an isolated incident? And if not, then how widespread are these issues and what can be done to turn the tide? Finally, I want to know what steps the Administration is taking to ensure the public's right to know,

which the President himself said is central to "the effective functioning of our constitutional democracy."

These, along with many others, are important questions that need to be answered. And I'm glad that today's hearing provides the opportunity to do just that.

I'm looking forward to hearing from our witnesses today, who I'm sure can shed some light on these matters. So I want to thank you all for being here this morning.

And now I'll turn to the Ranking Member for his opening remarks.

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Statement Of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Hearing On "Ensuring an Informed Citizenry: Examining the Administration's Efforts to Improve Open Government"
May 6, 2015

Today, the Committee holds an important hearing on one of our most cherished open government laws, the Freedom of Information Act (FOIA). For nearly half a century, FOIA has translated our great American values of openness and accountability into practice by guaranteeing access to government information.

This Committee has a long tradition of working across the aisle when acting to protect the public's right to know, during both Democratic and Republican administrations. Senator Grassley and Senator Cornyn have been important partners in these efforts, and our collaboration has resulted in the enactment of several improvements to FOIA including the OPEN Government Act, the first major reform to FOIA in more than a decade, and the OPEN FOIA Act, which increased the transparency of legislative exemptions to FOIA.

We are moving in the right direction, but obstacles to the FOIA process remain in place and progress has come much too slow. The growing use of exemptions and inadequate communication with FOIA requesters remain key impediments to obtaining information under FOIA. For the second year in a row the Center for Effective Government graded the responsiveness of 15 Federal agencies that process most FOIA requests. While some agencies showed improvement from last year, the results are once again disappointing. Not a single agency received an A grade, only two agencies received a B grade, and the rest fell below a C. We can and we must do better than this.

Two agencies, including the State Department testifying before us today, received a failing grade for their handling of FOIA requests. According to the report, only 7 percent of FOIA requests the State Department received were responded to within the 20 days required. The State Department denied FOIA requests in their entirety almost 50 percent of the time. And administrative appeals take on average 540 days, or over a year and a half, to process. This is unacceptable. While I recognize that the number of FOIA requests has increased over the years and that the requests can be complex, this is not a reason to fall down on the job. If more resources are needed to keep up with the workload, agencies must ask for them.

But this problem cannot be solved by money alone. We need to fundamentally change the way we think about FOIA and our approach to this law. Our very democracy is built on the idea that our government should not operate in secret, and we should embrace that. Transparency allows the American people to hold its government accountable. And while it is not always popular, it is fundamental to the values on which our country was founded. That is why I worked with Senator Cornyn to craft the FOIA Improvement Act of 2015, a comprehensive bill that will codify what President Obama laid out in his historic 2009 memorandum requiring Federal agencies to adopt a "Presumption of Openness" when considering the release of government information under FOIA. This policy was first put into place by President Clinton but then repealed by President Bush. President Obama reinstated it as one of his first acts in office. By codifying the Presumption of Openness, Congress can establish a transparency standard that will remain for future administrations and agencies to follow. This policy embodies the very spirit of

FOIA, and if fully complied with would do more to improve the effectiveness of FOIA than any other reform.

I hope we can pass the FOIA Improvement Act without further delay. It is supported by more than 70 public interest groups that advocate for government transparency, it had the unanimous support of the Judiciary Committee in February, and it is nearly identical to legislation passed by the full Senate last year. There are no objections on the Democratic side to moving forward with this legislation and I hope we can bring it before the full Senate for consideration and pass this important bill.

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"Ensuring an Informed Citizenry:
Examining the Administration's Efforts to Improve Open Government"
Written Questions for the Record Submitted by Chairman Charles E. Grassley of Iowa
May 13, 2015

Questions for Ms. Barr

1. A 2012 State Department Inspector General report says that leadership and management practices "contribute to problematic morale and poor communication" across the Office of Information Programs and Services (IPS), which handles one of the largest FOIA workloads in the federal government.
    a. What specific steps have been taken since the 2012 IG report to improve management controls to ensure that the State Department can efficiently and effectively carry out its FOIA and records management duties?
2. I understand that in Fiscal Year 2014, the State Department experienced a 60% increase in FOIA lawsuits, which according to State Department's own Chief FOIA Officer Report, "necessitated the reallocation of resources from processing FOIA requests to handling FOIA litigation." Such a reallocation of resources and manpower, I imagine, has consequences for the efficient processing of pending FOIA requests.
    a. Should requesters have to shoulder that consequence? Doesn't the reallocation of State's resources to FOIA litigation only set itself up for additional litigation based on even more delays?
    b. What specifically are you doing to ensure that all the necessary functions of FOIA processing are still effectively and efficiently carried out under these circumstances?
3. In June of 2013 and March of 2015 I sent a letter to the State Department asking a number of questions. One of the major questions I asked related to the relationship between Ms. Huma Abedin and her role as a Senior Advisor to Secretary Clinton while simultaneously working in the private sector for a political intelligence and consulting firm, Teneo. Notably, Ms. Abedin was given a rare classification as a Special Government Employee (SGE) which allowed her to work part time from New York while still working for Secretary Clinton. Normally, SGE designations are used for individuals moving from the private sector to government because of a special skillset that person may have. However, in Ms. Abedin's case, she neither came from the private sector nor came from another government position. She converted from a full-time employee to become an SGE, with seemingly little difference in her job description or responsibilities. This arrangement raises serious ethical issues. Accordingly, I requested communications between Ms. Abedin's State Department email account and Teneo. When Secretary Clinton admitted that she housed a private email account on a personal server in her residence and as news reports surfaced that Ms. Abedin also emailed from a private email

account to that server, ethical and transparency issues became even more relevant.[1] In addition, the State Department's recordation policies as well as its ability to adequately and accurately respond to Congressional inquiries and FOIA requests is called into serious question. Accordingly, I now ask the following:

a. Did Ms. Abedin have an email account on Secretary Clinton's private email server? If so, when were her official emails sent to the Department and who sent them?
b. Did Ms. Abedin use a private email account outside of Secretary Clinton's private email server to communicate with Secretary Clinton? If so, has Ms. Abedin turned over those official emails to the State Department?
c. If Ms. Abedin had an account on Secretary Clinton's server and/or emailed Secretary Clinton from a private email account outside of Secretary Clinton's server, were any of Ms. Abedin's emails deleted from that server? If so, who deleted those emails?
d. Did Mr. Philippe Reines and/or Ms. Cheryl Mills have an email account on Secretary Clinton's private email server? If so, when were their official emails sent to the Department and who sent them?
e. Did Mr. Reines and/or Ms. Mills use a private email account outside of Secretary Clinton's private email server to communicate with Secretary Clinton? If so, has Mr. Reines and/or Ms. Mills turned over official emails to the State Department?
f. If Mr. Reines and/or Ms. Mills had an account on Secretary Clinton's server and/or emailed Secretary Clinton from a private email account outside of Secretary Clinton's server, were any of their emails deleted from that server? If so, who deleted those emails?
g. Will the State Department search the emails from Secretary Clinton's private server for documents responsive to my June 2013 and March 2015 inquiry?
h. Regarding my June 2013 and March 2015 letters, when can this Committee expect to receive full and complete responses?

4. According to Secretary Clinton, she deleted approximately 30,000 emails from her private server and submitted another 30,000 to the State Department. Secretary Clinton has stated that she was the sole arbiter in determining whether emails were of a personal nature and ought to be deleted and whether emails were of a business nature and ought to be saved. Secretary Clinton's email recordation system calls into question the ability of the State Department to properly review documents for FOIA compliance as well as adequately respond to legitimate FOIA requests. Moreover, Secretary Clinton's email recordation calls into question the State Department's ability to respond to Congressional inquiries.
   a. Generally speaking, are you aware of any employee besides Secretary Clinton who built a personal server in his/her personal residence and used a personal email account on such a server?

[1] *See* Stephen Dinan, "Hillary Clinton's aide Huma Abedin's emails now face disclosure lawsuit," *Washington Times* (May 5, 2015) http://www.washingtontimes.com/news/2015/may/5/huma-abedins-emails-face-disclosure-suit/; *see also* Daniel Halper, "Hillary's Top Two Aides Used Personal Email at State Department," *The Weekly Standard* (Mar. 11, 2015) http://www.weeklystandard.com/blogs/hillarys-top-two-aides-used-personal-email-state-department_883063.html.

b. When a State Department employee does not use an official email account for work related matters, what is the disciplinary protocol for failing to abide by State Department policy?
c. Has the State Department received any access to Secretary Clinton's personal server? If so, please explain the degree of access. If not, why not?
d. Of the emails Secretary Clinton has turned over to the State Department, can you unequivocally state that none of them are classified?
e. In light of Secretary Clinton's email practices, is the State Department able to comply with all FOIA requests on matters that touch and concern Secretary Clinton, Ms. Abedin, and/or other high level State Department officials who sent emails through Secretary Clinton's private server? Please explain.
f. What effect has Secretary Clinton's email recordation practices had on State Department FOIA compliance? What effect has Secretary Clinton's email recordation practices had on State Department responses to Congressional inquiries?

5. According to the State Department Records Management Manual, there is a protocol to winding down employment so as to properly preserve documentation. This protocol includes the requirement that a State Department official notify departing individuals regarding his/her obligations to preserve written and typed material, prepare an inventory of unclassified papers and non-record materials to the State Department, prepare an inventory of classified papers and materials to the State Department, and the signing of a separation statement prior to departure.
    a. Prior to the end of employment, did a State Department official notify Secretary Clinton regarding her obligations to preserve written and typed material? Did the same occur for Ms. Abedin?
    b. Prior to the end of employment, did Secretary Clinton prepare an inventory of unclassified papers and non-record materials to the State Department? Did Ms. Abedin do the same?
    c. Prior to the end of employment, did Secretary Clinton prepare an inventory of classified papers and non-record materials to the State Department? Did Ms. Abedin do the same?
    d. Has Secretary Clinton signed a separation statement (OF-109)? Has Ms. Abedin?

Questions for Ms. Pustay

1. I continue to hear of challenges that impact FOIA compliance. It's important that FOIA processors have a clear understanding of FOIA's purposes, including the President's directives on transparency and the "presumption of openness." This is especially crucial given the increased FOIA litigation and claims that the only way to force government compliance is to sue.
    a. In what areas are FOIA processors and management in most need of additional training?
    b. What resources are most needed to ensure that FOIA processors can effectively do their jobs?

2. I understand that in FY 2014, the State Department, for example, experienced a 60% increase in FOIA lawsuits.
    a. Is it possible that communication or training challenges, particularly with respect to application of the "foreseeable harm" standard, are contributing to State's increasing FOIA litigation?
    b. Has OIP provided any specialized training or services to assist the State Department in addressing:
        i. Its FOIA processing issues?
        ii. Its FOIA backlog?
        iii. Its delays in responding to requests?
3. In your testimony you discuss the administration's proposals responding to the Supreme Court's ruling in *Milner v. Department of the Navy*. You describe the proposals as not sweeping too broadly, while providing sufficient protection against the circumvention of the law. You've pointed out previously that it's critical for Congress to address the issue of the *Milner* decision. And I've asked you before whether the administration planned to submit a proposal to us for consideration.
    a. Can you explain specifically what the proposed *Milner* "fixes" would do?
    b. Can you explain why or why not Congress should support these reforms?
    c. Would either of the proposals eliminate agency confusion over how to handle sensitive information, resulting in increased disclosure?
    d. Might either proposal result in even more denials of FOIA requests?
    e. Would your office, or someone from the Administration, be willing to brief Judiciary Committee staff about the proposals?

Questions for Ms. Gramian

1. I continue to hear of challenges that impact FOIA compliance. It's important that FOIA processors have a clear understanding of FOIA's purposes, including the President's directives on transparency and the "presumption of openness." This is especially crucial given the increased FOIA litigation and claims that the only way to force government compliance is to sue.
    a. In what areas are FOIA processors and management in most need of additional training?
    b. What resources are most needed to ensure that FOIA processors can effectively do their jobs?
2. The mediation services that OGIS provides were intended to—and should—serve as a meaningful alternative to resolving FOIA disputes through litigation. Your testimony references the recent Administrative Conference recommendations regarding OGIS's services, including a recommendation that agencies let requesters know about the availability of dispute resolution services by OGIS in their final response letters and on their websites.
    a. How well are agencies currently doing this?
    b. Do you feel that there could be more engagement with the requester community by agencies to inform them of the mediation services that OGIS provides?

3. As we continue to see a rise in FOIA litigation, I'm concerned that the mediation services that OGIS was created to provide are not being adequately incorporated into the FOIA process.
    a. Can you provide some insight into the challenges OGIS is facing in offering mediation services?
    b. Are agencies generally willing to take part in these mediations?
    c. Are agencies generally cooperative and helpful throughout the process?

Questions for Ms. Kaiser

1. Secretary of State John Kerry recently called on the inspector general to conduct a thorough review of the Department's FOIA and records management operations. He says that a full and complete record of American foreign policy, and the public's access to that record, are "interrelated principles." And back in 2011, President Obama issued a memo regarding records management to the heads of executive departments and agencies, declaring that "proper records management is the backbone of Open Government."
    a. Would you agree that the proper management and archiving of official government records is the foundation of an open and transparent government?
    b. What are the consequences to FOIA—and to public access—if agencies are not taking seriously their obligations to keep track of information, particularly in the age of digital communication?
2. On the first day of Sunshine Week this year, the White House announced it was removing regulations that for 30 years had subjected its Office of Administration to FOIA requests.
    a. Do you think this decision was proper—both in terms of timing and policy?
    b. Is the decision to remove these regulations—all without an opportunity for public comment—consistent with the President's "presumption of openness"?
    c. Is the decision consistent with being the "most transparent administration in history"?
3. The mediation services that OGIS provides were intended to—and should—serve as a meaningful alternative to resolving FOIA disputes through litigation. The numbers show, however, that FOIA lawsuits continue to be on the rise. And the government's often-vigorous defense of FOIA litigation is surely costing taxpayers money. I'm concerned that there could be more engagement with the requester community by agencies at an earlier stage to inform them of the mediation services that OGIS provides. I'm equally concerned that agencies aren't warming up to the idea of mediation as a way to resolve FOIA disputes.
    a. Are the services OGIS provides being underutilized as a litigation alternative?
    b. What benefits would requesters receive if agencies take a more active and cooperative role in resolving FOIA disputes through mediation?
4. Is there anything you wish to add to, or correct for, the record? If so, please take this opportunity to provide any additional remarks or commentary.

Questions for Mr. Blanton

1. I understand that in Fiscal Year 2014, State experienced a 60% increase in FOIA lawsuits, which according to State's own Chief FOIA Officer Report, "necessitated the reallocation of resources from processing FOIA requests to handling FOIA litigation." Such a reallocation of resources and manpower, I imagine, has consequences for the efficient processing of pending FOIA requests.
    a. Should requesters have to shoulder that consequence? Doesn't the reallocation of State's resources to FOIA litigation only set itself up for additional litigation based on even more delays?
    b. What should State be doing to ensure that it's covering all its FOIA functions – not just litigation?
2. State's Chief FOIA Officer Report for 2015 says "the Department makes every effort to respond to FOIA requests within the statutory response period." However, State is consistently found to have one of the longest request processing periods in the federal government. DOJ found that it takes State an average of 109 days just to respond to simple requests. This is more than five times the average across the federal government of 20.51 days, even with all agencies feeling the squeeze of limited resources.
    a. What do you think explains these significant delays?
    b. Is the nature of the information that State handles, such as matters related to national security and foreign policy, any justification for these delays?
3. The mediation services that OGIS provides were intended to—and should—serve as a meaningful alternative to resolving FOIA disputes through litigation. The numbers show, however, that FOIA lawsuits continue to be on the rise. And the government's often-vigorous defense of FOIA litigation is surely costing taxpayers money. I'm concerned that there could be more engagement with the requester community by agencies at an earlier stage to inform them of the mediation services that OGIS provides. I'm equally concerned that agencies aren't warming up to the idea of mediation as a way to resolve FOIA disputes.
    a. Are the services OGIS provides being underutilized as a litigation alternative?
    b. What benefits would requesters receive if agencies take a more active and cooperative role in resolving FOIA disputes through mediation?
4. Is there anything you wish to add to, or correct for, the record? If so, please take this opportunity to provide any additional remarks or commentary.

Written Questions of Senator Patrick Leahy,
Ranking Member, Senate Committee on the Judiciary
To Joyce Barr
Assistant Secretary, Bureau of Administration
Department of State

Hearing on "Ensuring an Informed Citizenry: Examining the Administration's Efforts to Improve Open Government"

1. The State Department's record on Freedom of Information Act requests is poor. Not only does it take a long time for the Agency to respond to a request, over half the time the State Department denies the request in full. This denial rate is significantly higher than any other agency surveyed, including agencies who handle sensitive requests, such as the Department of Defense and the Department of Justice.

   Does the State Department comply with the Obama Administration's mandate that agencies approach FOIA with a Presumption of Openness, and err on the side of disclosure when considering FOIA requests? If so, why does the State Department deny nearly half of the requests it receives?

2. FOIA requests to the State Department have risen considerably over the past five years. This no doubt has taken a toll on your existing resources, increased the caseload of your FOIA staff, and made it more difficult to process requests in a timely manner.

   Has the State Department requested an increase in its budget to help it comply with its obligations under FOIA? If not, what does the Department of State need in order improve its FOIA response time and reduce the backlog of requests?

3. In a FOIA lawsuit seeking release of the Senate Intelligence Committee's full report on the CIA's torture program, Justice Department and State Department officials submitted declarations on January 21, 2015, stating that their copies of the report remain locked away, unopened. I was appalled to learn that both Departments, which received the full report in December, had not even opened it.

   Did State Department officials decide not to open the full report in an attempt to bolster the government's position in the FOIA lawsuit, or otherwise avoid federal records laws?

Written Questions of Senator Patrick Leahy,
Ranking Member, Senate Committee on the Judiciary
To Melanie Pustay
Director, Office of Information Policy
U.S. Department of Justice

Hearing on "Ensuring an Informed Citizenry: Examining the Administration's Efforts to Improve Open Government"

1. In the last few years the number of FOIA requests has risen dramatically. In FY 2010 the Federal Government received 557,000 FOIA requests. In FY 2014 that number had risen to 715,000 FOIA requests. The overall backlog of FOIA requests continues to rise and two thirds of the agencies reviewed by the Center for Effective Government received a D grade or an F grade for FOIA compliance. Yet, in your testimony, you stated that last year the government experienced its lowest staffing levels dedicated to FOIA in over six years.

   Given these challenging statistics, why is government staffing of FOIA so low? Has the Administration requested more funds to increase FOIA staff and help reduce the backlog? If not, why not? Can you briefly outline your plans to keep pace with the expected increase in the number of FOIA requests in the coming fiscal year?

Questions for the Record from Senator Thom Tillis

Hon. Joyce A. Barr, Assistant Secretary, Bureau of Administration, U.S. Department of State

May 13, 2015

1. In a letter to the State Department Inspector General, Secretary of State John Kerry admitted the Department faced challenges with regard to processing Freedom of Information Act (FOIA) requests and that Department personnel used non-government systems to conduct official business. A number of observers have stated that the State Department consistently performs poorly when responding to FOIA requests and that it currently maintains a significant backlog of requests.

    a. Since Secretary Kerry has taken over as Secretary of State, what actions has the Department taken to triage new and backlogged FOIA requests? Specifically:

        i. What are the Department's metrics for setting acceptable internal timetables for fulfilling FOIA requests?

        ii. Do you have an improvement plan to reach these metrics?

        iii. What milestone will the Department attempt to reach next? Put differently, if the plan is incremental, how does the Department plan on tracking the progress?

        iv. Will the Department publicly commit to meeting this milestone, and if the milestone is not met, will the Department return to the Senate Judiciary Committee to explain why?

2. At the hearing, there was significant discussion concerning former Secretary Clinton's use of a private server to conduct official government business. Uncertainty remains regarding whether these communications can ever be retrieved.

    a. Since Secretary Kerry has taken over as Secretary of State, have there been any changes in policy regarding the practice of Department personnel using private servers to conduct official government business?

        i. If yes, please specifically explain what these policy changes are and what steps were taken to ensure employees preserve and archive communications?

        ii. If not, does the State Department intend to implement a change in its policy to prevent employees from using private servers or implement new policies to ensure employees effectively store and archive communications made through private servers?

b. Please describe the process the Department has employed to investigate an allegation that an employee used private servers or hardware to conduct official government business.

c. If an employee is found to have intentionally used private servers or hardware to circumvent federal law, particularly laws related to the retention and review of communications regarding official government business, what disciplinary action would the State Department impose on the employee?

d. To your knowledge, has there ever been an instance in which criminal charges were pursued against a State Department employee as a result of that employee's use of a private (as opposed to Department-owned) server, personal computer, or any other unsecured device?

- According to the Testimony of Mr. Blanton, the State Department has a $1 Billion IT budget. How do you justify the speed with which your agency processes FOIA requests when this budget indicates plentiful resources to address the problem?

- Under exemption 5, a pre-decisional document does not lose its protection after the decision is made unless the agency incorporates the pre-decisional information into its final decision, either expressly or by reference. Nevertheless, establishing that the pre-decisional document was actually incorporated into a final decision can be a difficult hurdle for a requester. Do you think that modifying this exemption so that pre-decisional documents lose the protection post decision is an effective and responsible way to address the lackluster speed with which some agencies process FOIA requests?

- President Obama created a "presumption of openness" by adopting a foreseeable harm standard to guide agency use of exemptions. However, the White House has officially ended the Freedom of Information Act obligations of its Office of Administration after years of rejecting FOIA requests. How will this decision affect the fourth estate and the public?

- Criminal penalties are provided for the willful and unlawful destruction, removal, or private use of Federal records under 18 U.S.C. § 2071, which provides that the offender "shall be fined under this title or imprisoned not more than three years, or both."

    1. What is the department's history of enforcing this statute?
    2. Would a government official's utilization of a private email account and server to conduct official business and later deletion of emails on that private server qualify as conduct that this provision addresses?

Questions for the Record Submitted to
Assistant Secretary Joyce Barr by
Senator Charles E. Grassley (#1)
Senate Committee on the Judiciary
May 6, 2015

Question:

A 2012 State Department Inspector General report says that leadership and management practices "contribute to problematic morale and poor communication" across the Office of Information Programs and Services (IPS), which handles one of the largest FOIA workloads in the federal government.

What specific steps have been taken since the 2012 IG report to improve management controls to ensure that the State Department can efficiently and effectively carry out its FOIA and records management duties?

Answer:

Since the Office of Inspector General issued its 2012 report, the Department has taken several actions to improve the Department's FOIA and records management practices, which are particularly noteworthy given the challenges posed by the substantial increase in the number of FOIA requests and other record management responsibilities since 2012.

The Department increased its external communications by launching foia.state.gov. This website provides better guidance to the public to make it easier to submit FOIA requests. The Department has also overhauled our online FOIA reading room, which has almost 100,000 documents online.

The Department has improved internal communication and training. For example, we have increased the number of meetings with managers and staff and launched an internal tracking database to keep better track of FOIA projects. We have also improved our training to Department bureaus, which are responsible in the first instance for conducting FOIA searches, and internally in the Bureau of Administration, which handles the processing of FOIA requests. We have assigned more resources to the FOIA program, and have improved our internal software.

Most recently, in March 2015, the Secretary asked the OIG to review FOIA and records management practices. This review is on going. In August, the Secretary appointed a Transparency Coordinator who will also be involved in the improvement of these programs.

Questions for the Record Submitted to
Assistant Secretary Joyce Barr by
Senator Charles E. Grassley (#2)
Senate Committee on the Judiciary
May 6, 2015

Question:

I understand that in Fiscal Year 2014, the State Department experienced a 60% increase in FOIA lawsuits, which according to State Department's own Chief FOIA Officer Report, "necessitated the reallocation of resources from processing FOIA requests to handling FOIA litigation." Such a reallocation of resources and manpower, I imagine, has consequences for the efficient processing of pending FOIA requests.

A. Should requesters have to shoulder that consequence? Doesn't the reallocation of State's resources to FOIA litigation only set itself up for additional litigation based on even more delays?

B. What specifically are you doing to ensure that all the necessary functions of FOIA processing are still effectively and efficiently carried out under these circumstances?

Answer:

The Department is committed to transparency and to responding to FOIA requests as quickly as possible. Given the increased demand placed on the FOIA program in the Department, with a 300% increase in requests since 2008 (from 6,000 requests in 2008 to 20,000 requests in 2014), and the increased workload in FOIA litigation that has ensued, we are looking at ways to both process FOIA requests and manage FOIA litigation in the most efficient ways possible given the resources available to the program. The

combination of an increased number of FOIA requests and a growing number of FOIA litigation cases requires the Department to work on immediate plans to address the increased demands in both areas. We are also developing long term plans for the overall program so that we can put in place sustainable solutions that will allow us to better answer requests for information from the public.

Efforts are underway to better leverage technology to process FOIA requests, as well as to release documents on the Department's FOIA website to make them publicly available after they are requested.

Additionally, we are reviewing our FOIA practices to identify where process changes could be made that will allow the Department to respond to the public in a timely manner while also making sure that information gathered in response to FOIA requests is done so in the most thorough way possible and that the subsequent review of the information is done in a timely manner for release to the public.

In March of this year, the Secretary asked the Department's Inspector General to review FOIA and records management practices. In August, the Secretary appointed a Transparency Coordinator who will also be involved in the improvement of these programs, as well as overall transparency in the Department. In September, the Department reached out to all employees

and retirees asking for individuals with current Top Secret security clearances and substantive experience to serve in the FOIA office for the next 9 to 12 months. As of mid-October, more than 20 candidates have been selected, and we continue working to bring more staff on board.

Questions for the Record Submitted to
Assistant Secretary Joyce Barr by
Senator Charles E. Grassley (#3)
Senate Committee on the Judiciary
May 6, 2015

Question:

In June of 2013 and March of 2015 I sent a letter to the State Department asking a number of questions. One of the major questions I asked related to the relationship between Ms. Huma Abedin and her role as a Senior Advisor to Secretary Clinton while simultaneously working in the private sector for a political intelligence and consulting firm, Teneo. Notably, Ms. Abedin was given a rare classification as a Special Government Employee (SGE) which allowed her to work part time from New York while still working for Secretary Clinton. Normally, SGE designations are used for individuals moving from the private sector to government because of a special skillset that person may have. However, in Ms. Abedin's case, she neither came from the private sector nor came from another government position. She converted from a full-time employee to become an SGE, with seemingly little difference in her job description or responsibilities. This arrangement raises serious ethical issues. Accordingly, I requested communications between Ms. Abedin's State Department email account and Teneo. When Secretary Clinton admitted that she housed a private email account on a personal server in her residence and as news reports surfaced that Ms. Abedin also emailed from a private email account to that server, ethical and transparency issues became even more relevant.[1] In addition, the State Department's recordation policies as well as its ability to adequately and accurately respond to Congressional inquiries and FOIA requests is called into serious question. Accordingly, I now ask the following:

a. Did Ms. Abedin have an email account on Secretary Clinton's private email server? If so, when were her official emails sent to the Department and who sent them?

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[1] *See* Stephen Dinan, "Hillary Clinton's aide Huma Abedin's emails now face disclosure lawsuit," *Washington Times* (May 5, 2015) http://www.washingtontimes.com/news/2015/may/5/huma-abedins-emails-face-disclosure-suit/; *see also* Daniel Halper, "Hillary's Top Two Aides Used Personal Email at State Department," *The Weekly Standard* (Mar. 11, 2015) http://www.weeklystandard.com/blogs/hillarys-top-two-aides-used-personal-email-state-department_883063.html.

b. Did Ms. Abedin use a private email account outside of Secretary Clinton's private email server to communicate with Secretary Clinton? If so, has Ms. Abedin turned over those official emails to the State Department?

c. If Ms. Abedin had an account on Secretary Clinton's server and/or emailed Secretary Clinton from a private email account outside of Secretary Clinton's server, were any of Ms. Abedin's emails deleted from that server? If so, who deleted those emails?

d. Did Mr. Philippe Reines and/or Ms. Cheryl Mills have an email account on Secretary Clinton's private email server? If so, when were their official emails sent to the Department and who sent them?

e. Did Mr. Reines and/or Ms. Mills use a private email account outside of Secretary Clinton's private email server to communicate with Secretary Clinton? If so, has Mr. Reines and/or Ms. Mills turned over official emails to the State Department?

f. If Mr. Reines and/or Ms. Mills had an account on Secretary Clinton's server and/or emailed Secretary Clinton from a private email account outside of Secretary Clinton's server, were any of their emails deleted from that server? If so, who deleted those emails?

g. Will the State Department search the emails from Secretary Clinton's private server for documents responsive to my June 2013 and March 2015 inquiry?

h. Regarding my June 2013 and March 2015 letters, when can this Committee expect to receive full and complete responses?

Huma Abedin

On March 11, 2015, the Department wrote to Ms. Abedin to "ask that should you be aware or become aware in the future of a federal record in your possession, such as an email sent or received on a personal email account while serving in your official capacity at the Department, that such record be made available to the Department." We requested that such record be "provided to the Department at your earliest convenience if there is any reason to believe that it may not otherwise be preserved in the Department's recordkeeping system." On June 29, 2015, Ms. Karen Dunn and Mr. Miguel Rodriguez, representatives for Ms. Abedin, replied to the March 11 letter, which they noted was not received by Ms. Abedin until May 19. In the June 29 reply, Ms. Dunn and Mr. Rodriguez noted that, "On the same day that we received the department's letter requesting the assistance of our client, we received a request directed to Ms. Abedin from the House Select Committee on Benghazi (the Benghazi Committee) for 'documents that reflect any communication between Huma Abedin and any other person that refers to, relates to, or concerns the Attacks, any statement about the Attacks, or any response to the Attacks for the period from September 11, 2012 through and including September 30, 2012.'" This request was superseded on June 1 by a document request from the Benghazi Committee for "any and all

documents and communications sent or received by [Ms. Abedin] from any and all non-State Department email address(es) she utilized, referring or relating to a) Libya (including but not limited to Benghazi and Tripoli) and/or b) weapons located or found in, imported or brought into, and/or exported or removed from Libya." Ms. Dunn and Mr. Rodriguez noted that they were "on track to provide the Department documents responsive to the Select Committee's June 1, 2015 letter within the next several weeks and hope to work closely with the Department on a timetable for providing any other potential federal records in Ms. Abedin's possession."

On July 9, Ms. Abedin's representatives provided to the Department documents identified by Ms. Abedin as responsive or potentially responsive to the Benghazi Committee's June 1 request. On July 31, the Department wrote to Ms. Dunn and Mr. Rodriguez to request "that you and your client now take steps to return all copies of potential federal records in your possession to the Department as soon as possible." On August 7, Ms. Dunn and Mr. Rodriguez provided additional documents from Ms. Abedin and noted that they expected to complete the production of Ms. Abedin's potentially responsive documents by August 28. On September 1, they provided to the Department Ms. Abedin's documents that were "responsive or potentially responsive to your request."

Cheryl Mills and Philippe Reines

On March 11, 2015, the Department wrote separately to both Mr. Philippe Reines and Ms. Cheryl Mills to "ask that should you be aware or become aware in the future of a federal record in your possession, such as an email sent or received on a personal email account while serving in your official capacity at the Department, that such record be made available to the Department." We requested that such record be "provided to the Department at your earliest convenience if there is any reason to believe that it may not otherwise be preserved in the Department's recordskeeping system." On March 16, Beth Wilkinson, the representative of Ms. Mills, acknowledged receipt of the March 11 letter on behalf of her client, committed to provide any such potential federal records, and asked for an additional week to confer with Ms. Mills. On March 17, the Department acknowledged the March 16 letter, noted that Ms. Wilkinson "requested an extension to March 25, 2015", and granted that request. On March 24, Ms. Wilkinson wrote to the Department, noting "we believe that Ms. Mills may have documents responsive to your letter, and will work with her to produce any such documents to you as soon as possible."

On June 2, the Department wrote to Ms. Wilkinson regarding the March 11 letter to Ms. Mills to request that "you expedite production to the Department of any such document that is potentially responsive to the subpoena from the Select Committee on Benghazi that was attached to [the Department's] letter. The Department is committed to producing responsive documents to the Committee as quickly as possible." On June 25, Ms. Mills produced documents and committed to continue to produce additional documents. On July 31, the Department wrote to Ms. Wilkinson to request "that you and your client (Ms. Mills) now take steps to return all copies of potential federal records in your possession to the Department as soon as possible." On August 6, Ms. Wilkinson replied and advised that she "expect(ed) to produce additional documents for the Department's review in an electronic format on August 10, 2015." In a separate letter of August 6, Ms. Wilkinson noted, "Ms. Mills did not have an account on Secretary Clinton's email server." On August 10, Ms. Wilkinson provided documents from Ms. Mills' personal email account in response to the March 11 request from the Department. On August 12, Ms. Wilkinson produced another set of documents and noted, "With the delivery of these materials today, we have produced all potential federal records identified in Ms. Mills' possession.

Should any additional potential federal records be identified in the future, we will promptly notify the Department of State and provide them."

On March 16, Beth Wilkinson, Mr. Reines's representative, acknowledged receipt of the March 11 letter from the Department. On June 2, the Department wrote to Ms. Wilkinson regarding the March 11 letter to Mr. Reines to request that "you expedite production to the Department of any such document that is potentially responsive to the subpoena from the Select Committee on Benghazi that was attached to my letter. The Department is committed to producing responsive documents to the Committee as quickly as possible." On July 31, the Department wrote to Ms. Wilkinson to request "that you and your client (Mr. Reines) now take steps to return all copies of potential federal records in your possession to the Department as soon as possible." On July 28, Ms. Wilkinson provided documents from Mr. Reines and in an August 6 letter stated that "(o)n July 28, 2015, Mr. Reines provided a hard copy of all potential federal records in his possession from his tenure at the Department of State from 2009 through 2013 to the Department." The August 6 letter enclosed the July 28 documents in electronic format.

Additionally, on August 7, 2015, the Court in *Judicial Watch v. Department of State* (13-01363) ordered the Department "to request that Mrs. Hillary Clinton, Ms. Huma Abedin, and Ms. Cheryl Mills, i) not delete any federal documents, electronic or otherwise, in their possession or control, and ii) provide appropriate assurances to the Government that the above-named individuals will not delete any such documents." Accordingly, on August 10, the Department sent separate letters to the representatives of former Secretary Clinton, Ms. Abedin, and Ms. Mills in compliance with the Court's order. On August 12, each of the respective representatives sent replies.

The Department is not aware that Mr. Reines or Ms. Mills had an email account on Secretary Clinton's server. On September 22, 2015, Ms. Beth Wilkinson, representative of Ms. Mills and Mr. Reines, wrote to the Department and stated, "We have observed confusion in the media and other areas surrounding whether our clients used email accounts on the @clintonemail.com server. As stated in our August 6, 2015 letter, Cheryl Mills did not have an account on Secretary Clinton's email server. Philippe Reines ….. also never had accounts on that server."

Regarding searches of and deletions from former Secretary Clinton's server, on September 14, 2015, the Department wrote to the Federal Bureau of Investigation, noting the following:

> We understand that the Federal Bureau of Investigation (FBI) has obtained the private server used by former Secretary Clinton to operate her personal email account along with one or more related thumb drives. While we do not want to interfere with the FBI's review, the Department of State has an interest in preserving its federal records and, therefore, requests the FBI's assistance. … (W)e request from the FBI an electronic copy of the approximately 55,000 pages identified as potential federal records and produced on behalf of former Secretary Clinton to the Department of State on December 5, 2014. … (T)o the extent the FBI recovers any potential federal records that may have existed on the server at various points in time in the past, we request that you apprise the Department insofar as such records correspond with Secretary Clinton's tenure at the Department of State."

The Department has worked closely with Committee staff with respect to its various requests for documents and will continue to do so.

Questions for the Record Submitted to
Assistant Secretary Joyce Barr by
Senator Charles E. Grassley (#4a &4b)
Senate Committee on the Judiciary
May 6, 2015

Questions:

According to Secretary Clinton, she deleted approximately 30,000 emails from her private server and submitted another 30,000 to the State Department. Secretary Clinton has stated that she was the sole arbiter in determining whether emails were of a personal nature and ought to be deleted and whether emails were of a business nature and ought to be saved. Secretary Clinton's email recordation system calls into question the ability of the State Department to properly review documents for FOIA compliance as well as adequately respond to legitimate FOIA requests. Moreover, Secretary Clinton's email recordation calls into question the State Department's ability to respond to Congressional inquiries.

a. Generally speaking, are you aware of any employee besides Secretary Clinton who built a personal server in his/her personal residence and used a personal email account on such a server?

b. When a State Department employee does not use an official email account for work related matters, what is the disciplinary protocol for failing to abide by State Department policy?

Answers:

At this time, the Department is not aware of any other employee who built a personal server in his or her personal residence and used a personal email account on such a server.

Managing records properly is everyone's job. Every employee has two basic responsibilities in this regard:

1. To create records that the employee and others need to do business. It is very important to record decisions and actions taken.
2. To take care of the records so that they can be found when needed. This means setting up good records management systems.

As with many of the Department's policies, an employee's failure to comply could result in a variety of responses, depending on the circumstances. As a first step, poor record-keeping would be the subject of counseling about how to remedy the situation.

More serious offenses involving records could be subject to more serious discipline. In its Foreign Affairs Manual (FAM), the Department has set out its policies for appropriate email use and records management. The FAM also includes a list of offenses for which an employee can face discipline, again, depending on the circumstances.

These offenses could include failure to follow proper instructions and conduct demonstrating untrustworthiness, unreliability, or use of poor judgment. The Department takes security of its classified information very seriously, and improper handling of classified or administratively-controlled information can, if the circumstances warrant, result in disciplinary action or adverse action to an employee's security clearance.

Discipline is the responsibility of the employee's supervisor, who coordinates with the Bureau of Human Resources. Penalties can fall within the range of a Letter of Reprimand to suspension to removal. In cases where deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an employee's reliability or ability to safeguard such information, the Bureau of Diplomatic Security has the authority to adjudicate appropriate security clearance actions.

Questions for the Record Submitted by
Senator Charles Grassley (#4c)
Assistant Secretary for Administration Joyce Barr
Senate Judiciary Committee
May 6, 2015

Question:

c. Has the State Department received any access to Secretary Clinton's personal server? If so, please explain the degree of access. If not, why not?

Answer:

We do not have access to Secretary Clinton's server; we understand that it is in the possession of the Federal Bureau of Investigation.

Questions for the Record Submitted by
Senator Charles Grassley (#4d)
Assistant Secretary for Administration Joyce Barr
Senate Judiciary Committee
May 6, 2015

Question:

d. Of the emails Secretary Clinton has turned over to the State Department, can you unequivocally state that none of them are classified?

Answer:

Some of former Secretary Clinton's emails that the Department has posted online have had portions redacted because of classification. During the FOIA review process, it was deemed that some of the information in certain emails should be classified prior to public release. It is not uncommon that something that is sent today on an unclassified network could in later years be deemed to be classified pursuant to a review under FOIA.

Questions for the Record Submitted by
Senator Charles Grassley (#4e & 4f)
Assistant Secretary for Administration Joyce Barr
Senate Judiciary Committee
May 6, 2015

Question:

e. In light of Secretary Clinton's email practices, is the State Department able to comply with all FOIA requests on matters that touch and concern Secretary Clinton, Ms. Abedin, and/or other high level State Department officials who sent emails through Secretary Clinton's private server? Please explain.

f. What effect has Secretary Clinton's email recordation practices had on State Department FOIA compliance? What effect has Secretary Clinton's email recordation practices had on State Department responses to Congressional inquiries?

Answer:

As a general matter, the Department acknowledges that we are struggling to keep up with a large increase in FOIA requests. Since 2008, our caseload has increased over 300 percent. In Fiscal Year 2008, the State Department received fewer than 6,000 new FOIA requests; in Fiscal Year 2014, we received nearly 20,000.

Furthermore, many of these cases are increasingly complex. The State Department is the public's first, and often the only, stop for

information relating to national security issues. Other national security agencies are partially, if not completely, exempt from FOIA requests. As a result, requesters often come only to the Department to request information on any and all national security issues, including diplomacy, terrorism, wars, foreign government relations, and security. These complex subject matters require multiple searches throughout many of our 275 Missions around the globe, often involving the review of classified or highly sensitive materials, as well as coordination with other federal agencies.

In addition, the Department receives steady requests for information from Congress, which adds to the overall workload.

FOIA requests for all 55,000 pages of former Secretary Clinton's emails at one time has put added stress onto an already overloaded process. However, we are doing everything we can to meet the court ordered deadlines to produce a certain percentage of these emails by the end of each month until January 2016. We have produced emails each month from May to September of 2015, releasing, as of September 30, a total of 19,570 of the 52,455 pages of records, more than 37 percent of the total. In addition, we have received documents from some of former Secretary Clinton's aides,

which we are also processing for release in response to FOIA requests, as relevant.

In order to process the Clinton emails, as well as keep up with regular FOIA requests, internally we have diverted some Department manpower to assist the FOIA Office. To date over 20 individual volunteers have been selected or detailed to assignments in the FOIA office to help address backlog and new incoming requests, and we continue work to add additional staff.

Questions for the Record Submitted to
Assistant Secretary Joyce Barr by
Senator Thom Tillis (#1)
Senate Committee on the Judiciary
May 6, 2015

In a letter to the State Department Inspector General, Secretary of State John Kerry admitted the Department faced challenges with regard to processing Freedom of Information Act (FOIA) requests and that Department personnel used non-government systems to conduct official business. A number of observers have stated that the State Department consistently performs poorly when responding to FOIA requests and that it currently maintains a significant backlog of requests.

Since Secretary Kerry has taken over as Secretary of State, what actions has the Department taken to triage new and backlogged FOIA requests? Specifically:

i. What are the Department's metrics for setting acceptable internal timetables for fulfilling FOIA requests?

ii. Do you have an improvement plan to reach these metrics?

iii. What milestone will the Department attempt to reach next? Put differently, if the plan is incremental, how does the Department plan on tracking the progress?

iv. Will the Department publicly commit to meeting this milestone, and if the milestone is not met, will the Department return to the Senate Judiciary Committee to explain why?

Answer:

The Department received over 19,000 requests in Fiscal Year 2014.

By May 2015, the backlog of FOIA requests was 18,000. With so many

requests of all types already pending in the backlog, along with new requests being submitted each day by requesters, the Department has a timetable in place for different types of requests to ensure that they are responded to as soon as possible, while taking into account delays that result due to unusual circumstances. While the goal of metrics in place is to respond within the 20-day statutory time period and to achieve 10% backlog reduction each year, the reality is that there are many roadblocks in place to achieving this goal.

In March, Secretary Kerry asked the Department's Inspector General to review records and FOIA practices at the Department. Additionally, the Secretary appointed a Transparency Coordinator who will be looking into these topics and more with regard to records and FOIA at the Department. In September, the Department reached out to all employees and retirees asking for individuals with current Top Secret security clearances and substantive experience to serve in the FOIA office for the next 9 to 12 months. As of mid-October, more than 20 candidates have been selected, and we continue working to bring more staff on board.

Each FOIA request is reviewed on an individual basis, and for the most part, each request is unique.

The FOIA processing timetable is defined by the following metrics:

- Respond to requests on a first-in, first-out basis

- Prioritize cases within queues, such as expedited, simple, and complex requests. This can best be achieved by constantly evaluating the status of these cases and monitoring their progress.

- Under normal circumstances, the Department acknowledges a new FOIA request within 5 – 7 days. There may be some back and forth between the Department and the FOIA requester before a perfected request may go on to processing. For example, if the request is seeking voluminous materials or the request is unclear to those searching for documents, the FOIA office will contact the requester to discuss the scope and narrowing the request, if possible, to reduce the time it takes to process the request. A decision to expedite and/or provide a fee waiver is also completed within this timeframe.

- Within 8 - 10 days, a search tasker is sent out to bureaus or a search is conducted within the State Archiving System for responsive documents. This part of the process is handled by the FOIA case processing units. Due to volume of requests received and staffing challenges, not all taskers are sent within the required timeframe.

- The search tasker that is sent to bureaus provides a due date for responding to the tasker. If the bureau does not respond, the FOIA office reaches out to the bureau to remind them.

- Once documents from the relevant bureau(s) are provided to the FOIA office for review, these documents must be scanned and indexed into the electronic case processing system. Depending on the volume of documents, this step may take 6 – 9 months to complete.

- Once indexed, a FOIA reviewer reviews the documents and often must coordinate the review with other bureaus within the Department and at other agencies. Sometimes, it also becomes evident that an additional office may need to be tasked after the review is conducted. If that happens, the search tasker is sent out and the above steps are taken for the new search.

- After the review is completed, a response is sent out to the requester, which may be an interim release, if the production is rolling and more productions will be forthcoming, or a final release.

The Department is always evaluating the process to improve response time and provide a quality search and review of records. The Department will be working with the Secretary's new Transparency Coordinator to develop reachable metrics in order to measure progress in FOIA.

The Department will be working with the Secretary's new Transparency Coordinator to develop reachable metrics in order to measure progress in FOIA.

The Department FOIA Office will be working with the Secretary's Transparency Coordinator to develop reachable milestones. The Department is willing to discuss with you these milestones once they have been established.

Questions for the Record Submitted to
Assistant Secretary Joyce Barr by
Senator Thom Tillis (#2)
Senate Committee on the Judiciary
May 6, 2015

At the hearing, there was significant discussion concerning former Secretary Clinton's use of a private server to conduct official government business. Uncertainty remains regarding whether these communications can ever be retrieved.

Since Secretary Kerry has taken over as Secretary of State, have there been any changes in policy regarding the practice of Department personnel using private servers to conduct official government business?

i. If yes, please specifically explain what these policy changes are and what steps were taken to ensure employees preserve and archive communications?

ii. If not, does the State Department intend to implement a change in its policy to prevent employees from using private servers or implement new policies to ensure employees effectively store and archive communications made through private servers?

iii. Please describe the process the Department has employed to investigate an allegation that an employee used private servers or hardware to conduct official government business.

iv. If an employee is found to have intentionally used private servers or hardware to circumvent federal law, particularly laws related to the retention and review of communications regarding official government business, what disciplinary action would the State Department impose on the employee?

v. To your knowledge, has there ever been an instance in which criminal charges were pursued against a State Department employee as a result of that employee's use of a private (as opposed to Department-owned) server, personal computer, or any other unsecured device?

Answer:

The Department of State is working to meet the goals of the President's Managing Government Records Directive. In 2014 and 2015, the Department issued guidance to all Department employees, including Senior Officials, reminding them of their overall records management responsibilities, including email, and issued a directive to preserve electronically the email of Senior Officials upon their departure from the Department. Consistent with the November 2014 Presidential and Federal Records Act Amendments, the Department also issued a Department Notice that reiterates and clarifies records management responsibilities of all employees, noting that in the rare instances in which an employee uses personal email (e.g., traveling overseas where electronic connection to official government systems are poor), the employee must copy his or her state.gov account, or forward the message to his or her government account within 20 days. The Department is also reviewing email management options for the Department through an Electronic Records Management Working Group established by the Under Secretary for Management.

On March 25, Secretary Kerry sent a letter to our Inspector General requesting that the Inspector General undertake a review of the Department's records management efforts to date and to recommend

concrete ways the Department can improve. We look forward to considering any recommendations made by the Office of Inspector General in this regard.

On March 25, Secretary Kerry sent a letter to our Inspector General, requesting that the Inspector General undertake a review of the Department's records management efforts to date and to recommend concrete ways the Department can improve. We continue to work with the IG and await the results of this review.

Managing records properly is everyone's job. Every employee has two basic responsibilities in this regard:

1. To create records that the employee and others need to do business. It is very important to record decisions and actions taken.
2. To take care of the records so that they can be found when needed. This means setting up good records management systems.

As with many of the Department's policies, an employee's failure to comply could result in a variety of responses, depending on the circumstances. As a first step, poor record-keeping would be the subject of counseling about how to remedy the situation.

More serious offenses involving records could be subject to more serious discipline. In its Foreign Affairs Manual (FAM), the Department has set out its policies for appropriate email use and records management. The

FAM also includes a list of offenses for which an employee can face discipline, again, depending on the circumstances.

These offenses could include failure to follow proper instructions and conduct demonstrating untrustworthiness, unreliability, or use of poor judgment. The Department takes security of its classified information very seriously, and improper handling of classified or administratively-controlled information can, if the circumstances warrant, result in disciplinary action or adverse action to an employee's security clearance.

Discipline is the responsibility of the employee's supervisor, who coordinates with the Bureau of Human Resources. Penalties can fall within the range of a Letter of Reprimand to suspension to removal. In cases where deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an employee's reliability or ability to safeguard such information, the Bureau of Diplomatic Security has the authority to adjudicate appropriate security clearance actions.

To our knowledge, the Department has not prosecuted an employee for use of a private server.

Questions for the Record Submitted to
Assistant Secretary of State Joyce Barr by
Senator Patrick Leahy (#1)
Senate Committee on the Judiciary
May 6, 2015

Question:

Does the State Department comply with the Obama Administration's mandate that agencies approach FOIA with a Presumption of Openness, and err on the side of disclosure when considering FOIA requests? If so, why does the State Department deny nearly half of the requests it receives?

Answer:

The Department takes its responsibility under the Freedom of Information Act (FOIA) very seriously and complies with all Obama Administration guidance regarding transparency, including the 2009 Open Government Directive, available at https://www.whitehouse.gov/open/documents/open-government-directive, and Attorney General Holder's 2009 memorandum regarding FOIA, available at http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf . The Department has well-established policies regarding disclosing as much information as possible without compromising national security and/or the visa and permit processes.

Given the Department's mission, a large majority of FOIA withholdings are made under FOIA Exemption 3 pursuant to the Immigration and Nationality Act (INA) because they request certain visa-related records. Section 222(f) of the INA provides that "(t)he records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential and shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States" with certain limited exceptions.

In addition, the nature of the Department's mission involves issues that implicate national security; therefore, certain information maintained by the Department is classified to protect national security. For this reason, the Department has limited discretion in releasing this information and asserts Exemption 1 to protect properly classified information.

Finally, requestors often erroneously submit FOIA requests to the Department. For example, the Department of State receives requests related to one of the 50 states. We also receive requests that pertain to other agencies.

Questions for the Record Submitted to
Assistant Secretary of State Joyce Barr by
Senator Patrick Leahy (#2)
Senate Committee on the Judiciary
May 6, 2015

Question:

Has the State Department requested an increase in its budget to help it comply with its obligations under FOIA? If not, what does the Department of State need in order improve its FOIA response time and reduce the backlog of requests?

Answer:

The Department is evaluating a budget request that will help meet obligations under FOIA.

In FY 2015, the Department reprogrammed funding at the end of the fiscal year to provide additional resources for staffing, reviewers, and an improved electronic system to process requests electronically, not in paper format.

Additionally, the FOIA Program is also looking at other ways that it can leverage existing resources within the Department to receive timely responses from bureaus and offices so that it can better respond to requests in a faster manner. Earlier this year, the Secretary asked the Department's Office of Inspector General to help "ensur(e) that the Department is doing everything it can to improve" records management, including how to

improve its tools and methods for complying with FOIA requests. Also, the Secretary has recently appointed a Transparency Coordinator who will be looking into these matters.

Questions for the Record Submitted to
Assistant Secretary of State Joyce A. Barr by
Senator Patrick Leahy (#3)
Senate Committee on the Judiciary
May 6, 2015

Question:

In a FOIA lawsuit seeking release of the Senate Intelligence Committee's full report on the CIA's torture program, Justice Department and State Department officials submitted declarations on January 21, 2015, stating that their copies of the report remain locked away, unopened. I was appalled to learn that both Departments, which received the full report in December, had not even opened it.

Did State Department officials decide not to open the full report in an attempt to bolster the government's position in the FOIA lawsuit, or otherwise avoid federal records laws?

Answer:

As you are aware, the status of the Senate Select Intelligence Committee's report regarding the CIA's former detention and interrogation program delivered to the Department has been the subject of ongoing litigation in *ACLU v. CIA*, Civil Action No. 13-1870 (D.D.C.). In a filing with the Court, the government "assure[d] the Court that it will preserve the status quo either until the issue of whether the Full Report is a congressional document or an agency record is resolved, or until it obtains leave of court to alter the status quo." *See* Defendants' Response to Plaintiffs' Emergency Motion For An Order Protecting This Court's Jurisdiction, filed February 6,

2015. The ACLU appealed the district court's decision that the report in question was not an agency record subject to FOIA. As such, the case is not fully resolved and the Department must maintain the status quo with regard to the treatment of the final report.

Questions for the Record Submitted to
Assistant Secretary Joyce A. Barr by
Senator Vitter
Senate Committee on the Judiciary
May 6, 2015

Question 4:

According to the Testimony of Mr. Blanton, the State Department has a $1 Billion IT budget. How do you justify the speed with which your agency processes FOIA requests when this budget indicates plentiful resources to address the problem?

Answer:

The Department's $1.6 billion IT budget covers a wide variety of requirements, including the periodic technological refresh of computers and server equipment at all of our domestic facilities and overseas missions; personal communication devices such as cell-phones and Blackberries; the operations, maintenance and security of the Department's intranet platform and electronic outreach efforts; and the development systems designed to standardize and improve management processes, ranging from logistics and human resources to passport and visa processing.

Personnel costs are the largest share of the FOIA Office's operating budget, and are funded out of Diplomatic and Consular Programs. Though the Department's FOIA Office has identified technological solutions that could aid in their work, the increase in the Department's FOIA backlog is

more complicated than a simple lack of IT resources. In recent years, the FOIA office has seen a significant workload increase (nearly 20,000 requests in 2014, growing over 300 percent since 2008) as well as an increase in litigation over open cases, while funding constraints have meant that the office's resources haven't kept pace with this increasing demand. Once a case enters litigation, reaching resolution is far more labor intensive due to additional requirements. Additionally, the Department deals with many complex FOIA requests requiring coordination across bureaus and posts overseas and must thoroughly review responses to prevent the release of sensitive and potentially damaging information.

The Department continues to determine what will be needed to meet the Administration's Open Government Directive, requiring agencies to reduce their backlogs of FOIA requests by 10 percent each year. The Department's goals related to FOIA compliance for the near future are twofold: to reduce the open FOIA case backlog and deploy enhanced technology on the unclassified networks to improve workflow. In the coming months, the Department will seek to determine the appropriate response and whether an increase in staffing and/or funding is required to meet these needs to both reduce this backlog and to ensure that the FOIA office has the IT capabilities to handle the growing workload going forward.

Thomas Blanton, Director, National Security Archive, George Washington University

Written Questions and Answers for the Record, "Ensuring an Informed Citizenry: Examining the Administration's Efforts to Improve Open Government"

U.S. Senate Committee on the Judiciary, Hearing May 6, 2015

Questions from Chairman Grassley:

1. I understand that in Fiscal Year 2014, State experienced a 60% increase in FOIA lawsuits, which according to State's own Chief FOIA Officer Report, "necessitated the reallocation of resources from processing FOIA requests to handling FOIA litigation." Such a reallocation of resources and manpower, I imagine, has consequences for the efficient processing of pending FOIA requests.
    a. Should requesters have to shoulder that consequence? Doesn't the reallocation of State's resources to FOIA litigation only set itself up for additional litigation based on even more delays?
    b. What should State be doing to ensure that it's covering all its FOIA functions – not just litigation?

These insightful questions point to the core problem with State's short-sighted strategy of shifting resources over from FOIA processing to litigation support. By slowing down the processing of existing FOIA requests, they almost certainly will generate more litigation, not less, and the resource shift becomes self-defeating. State did face extraordinary circumstances in 2014 and 2015, with a former Secretary of State running for president as the favorite for the nomination of her party. But instead of getting out in front of the inevitable flood of FOIA requests – and lawsuits – about her, State waited until federal judges set the deadlines. A more efficient approach would have included establishing a documentary SWAT team that would build its own expertise in the wide range of records involving the former Secretary, and expeditiously move them into the public domain. The e-mail from the private server is only the first challenge; next would come all the Secretary's calendars and schedules; then her memcons and telcons and senior staff meeting notes. All of these records meet the criteria of high public interest, and the Department should not have waited to be asked, or ordered, to review and release them. Finally, existing law does give State the ability to set up separate lines for FOIA processing based on the complexity of the request. In this way, simpler requests by ordinary citizens or by researchers seeking a single document could make up their own queue, while those who are filing multiple requests or lawsuits would stand in line behind themselves.

2. State's Chief FOIA Officer Report for 2015 says "the Department makes every effort to respond to FOIA requests within the statutory response period." However, State is consistently found to have one of the longest request processing periods in the federal government. DOJ found that it takes State an average of 109 days just to respond to simple requests. This is more than five

times the average across the federal government of 20.51 days, even with all agencies feeling the squeeze of limited resources.

a. What do you think explains these significant delays?
b. Is the nature of the information that State handles, such as matters related to national security and foreign policy, any justification for these delays?

Talking with present and former State Department FOIA officials, they tell me the "limited resources" problem that all agencies feel does have a disproportionately large effect at State, primarily in the area of inadequate IT systems, described by many as at least two generations behind. We know, for example, that when Secretary Clinton asked in her first week at State for an encrypted Blackberry like the one President Obama carried, the National Security Agency was willing but officials concluded that State simply did not have the infrastructure to support such a Blackberry – and the infamous private server was the result. The National Security Archive's experience with FOIA requests at State also suggests several other dynamics at work in the FOIA delays. Not least would be the lowly status and relative lack of authority in State's FOIA office itself, with no direct line to the top of the agency except through several layers of bureaucracy, with no power to search for records itself except in the central cables database, with little discretion to order release of records if the program offices involved don't sign off. This is a problem in many agencies, where the substantive officials have to clear any release, yet few are willing to take the time out of their daily grinds actually to review the materials and get them back to the FOIA office. FOIA compliance needs to become part of every employee's performance evaluation at year-end, and part of employee training at the front end. But the part (b) of this question points to a final dynamic underlying State's FOIA delays, that of security classification. Yes, State handles a wide range of sensitive information about foreign relations and national security, but the National Security Archive's experience with State over the past 30 years demonstrates that over-classification is the norm, that most of State's documentation could be released with a few years after its creation, that the highly subjective quality of most classification judgments does add real delay to the FOIA process. Two officials can look at the same document and come to opposite conclusions about whether it should be (or stay) classified. We have published examples where the same classification officer censored completely different portions of the same document in reviews just a week or two apart. There are few incentives inside the bureaucracy for challenging over-classification, so bureaucratic imperatives are likely to dominate, rather than the public's right to know. Congressional oversight remains one of the few tools that actually works to combat the bureaucracy's reflexive over-classification.

3. The mediation services that OGIS provides were intended to—and should—serve as a meaningful alternative to resolving FOIA disputes through litigation. The numbers show, however, that FOIA lawsuits continue to be on the rise. And the government's often-vigorous defense of FOIA litigation is surely costing taxpayers money. I'm concerned that there could be more engagement with the requester community by agencies at an earlier stage to inform them of the mediation services that OGIS provides. I'm equally concerned that agencies aren't warming up to the idea of mediation as a way to resolve FOIA disputes.

a. Are the services OGIS provides being underutilized as a litigation alternative?
b. What benefits would requesters receive if agencies take a more active and cooperative role in resolving FOIA disputes through mediation?

Yes, OGIS is being underutilized as a litigation alternative, partly because agencies have not uniformly included resort to OGIS as part of their reply letters to requesters, partly because OGIS is seen more as a hot line than as a mediator with real influence, and partly because the Justice Department has not exactly steered agencies towards OGIS. In fact, the Office of Information Policy at Justice actively worked to undermine OGIS even after Congress specifically ordered OGIS into existence. Requesters would benefit significantly from a more active agency role in cooperation with OGIS, for speedier replies and more consistent customer service. Congress will need to continue its oversight both of OGIS and of the Justice Department. But Congress should also consider other measures to enhance the authority of OGIS. This Committee should be aware that the U.S. FOIA, compared to the more than 100 other countries with access to information laws, does not rank very highly, in fact, only a middling score, 51st out of 103 in one recent study by a Canadian research group; and the low rating was largely based on our lack of a powerful tribunal or information commissioner who could resolve FOIA disputes – not just provide FOIA therapy to givers and receivers of FOIAs. In countries like Mexico and India, the information commissioners even have the power to overrule ministers and order the release of records when exemptions were wrongfully applied. More authority and more resources for OGIS will be necessary to make our FOIA process work nearly as well.

4. Is there anything you wish to add to, or correct for, the record? If so, please take this opportunity to provide any additional remarks or commentary.

I would like to emphasize the portion of my testimony that concerned the generational failure in the U.S. government to e-archive e-mail. There is no small irony in the fact that had former Secretary Clinton used a state.gov account rather than her private server, we would likely today have only a few hundred – not 30,000 – of her e-mail messages from her time as Secretary of State. The so-called POEMS system that all undersecretaries and most assistant secretaries at State used only handled the e-mail electronically in real time, but not as an archive. For preservation of historic or administratively valuable records, either the sender or recipient had to "print and file" the message – which is why there are so few messages surviving from former Secretary Colin Powell's four years at State. My recommendation for this Committee is to look closely at the December 31, 2016 deadline now in place for agencies across the government to manage and archive their e-mail electronically. Oversight will be called for, both before and after this deadline.

Question from Senator Vitter:

Under exemption 5, a pre-decisional document does not lose its protection after the decision is made unless the agency incorporates the pre-decisional information into its final decision, either expressly or

by reference. Nevertheless, establishing that the pre-decisional document was actually incorporated into a final decision can be a difficult hurdle for a requester. Do you think that modifying this exemption so that pre-decisional documents lose the protection post decision is an effective and responsible way to address the lackluster speed with which some agencies process FOIA requests?

In general, I would support any effort by Congress to limit the breadth and scope of exemption 5. Originally meant to protect deliberative space for officials, the exemption has become what one expert called the "withhold it because you want to" exemption. The first two years of the Obama administration saw a significant decline in the number of times that agencies invoked this exemption to deny FOIA requests. Perhaps there was a real effect from the President's Day One pronouncements on open government. But agencies stopped believing the White House around year three of the Obama presidency, and use of the 5th exemption soared and remains at all-time record levels, according to the Associated Press tabulation of agency FOIA reports. At the same time, I am somewhat wary of a textual modification to the exemption that broadly drops any protection to pre-decisional documents once the relevant decision is made. Certainly such a change would require additional litigation to work out its parameters. It seems to me that a more effective and responsible way to address the exemption challenge is to include in FOIA the kind of public interest balancing test that other countries have incorporated into their access laws, for example, in Mexico there is an override of exemptions if the records concern grave abuses of human rights, and in Japan there is an override of exemptions if the records concern a danger to public health. Combined with a sunset on the deliberative exemption such as the Presidential Records Act gives former presidents (12 years after they leave office), such a public interest test could give agencies and judges the basis for faster and more effective processing.

Questions for the Record Submitted to
Assistant Secretary Joyce A. Barr by
Senator Vitter
Senate Committee on the Judiciary
May 6, 2015

Question 4:

According to the Testimony of Mr. Blanton, the State Department has a $1 billion IT budget. How do you justify the speed with which your agency processes FOIA requests when this budget indicates plentiful resources to address the problem?

Answer:

The Department's $1.6 billion IT budget covers a wide variety of requirements, including the periodic technological refresh of computers and server equipment at all of our domestic facilities and overseas missions; personal communication devices such as cell phones and Blackberries; the operations, maintenance and security of the Department's intranet platform and electronic outreach efforts; and the development systems designed to standardize and improve management processes, ranging from logistics and human resources to passport and visa processing.

Personnel costs are the largest share of the FOIA Office's operating budget, and are funded out of Diplomatic and Consular Programs. Though the Department's FOIA Office has identified technological solutions that could aid in their work, the increase in the Department's FOIA backlog is

more complicated than a simple lack of IT resources. In recent years, the FOIA office has seen a significant workload increase (nearly 20,000 requests in 2014, growing over 300 percent since 2008) as well as an increase in litigation over open cases, while funding constraints have meant that the office's resources haven't kept pace with this increasing demand. Once a case enters litigation, reaching resolution is far more labor intensive due to additional requirements. Additionally, the Department deals with many complex FOIA requests requiring coordination across bureaus and posts overseas and must thoroughly review responses to prevent the release of sensitive and potentially damaging information.

The Department continues to determine what will be needed to meet the Administration's Open Government Directive, requiring agencies to reduce their backlogs of FOIA requests by 10 percent each year. The Department's goals related to FOIA compliance for the near future are twofold: to reduce the open FOIA case backlog and deploy enhanced technology on the unclassified networks to improve workflow. In the coming months, the Department will seek to determine the appropriate response and whether an increase in staffing and/or funding is required to meet these needs to both reduce this backlog and to ensure that the FOIA office has the IT capabilities to handle the growing workload going forward.

"Ensuring an Informed Citizenry:
Examining the Administration's Efforts to Improve Open Government"
Written Questions for the Record Submitted by Chairman Charles E. Grassley of Iowa
May 13, 2015

Questions for Ms. Gramian

1. I continue to hear of challenges that impact FOIA compliance. It's important that FOIA processors have a clear understanding of FOIA's purposes, including the President's directives on transparency and the "presumption of openness." This is especially crucial given the increased FOIA litigation and claims that the only way to force government compliance is to sue.
   a. In what areas are FOIA processors and management in most need of additional training?

      Response: The majority of FOIA professionals with whom OGIS interacts in the course of our work are knowledgeable about the law and process and want to do their jobs well. In addition to training already offered to FOIA professionals by the Department of Justice's, Office of Information Policy (OIP) and OGIS , one area where there appears to be a gap in many agencies is in top-level support for FOIA and a lack of appreciation for shared responsibility under the law for preventing and resolving FOIA disputes. In 2013, OGIS recommended that agency leaders remind **all** staff of the importance of FOIA, and provide training to every new employee. We believe that such training and support from the top will improve FOIA programs across the government.

   b. What resources are most needed to ensure that FOIA processors can effectively do their jobs?

      Response: Through our mediation and review work across the government, we have heard from agencies, particularly those with a large backlog that additional training and support from agency leaders would improve FOIA programs across the government and the ability of agencies to comply with the law.

      We also observe that many FOIA offices are not able to easily and efficiently search information systems or extract information for FOIA processing. In addition to having access to existing modern technology that improves the office's ability to search, extract and process records, it is critical that an agency involve records managers and FOIA professionals in developing and investing in additional technological resources. Engaging both FOIA professionals and records managers when an agency is acquiring new technological systems helps improve the life cycle management of information, allowing agencies to efficiently and effectively search for and process responsive records. Building FOIA release into the collection and storage of government information would also improve the ability of agencies to make proactive disclosures without spending additional time processing proactive material.

Additional resources that would assist agencies include: providing alternative dispute resolution training for FOIA professionals and continued development of shared agency technology to process FOIA requests and make records available.

2. The mediation services that OGIS provides were intended to—and should—serve as a meaningful alternative to resolving FOIA disputes through litigation. Your testimony references the recent Administrative Conference recommendations regarding OGIS's services, including a recommendation that agencies let requesters know about the availability of dispute resolution services by OGIS in their final response letters and on their websites.
    a. How well are agencies currently doing this?

    Response: The Office of Information Policy at the Department of Justice issued guidance in 2010 instructing agencies to include in their final agency determinations a standard paragraph notifying the requester of the availability of mediation services offered by OGIS. The Departments of Justice and Homeland Security were the first agencies to inform requesters about OGIS's mediation services in their administrative appeal determination letters and given the high volume that those two agencies handle, as a result of those notifications OGIS has seen that nearly half of the mediation cases that OGIS handles – 44 percent in Fiscal Year 2014 – involve those agencies. According to information collected by the Department of Justice through the 2014 Chief FOIA Officers reports, almost all agencies that processed requests either let requesters know about OGIS' services or plan to take steps to do so in the future. It is hard to tell exactly how many agencies are letting customers know about OGIS because the data does not differentiate between agencies that are doing so and agencies that did not process any appeals. We know that more agencies are beginning to include OGIS' language in their final responses, however, because we receive requests for assistance involving a greater variety of agencies.

    b. Do you feel that there could be more engagement with the requester community by agencies to inform them of the mediation services that OGIS provides?

    Response: We are happy to be assisting in cases that involve a wider variety of agencies, and continue to encourage agencies to let requesters know about our services through their final appeal response letters and on their websites. We would also like to note that resolving disputes with requesters is a shared responsibility under the statute. It is important for requesters to have easy access to agency FOIA Public Liaisons, meaning the FOIA Public Liaison's up-to-date contact information should be included in all correspondence with requesters and on the agency's website.

3. As we continue to see a rise in FOIA litigation, I'm concerned that the mediation services that OGIS was created to provide are not being adequately incorporated into the FOIA process.

a. Can you provide some insight into the challenges OGIS is facing in offering mediation services?

Response: The two biggest challenges OGIS faces in offering mediation services are discussing specific FOIA requests with agencies that do not have an applicable routine use in place in a Privacy Act system of records, and developing a dispute resolution mindset within agencies. As I testified, the Privacy Act of 1974 protects FOIA and Privacy Act request and appeal files, and generally prohibits agencies from sharing information that is in those files without a routine use provision or prior written consent of the requester. Without an applicable routine use, before OGIS facilitators can contact agencies to discuss FOIA/Privacy Act requests or appeals, we must first obtain a signed and dated consent from the requester authorizing OGIS and any federal agency to share information and records related to the request. As of May 15, 2015, six cabinet-level departments and six agencies have Privacy Act routine-use provisions in place allowing us to discuss requesters' FOIA files without their signed and dated consent.
With respect to dispute resolution, OGIS appreciates the value in harnessing existing agency resources, including agency FOIA professionals, chiefly FOIA Public Liaisons, who are mandated with resolving disputes between the agency and the requester, 5 U.S.C. § 552(a)(6)(B)(ii) and 5 U.S.C. § 552(l). We recognize that harnessing these resources among 15 Cabinet-level departments and their components and 85 agencies takes time and we are committed to helping foster a dispute resolution mindset across the government.

b. Are agencies generally willing to take part in these mediations?

Response: We have a strong record of working with agencies to resolve FOIA disputes. At the conclusion of OGIS' involvement in a case, particularly in a complex case or where we notice an unusual policy or practice, we generally write a final letter explaining our interactions with the requester and the agency, the resolution of the case, and if applicable, whether the agency or the requester declined to cooperate. A sample of these letters is available on our website.

c. Are agencies generally cooperative and helpful throughout the process?

Response: OGIS has built strong working relationships with FOIA professionals based on an understanding of our role as a neutral third-party that advocates for neither the requester nor the agency but for the FOIA process. As awareness of our services continues to spread across agencies and among the requester community, we look forward to continuing to develop these relationships.

Question to OGIS

- Under exemption 5, a pre-decisional document does not lose its protection after the decision is made unless the agency incorporates the pre-decisional information into its final decision, either expressly or by reference. Nevertheless, establishing that the pre-decisional document was actually incorporated into a final decision can be a difficult hurdle for a requester. Do you think that modifying this exemption so that pre-decisional documents lose the protection post decision is an effective and responsible way to address the lackluster speed with which some agencies process FOIA requests?

Response: Given our experience providing mediation services to thousands of requesters since 2009, we observe that there is a wide variety in the kinds of records held by each agency and that every request is different. It is hard to judge what the net effect of this proposal would be on the speed of processing because it would have to be reviewed on a case-by-case basis. OGIS is not in a position to comment about the effects of such a modification.

Regarding the speed with which agencies process FOIA requests, we have observed that customer service is crucial to the FOIA process and can often streamline the process by making it more transparent and understandable and setting customer expectations. Good customer service, a crucial aspect of effective communication skills, can also help avoid misunderstandings about fee issues and/or the scope of a request. We provide training that improves FOIA professionals' communications skills and work with agencies through our mediation and review programs to help ensure that customer service improvements in the law are applied.

"Ensuring an Informed Citizenry:
Examining the Administration's Efforts to Improve Open Government"
Written Questions for the Record Submitted by Chairman Charles E. Grassley of Iowa
May 13, 2015

Questions for Ms. Kaiser

1. Secretary of State John Kerry recently called on the inspector general to conduct a thorough review of the Department's FOIA and records management operations. He says that a full and complete record of American foreign policy, and the public's access to that record, are "interrelated principles." And back in 2011, President Obama issued a memo regarding records management to the heads of executive departments and agencies, declaring that "proper records management is the backbone of Open Government."

    a. Would you agree that the proper management and archiving of official government records is the foundation of an open and transparent government?

Yes, we believe that transparency of government work cannot be achieved without the underlying requirements of proper document management and archiving. Without a system of proper records keeping, the principle of access is hollow. In our view, open and transparent government is founded an the principles of (1) preserving a record of government activities and operations; (2) presuming openness in the absence of a foreseeable harm from disclosure; and (3) disclosing information to the public in a timely manner. These premises are essential to achieve true transparency.

    b. What are the consequences to FOIA—and to public access—if agencies are not taking seriously their obligations to keep track of information, particularly in the age of digital communication?

Gavernment agencies cannot meet their statutary abligation to disclose infarmatian if they da not manage recards praperly. Further, agencies must apply standards for review and disclosure that are (1) consistent with the intent af Congress that FOIA serve as a disclasure not a withholding statute; (2) effective regardless of the format or medium in which the information is held; and (3) applied consistently across agencies and administrations. FOIA needs to remain strong and adaptable in the quickly-evolving digital landscape.

The AP, like other media entities, is a proxy for the people. It is AP's mission to inform the world. AP journalists rely on FOIA to inform the public about issues that are critical to the public – what public officials are doing, how tax dollars are being spent, and what decisions are being made on the public's behalf. Information disclosed through FOIA informs our society, and it is through that transparency that we achieve accountability – a core element of our democracy.

2. On the first day of Sunshine Week this year, the White House announced it was removing regulations that for 30 years had subjected its Office of Administration to FOIA requests.
    a. Do you think this decision was proper—both in terms of timing and policy?
    b. Is the decision to remove these regulations—all without an opportunity for public comment—consistent with the President's "presumption of openness"?
    c. Is the decision consistent with being the "most transparent administration in history"?

The Office of Administration took the position in 2007 that it is not an agency subject to the Freedom of Information Act. It stopped providing information in response to FOIA requests at that time, even though it had provided information in years prior. The Office of Administration prevailed in its position that it was not subject to FOIA in a subsequent lawsuit: Citizens for Responsibility and Ethics in Washington v. Office of Administration, 566 F.3d 219 (D.C. Cir. 2009). Therefore, although rescinding the Office of Administration's FOIA regulations earlier this year did not have a substontive impact on the way the Office has been responding to requests since 2007, the timing of it during Sunshine Week was unfortunate.

Further, we believe that FOIA's long history as a disclosure stotute and the Administration's stated intention of discretionary disclosures when possible – while protecting important interests such as trode secrets, personal privacy and national security – strongly indicates that as a policy matter, the Office of Administration should respond to FOIA requests. Such a positon would be consistent with the principles of transparency.

3. The mediation services that OGIS provides were intended to—and should—serve as a meaningful alternative to resolving FOIA disputes through litigation. The numbers show, however, that FOIA lawsuits continue to be on the rise. And the government's often-vigorous defense of FOIA litigation is surely costing taxpayers money. I'm concerned that there could be more engagement with the requester community by agencies at an earlier stage to inform them of the mediation services that OGIS provides. I'm equally concerned that agencies aren't warming up to the idea of mediation as a way to resolve FOIA disputes.
    a. Are the services OGIS provides being underutilized as a litigation alternative?
    b. What benefits would requesters receive if agencies take a more active and cooperative role in resolving FOIA disputes through mediation?

The Office of Government Information Services was created to help resolve disputes before reaching litigation; it was meant to provide a means to address those improper deniols that would never be taken to court due to the high financial barriers to litigotion. Yet the admirable goals for OGIS cannot fully be realized under its current structure. Investing the resources into strengthening OGIS is a worthwhile endeavor for increasing transparency.

There are several steps that need to be taken to restore OGIS as a practical alternative to litigation. For starters, every agency subject to FOIA should inform its own staff and all

requesters of the mediation services provided by OGIS. But agencies also need to be open to mediotion. Currently, OGIS cannot mediate a dispute without the agencies' consent. As a practical matter, that provides a major set-back to OGIS's ability to serve as a real alternative to litigation.

In addition, agencies should do more to resolve routine processing obstacles on their own; OGIS currently does much of this work. Shifting the burden to agencies to better manage the procedural issues of their FOIA cases would allow OGIS to focus its limited resources on addressing and resolving substantive disputes between the government and requesters.

Finally, OGIS should use advisory opinions and other forms of guidance to ensure all agencies benefit from the lessons learned in existing disputes, many of which are likely to arise in future and similar requests. This will result in fewer delays and more information released to the public.

4. Is there anything you wish to add to, or correct for, the record? If so, please take this opportunity to provide any additional remarks or commentary.

I have nothing further to add at this time. We thank you for the continued apportunity to address this Committee on the critical issue of preserving and strengthening our country's freedom of information laws.

"Ensuring an Informed Citizenry:
Examining the Administration's Efforts to Improve Open Government"
Written Questions for the Record Submitted by Senator David Vitter of Louisiana.
May 13, 2015

Question

President Obama created a "presumption of openness" by adopting a foreseeable harm standard to guide agency use of exemptions. However, the White House has officially ended the Freedom of Information Act obligations of its Office of Administration after years of rejecting FOIA requests. How will this decision affect the fourth estate and the public?

The Office of Administration took the position in 2007 that it is not an agency subject to the Freedom of Information Act. It stopped providing information in response to FOIA requests at that time, even though it had provided information in years prior. The Office of Administration prevailed in its position that it was not subject to FOIA in a subsequent lawsuit: Citizens for Responsibility and Ethics in Washington v. Office of Administrotion, 566 F.3d 219 (D.C. Cir. 2009). Therefore, rescinding the Office of Administration's FOIA regulations earlier this yeor did not hove a substantive impoct on the way the Office has been responding to requests since 2007.

We do believe, however, that FOIA's long history as a disclosure statute and the Administration's stated intention of discretionary disclosures when possible – while protecting important interests such as trade secrets, personol privacy and national security – strongly indicates that as a policy matter, the Office of Administration should respond to FOIA requests. 5uch o positon would be consistent with the principles of transparency.

Questions for the Record
Director Melanie Ann Pustay
Office of Information Policy
"Ensuring an Informed Citizenry:
Examining the Administration's Efforts to Improve Open Government"
Committee on the Judiciary
United States Senate
May 6, 2015

Questions Posed by Chairman Grassley

1. **I continue to hear of challenges that impact FOIA compliance. It's important that FOIA processors have a clear understanding of FOIA's purposes, including the President's directives on transparency and the "presumption of openness." This is especially crucial given the increased FOIA litigation and claims that the only way to force government compliance is to sue.**

   A. **In what areas are FOIA processors and management in most need of additional training?**

   B. **What resources are most needed to ensure that FOIA processors can effectively do their jobs?**

Response:

As I mentioned during the May 6, 2015, hearing, I firmly believe that well-trained personnel are the foundation of any successful Freedom of Information Act (FOIA) program. It is vital that such personnel have a complete understanding of all of the FOIA's legal requirements as well as the policy considerations set out in the President's and Attorney General's 2009 FOIA Memoranda. As a result, the Office of Information Policy (OIP) maintains a continuous focus on providing, and encouraging agencies to provide, substantive FOIA training. At the same time, with one hundred agencies subject to the FOIA, and hundreds of FOIA offices implementing the law in the context of a wide range of different types of records and requests, the kind of FOIA training that is needed by each agency will necessarily vary across the government. It is precisely for this reason that my office has focused on making available to all agencies a wide range of FOIA training and resources that address all aspects of FOIA law and policy.

Every year, OIP provides training to thousands of FOIA professionals covering, among other areas, the presumption of openness and the President's and Attorney General Holder's FOIA Memoranda, the FOIA's procedural requirements, the proper application of FOIA exemptions, and the importance of good customer service. We also offer agencies specialized training with lectures designed for their specific FOIA training needs. In addition to providing training on the legal and policy requirements of the FOIA, we provide practical training and guidance to agencies to assist them with the various challenges concerning the management of a FOIA

program. For example, this past year OIP's Best Practices Workshop series covered key topics in FOIA administration such as reducing backlogs and improving timeliness, improving proactive disclosures, and utilizing technology for the benefit of FOIA processing. A summary of these sessions and the best practices discussed are posted on a designated page of our website for the benefit of all agencies. Finally, in an effort to make important FOIA training resources available to all agency personnel all over the world, OIP recently released a suite of four new electronic FOIA training resources. Embracing former Attorney General Holder's call that "FOIA is everyone's responsibility," these new resources have been designed for all levels of the federal workforce from the summer intern to the senior executives in the agency.

2. I understand that in FY 2014, the State Department, for example, experienced a 60% increase in FOIA lawsuits.

A. Is it possible that communication or training challenges, particularly with respect to application of the "foreseeable harm" standard, are contributing to State's increasing FOIA litigation?

Response:

I would respectfully direct you to the Department of State for specific questions regarding their FOIA administration.

B. Has OIP provided any specialized training or services to assist the State Department in addressing:

I. Its FOIA processing issues?

II. Its FOIA backlog?

III. Its delays in responding to requests?

Response:

OIP has provided specialized training at the request of the Department of State. Last year, OIP senior staff provided the agency training on the FOIA's procedural requirements and Exemption 2. The year before that OIP provided Department of State personnel training on the proper application of Exemptions 5, 6, and 7(C). Further, as discussed above, OIP provides a wealth of training resources and opportunities for all agencies. In addition to the newly available electronic FOIA training resources, OIP provides free training available for all agency personnel on every aspect of the law. Beyond the substance of the law, OIP has also provided training opportunities for agencies to learn best practices in managing their FOIA obligations. OIP's Best Practices Workshop series launched this past year brings agencies together to discuss various aspects of FOIA administration and to identify best practices and strategies that can be leveraged for success by all agencies. Our very first workshop was on the topic of backlog

reduction and improving timeliness. As noted above, as with all of our workshops, a brief synopsis of the event and the best practices highlighted can be found on our website.

Recognizing the importance of FOIA training, every year OIP requires agencies to report on their efforts to provide substantive FOIA training to staff and we score the agencies on this in our annual assessment. In its 2015 Chief FOIA Officer Report, the Department of State reported that all of its FOIA professionals attended FOIA training.

3. In your testimony you discuss the administration's proposals responding to the Supreme Court's ruling in *Milner v. Department of the Navy*. You describe the proposals as not sweeping too broadly, while providing sufficient protection against the circumvention of the law. You've pointed out previously that it's critical for Congress to address the issue of the *Milner* decision. And I've asked you before whether the administration planned to submit a proposal to us for consideration.

A. Can you explain specifically what the proposed *Milner* "fixes" would do?

Response:

The Administration recently submitted a single proposal to amend Exemption 2 of the FOIA as part of the Fiscal Year 2016 Defense Authorization Act bill. The proposal seeks to reinstate the protection that had long been afforded under Exemption 2 of the FOIA prior to *Milner v. Department of the Navy*, 131 S. Ct. 1259 (2011). The proposal has been very thoughtfully crafted so as to not sweep too broadly while providing adequate protection against disclosures that could be reasonably expected to risk impairment of effective agency operations or circumvention of statute or regulation.

B. Can you explain why or why not Congress should support these reforms?

Response:

It is important for Congress to support a proposed amendment to Exemption 2 in order to remedy the critical gap in the FOIA that arose as a result of the Supreme Court's dramatic narrowing of Exemption 2 in the *Milner* case. The recently submitted proposal seeks to amend Exemption 2 directly to reinstate the protection long afforded by FOIA jurisprudence to predominantly internal material where there was a risk that disclosure could cause circumvention of the law (i.e., what was known as "High 2"). There are many types of very sensitive records that are currently vulnerable in the absence of the proposed amendment.

C. Would either of the proposals eliminate agency confusion over how to handle sensitive information, resulting in increased disclosure?

Response:

Our intent is to amend Exemption 2 so as to eliminate agency confusion on the handling of certain sensitive information. As I mentioned above, the *Milner* decision left a critical gap in the law regarding protection that had long been afforded to material for which disclosure could risk causing harm. We believe it is preferable to address this matter directly by amending Exemption 2, rather than attempting to rely on other exemptions to cover this gap on an ad hoc basis. Our goal is to provide agency FOIA professionals a clear understanding of how to protect material that, if released, could impair agency operations or risk circumvention of the law.

D. Might either proposal result in even more denials of FOIA requests?

Response:

Our intent is to restore the law to where it was prior to the decision in *Milner*.

E. Would your office, or someone from the Administration, be willing to brief Judiciary Committee staff about the proposals?

Response:

Yes, I am happy to brief your Committee staff on this and on any matters regarding the government-wide administration of the FOIA. We briefed the Committee on the Judiciary on May 27, 2015, and we look forward to continuing our discussion with Committee staff concerning the best wording for the proposed amendment.

Questions Posed by Senator Leahy

4. **In the last few years the number of FOIA requests has risen dramatically. In FY 2010 the Federal Government received 557,000 FOIA requests. In FY 2014 that number had risen to 715,000 FOIA requests. The overall backlog of FOIA requests continues to rise and two thirds of the agencies reviewed by the Center for Effective Government received a D grade or an F grade for FOIA compliance. Yet, in your testimony, you stated that last year the government experienced its lowest staffing levels dedicated to FOIA in over six years.**

   Given these challenging statistics, why is government staffing of FOIA so low? Has the Administration requested more funds to increase FOIA staff and help reduce the backlog? If not, why not? Can you briefly outline your plans to keep pace with the expected increase in the number of FOIA requests in the coming fiscal year?

Response:

As I am sure you can appreciate, agencies' FOIA staffing levels are affected by a range of budgetary realities. This past fiscal year agencies faced challenging fiscal times and limited hiring authorities. Nonetheless, agencies have found success in many areas of FOIA administration, including improving processing times for both simple and complex requests and maintaining a high release rate. Moreover, the vast majority of agencies (72 out of 100) reported low backlogs of fewer than 100 requests.

Reducing backlogs and improving timeliness has been a key focus of my Office and our efforts to encourage government-wide compliance with the FOIA. As part of OIP's assessment of agencies' FOIA administration we score agencies on backlog reduction, as well as the closing of their ten oldest requests, and their processing times for simple requests. In addition, like we did in 2014, this past year we required any agency with a backlog above 1000 requests that had not reduced that backlog to provide a plan for backlog reduction in the year ahead. Several agencies have reported plans aimed at reducing their backlogs and improving timeliness.

As detailed in our Chief FOIA Officer Report, a number of Department of Justice components have reported plans to backfill or to hire additional FOIA professionals to meet the demands of our FOIA program. Additionally, OIP continues to work with each of the Department's components through our Component Improvement Initiative to identify causes contributing to backlogs and to assist components in overcoming those challenges and finding further efficiencies. Further, as the Department's Chief FOIA Officer, the Associate Attorney General continues to convene the Department's FOIA Council to manage the Department's overall FOIA administration and to provide top level support for backlog reduction efforts. I encourage you to review other agencies' backlog reduction plans in their 2015 Chief FOIA Officer Reports, all of which are available on OIP's website.

Questions Posed by Senator Vitter

5. **Criminal penalties are provided for the willful and unlawful destruction, removal, or private use of Federal records under 18 U.S.C. § 2071, which provides that the offender "shall be fined under this title or imprisoned not more than three years, or both."**

   A. **What is the department's history of enforcing this statute?**

   B. **Would a government official's utilization of a private email account and server to conduct official business and later deletion of emails on that private server qualify as conduct that this provision addresses?**

Response:

These questions are beyond the purview of my Office, which is focused on the implementation of the Freedom of Information Act, 5 U.S.C. § 552 (2012).

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May 4th, 2015

The Hon. Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C., 20510

The Hon. Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C., 20510

Dear Chairman Grassley and Ranking Member Leahy:

Mr. Chairman and members of the Committee, I am writing on behalf of ARMA International, a not-for-profit professional association comprising more than 27,000 records management (RM) and information governance (IG) professionals world-wide, many of whom are employed by the Federal government. On behalf of the association, I offer this statement, in reference to the hearing on "Ensuring an Informed Citizenry: Examining the Administration's Efforts to Improve Open Government," scheduled to take place on Wednesday, May 6, 2015.

ARMA International appreciates the Committee's focus on the need to create a more open and transparent government. The success of those objectives depends on ensuring that RM and IG professionals have the tools, authorities, and resources to manage a modern RM program.

In today's information-driven world, every computer or personal digital assistant creates, receives, uses, stores, and disposes of information. Appropriately managing this information throughout its life cycle is imperative to every organization's ability to achieve operational goals and minimize risks. Government records managers have the added responsibility of promoting openness, transparency, and access to public records. Without more resources and leadership, these Federal government objectives will remain unrealized.

The recent spotlight on high-ranking government executives using personal communication devices to conduct official government business without ensuring that the information those devices generated was captured highlights this need; additional resources and authority are essential for educating and training government personnel to comply with the Federal records laws and requirements that underpin public access, openness, and transparency.

Recent Initiatives to Promote Open Government through Information Governance

Congress and the Obama Administration have put in place a number of foundational measures that will ultimately lead to a more efficient and cost-effective framework for identifying, preserving, and making publicly available the government's official records.

For example, the 2012 Managing Government Records Directive, issued jointly by the Office of Management and Budget (OMB) and the National Archives and Records Administration (NARA), initiated a multi-year process that requires Federal agencies to manage both permanent

and temporary e-mail records in an electronically accessible format by the end of 2016. The Directive also requires Federal agencies to manage all permanent electronic records in an electronic format by the end of 2019.

Last November, Congress enacted the Presidential and Federal Records Act (PFRA) Amendments of 2014 (H.R. 1233) to, among other things, update an antiquated Federal Records Act that has made it difficult for Federal RM professionals to handle the growing volume of electronic communications. Until then, the focus of the Federal Records Act had been on the physical characteristics of how a record is preserved rather than on the actual information being stored. This resulted in confusion over RM policies, practices, and responsibilities, including about how to capture and dispose of e-mails and other electronic messages that may be official records.

Additional Reforms to Improve Access, Transparency, and Compliance

With the Managing Government Records Directive and the PFRA amendments in place, new policies and enforcement mechanisms will be developed to govern how agencies preserve, handle, and maintain electronic communications. This is a significant step toward giving RM professionals the tools they need to implement a modern recordkeeping system throughout the Federal government. But much more can and should be done.

First, ARMA International urges Congress to provide NARA additional authorities and resources to address its enormous challenge of implementing the Managing Government Records Directive. Effectively managing the government's information assets across myriad departments and agencies is a complicated endeavor, and NARA currently lacks both the authority and resources to compel consistent implementation and compliance.

Second, ARMA International urges Congress to enact the FOIA Improvement Act of 2015 (S. 337), which the Senate Judiciary Committee unanimously approved on February 5. We support this legislation because 1) it will increase the amount of agency information made available through proactive disclosure and 2) it will allow agencies to be more efficient and cost-effective with their RM practices, especially with information that has been or could be determined to have value as a record and be made publicly available.

Compliance with the FOIA Improvement Act will require the development of policies and procedures to recognize electronic communications that qualify as government records and to make more of those records available for public access. As this critical information is more readily available and accessible for decision making, the effectiveness of government programs will improve. Enactment of this Act also will help improve the security of information and records that are considered private, confidential, secret, classified, or essential to the continuity of government programs.

Third, ARMA International urges Congress to conduct oversight of the implementation of a new occupational series for RM professionals in Federal departments and agencies. The Office of Personnel Management (OPM) was tasked with establishing this occupational series as part of the Managing Government Records Directive, and the agency released an internal memorandum for Chief Human Capital Officers on March 10, 2015, announcing its establishment.

ARMA International is pleased that OPM moved forward with the release, which finally recognizes the importance and unique skill set of Federal RM professionals. Effectively implemented, this new occupational series also will create accountabilities for those up the chain of command. Continued Congressional oversight will be needed, though, to ensure that these dedicated RM professionals have the appropriate authority to compel consistent implementation and compliance across programs, departments, and agencies. This is critical to the successful implementation of an open government agenda.

Finally, ARMA International encourages Congress to consider establishing a Chief Records Officer (CRO) position in Federal departments and agencies. NARA recognized the importance of such a position when it established the first CRO in the Federal government in 2011. While many Federal agencies identify senior officials as Records Officers, officials at this level are often disconnected from accountability for implementing and executing RM programs and policies.

The CRO would be accountable for that, as well as be responsible for 1) assisting the Chief Information Officer (CIO) in understanding his or her records-related role and 2) for integrating and aligning the use of information technology with the department or agency's use of information in the pursuit of its core mission. (ARMA would consider this to be an IG role, since it would "hold organizations and individuals accountable to create, organize, secure, maintain, use, and dispose of information in ways that align with and contribute to the organization's goals," as ARMA defines it.)

Establishing the CRO position would facilitate implementation of a recommendation made by the director of NARA's Office of Government Information Services at a March 11, 2014, hearing of the Senate Judiciary Committee: Federal agency program officers should consult with their RM professionals when procuring new technology, upgrading existing technology, or creating a new database.

Conclusion

Americans deserve a government that operates transparently and protects and manages public records responsibly. The effectiveness of government policies, programs, and decisions that seek to promote those objectives depends on RM professionals having the tools, resources, and authorities they need to be successful in meeting their legal and regulatory responsibilities with regard to managing information in the digital age.

Thank you to the Committee for the opportunity to share the views of our association.

Sincerely,

Fred Pulzello, IGP, CRM
President, ARMA International

information governance initiative

iginitiative.com

May 1, 2015

The Hon. Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Leahy:

Thank you for the opportunity to provide a written submission for the record of the hearing "Ensuring an Informed Citizenry: Examining the Administration's Efforts to Improve Open Government."

I am writing as Co-Chair of the Information Governance Initiative, a vendor-neutral industry consortium and think tank established in 2014 dedicated to advancing the adoption of information governance practices and technologies through research, publishing, advocacy, education, and peer-to-peer networking.[1] The IGI considers it well within the scope of its mission to provide useful recommendations to public sector institutions on how state-of-the-art software in the information management space may be used in furtherance of important public policy goals, including compliance with the Federal Records Act and the Freedom of Information Act.

By way of further background, I had the privilege of spending 33 years in the federal service, including as a trial attorney and senior counsel in the Civil Division of the Department of Justice, and as Director of Litigation at the National Archives and Records Administration (NARA). Between 1992 and 1999, I acted as lead DOJ counsel in

[1] See www.iginitiative.com. The views expressed here are not intended to preclude the submission of additional or differing views by individual or organizational members of the IGI.

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the litigation known as the "PROFS case," *Armstrong v. Executive Office of the President*,[2] a landmark case involving preservation of White House e-mail under the federal records laws. During my time at DOJ and NARA, I performed duties on numerous other high-profile lawsuits filed under the Freedom of Information Act (FOIA), Federal Records Act, and Presidential Records Act. I consider it the highest honor of my life to have had the opportunity to represent the United States as government counsel, defending on a nonpartisan basis policies advanced by the administrations of President Reagan through President Obama. The views I express here are those of a former government lawyer with extensive legal background and experience on federal recordkeeping and access issues, without regard to party or politics.

The present hearing is important for reasons that go far beyond the actions of one former Cabinet officer's compliance with federal recordkeeping and access laws. From the first day of his Administration, President Obama has highlighted the importance of openness and transparency in carrying out the activities of government.[3] More recently, in connection with his Memorandum on Managing Government Records, the President has underscored that "recordkeeping is the backbone of open government."[4] However, in light of the substantial publicity surrounding revelations that former Secretary of State Hillary Clinton used a private email network for the conduct of official government business,[5] I believe it would be helpful first to focus on what I would have imagined to be several well-established propositions under the FOIA and the Federal Records Act. After

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[2] 1 F.3d 1274 (D.C. Cir. 1993). For a history of the case, see Jason R. Baron, "The PROFS Decade: NARA, E-mail, and the Courts," in Bruce Ambacher, ed., THIRTY YEARS OF ELECTRONIC RECORDS (Lanham, MD: Scarecrow Press 2003).

[3] See President's Memorandum Re Transparency and Open Government, dated January 21, 2009, https://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.

[4] President's Memorandum on Managing Government Records, 76 F.R. 75423 (Nov. 28, 2011), https://www.whitehouse.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records.

[5] See, e.g., Michael Schmidt, "Hillary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules," *New York Times* (March 3, 2015), http://www.nytimes.com/2015/03/03/us/politics/hillary-clintons-use-of-private-email-at-state-department-raises-flags.html?_r=0.

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doing so, I will make several observations and recommendations for the Committee's consideration regarding improving open government in the digital age.

First, the setting up of and maintaining a private email network as the sole means to conduct official business by email, coupled with the failure to timely return email records into government custody, amount to actions plainly inconsistent with the federal recordkeeping laws.

As an initial matter, any federal employee's decision to conduct *all* e-mail correspondence through a private e-mail network, using a non-.gov address, is inconsistent with long-established policies and practices under the Federal Records Act and NARA regulations governing all federal agencies. Ever since 1950, when Congress enacted the first comprehensive Federal Records Act, the head of each agency has been responsible for ensuring that adequate and complete documentation of the organization, functions, policies, decisions, procedures, and essential transactions of his or her agency is maintained.[6] This statutory obligation applies first and foremost to the records of the head of the agency him or herself. This obligation is routinely carried out through the implementation of official recordkeeping systems, adequate controls, and records schedules, all requiring that federal records be retained either permanently, or temporarily for set retention periods.[7] All high level officials are or should be aware of their basic obligations to maintain adequate documentation of their activities in government. No federal employee, including high-level officials, is allowed an "exemption" from these requirements.

In the wake of the 1993 federal court of appeals decision in the above-referenced *Armstrong* case, which held that the electronic versions of e-mails (including complete sender and recipient information) may be worthy of preservation as federal records, federal agencies have been governed by NARA's government-wide regulations covering e-mail record as first promulgated in 1995.[8] These regulations in their present form[9] require that all federal record e-mails appraised as long-term temporary or permanent

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[6] See 44 U.S.C. 3101; see generally 44 U.S.C., Chapters 21, 29, 31 and 33.
[7] 44 U.S.C. 3303, 3303a.
[8] NARA Final Rule on Electronic Mail Systems, 60 F.R. 44641 (Aug. 28, 1995) (originally codified at former 36 C.F.R. 1234.24 (1995)).
[9] See 36 C.F.R. 1236.22 (2014) (text unchanged since 2009).

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records, either be printed out or electronically transferred to an appropriate official recordkeeping system. (In 2006, the regulations were amended to make clear that short-term, transitory e-mail records may simply be left to reside on an e-mail network, prior to deletion.) Again, every federal employee including high-level officials has been governed by the obligation to preserve e-mail records documenting agency policies and decisions since 1995.

Specifically with respect to e-mail communications created or received outside of official electronic systems maintained by an agency, the 2009 NARA regulations state:

> Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that Federal records sent or received on such systems are preserved in the appropriate agency recordkeeping system.

Had I been asked to provide a legal opinion on the meaning of this regulation while in my former official capacity in NARA's Office of General Counsel, I can assure this Committee that I would have said that e-mail records sent or received on a private commercial network (e.g., on Gmail, or on one's own server), should be transferred contemporaneously with their creation or receipt, and certainly *no later than when an official or employee left public service.* This interpretation is especially reasonable in light of the fact that when exiting government service, federal employees are otherwise expected to have made an effort to ensure that federal records in their possession (including in work spaces in the case of paper records, or local hard drives or servers in the case of electronic records) are preserved in an appropriate official system. Every agency either has or should have employee "exit procedures" in place which take into account the need to preserve records. I believe the vast majority of federal records officers would interpret this regulation in the same manner as I do.

Last year, as part of Congressional enactment of the Presidential and Federal Records Act Amendments of 2014, section 2911 of the Federal Records Act was amended to expressly provide that an officer or employee may not create or send a record using a non-official electronic messaging account unless the e-mail is copied to or transferred to an official account within 20 days, with further provision for possible disciplinary

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sanctions for intentional violations.[10] However, the fact that the 2014 statute sets an express deadline does not excuse tardy conduct under the 2009 regulations; if anything, the statute underscores the fact that the prior regulations were not intended or reasonably read to allow high-level officials to meet their obligations by returning records into government custody only when they chose to do so, perhaps many months or years after leaving office. The Federal Records Act has never given employees or officials that kind of license to evade their responsibilities in ensuring that adequate documentation of their time in the public service is preserved for the American people.

Indeed, the Federal Records Act contains provisions where an agency head or the Archivist of the United States is empowered to notify the Attorney General when federal records have been improperly removed from government custody or where a threat exists as to their destruction, for consideration of a possible "replevin" lawsuit to demand return of records that are rightfully the government's to possess and preserve.[11] Although this provision is discretionary, and would normally only be invoked where clear evidence exists that government records remain in the possession of a private citizen, it is a useful additional tool (beyond section 2911) in future cases where an official has departed from office with e-mail or other records in their possession, and a credible threat to their continued preservation exists.

Another aspect of the recent controversy has been the erroneous assumption on the part of some that e-mail records from a private or commercial account, when sent to or received from a ".gov" address, are being automatically preserved "somewhere" in a federal agency -- thus providing an excuse for the failure to have taken adequate steps to ensure that such records are transferred from a private account. There are several problems with this assumption. Very few federal agencies have implemented an automated system for archiving email. For example, at the State Department, the so-called "SMART" system apparently has been used in a fashion (at least until recently) where only a tiny percentage of e-mail communications were tagged as records in an electronic archive repository.[12] Moreover, to the extent federal agencies continue to rely

[10] See Pub. L. 113-187 (adding 44 U.S.C. 2911).
[11] See 44 U.S.C. 2905 & 3106.
[12] See State Department Office of Inspector General Report ISP-I-15-15, "Review of State Messaging and Archive Retrieval Toolset and Record Email," March 2015,

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on "print to paper" policies for preserving email records, there is little assurance that over-burdened employees are able to comply with the manual efforts needed to ensure that those policies are routinely carried out.

Second, a federal employee or official choosing to carry out communications using a non-".gov" address, without making timely transfer of those records to an appropriate governmental system, compromises the ability of an agency to adequately respond to FOIA requests.

For example, the State Department, like every federal agency, struggles with attempting to keep up with the thousands of FOIA requests received and pending in its FOIA queues. To meet an agency's responsibilities to provide timely access to government records, in most instances FOIA officers must rely on custodians of records (i.e., actual end-users with individual e-mail accounts on an e-mail network) to locate responsive records to public access requests. Moreover, under the Electronic Freedom of Information Act Amendments of 1996, requesters have the right to demand that responsive records be provided in an electronic format.[13]

Whatever bureaucratic obstacles agencies have in responding to requests in a timely way, their duties are made hugely more difficult in the case of a high-level official choosing to exclusively maintain their e-mail record communications on a private network server. In this scenario, neither the FOIA officer nor the records officer has any direct means of access to records that may be responsive to individual requests. The FOIA officer may not even know of the existence of the private server, as he or she would not routinely be a close confidant or in the circle of advisors of such an official.

The erroneous assumptions made with respect to automated archiving apply as well to access considerations under the FOIA. The fact that an e-mail sent to or received from a ".gov" address existed at some point on a government e-mail network does not automatically ensure that the e-mail would have been printed out or otherwise archived for preservation in an official recordkeeping system, so as to be available for access through FOIA. Moreover, if e-mail records from a private server or commercial account

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https://oig.state.gov/system/files/isp-i-15-15.pdf (stating that only approximately 60,000 out of 1 billion e-mails sent in 2011 were tagged as federal records).

[13] See 5 U.S.C. 552(a)(3)(B), as amended by Pub. L. 104-231.

were sent to or received from a .gov locations outside the agency in which the employee or official works, they would only be available to FOIA request lodged at that separate federal agency. But an e-mail from a Cabinet officer concerning official business would in the normal course be considered a federal record in both the sender agency as well as the recipient agency, and hence would be expected to be an "agency record" within the definition of the FOIA, and accessible to the public if a request were filed in either location.

Third, the recordkeeping laws narrowly circumscribe what is truly to be considered "personal records." Pursuant to NARA regulations, "If information about private matters and agency business appears in a received document, the document is a Federal record."[24]

In other words, when high level officials take it upon themselves to decide what is personal, and what are official records, to be transferred from a private or commercial account, NARA's default rule should be applied essentially in this manner: where *any paragraphs or sentences* in a given e-mail pertain to government business, the e-mail is to be considered a "federal record" to be transferred to an appropriate recordkeeping system for preservation, for future possible release under FOIA in whole or in part.[25]

Federal employees make decisions every day as to what e-mail records should or should not be preserved in accordance with agency recordkeeping policies, and it is not wrong for an employee to exclude personal e-mails sent or received on a government system from what are otherwise the rules for preserving federal records. However, in the usual course, agency employees are making these types of decisions with respect to communications sent or received on a government electronic system. This means that their choices in archiving e-mail are capable of oversight, by supervisors, records managers, Inspectors General, or others with authorization to conduct audits or inspections. In contrast, the routine use of commercial e-mail services for government business (including the setting up of a private network) potentially cloaks in secrecy all

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[24] 36 C.F.R. 1222.20(b)(2).

[25] Any portions of email records deemed "personal" can be withheld at the agency's discretion under Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6), on the grounds that release would constitute a substantial unwarranted invasion of privacy.

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decision making with respect to what is personal and what is official, without further oversight.

Concededly, the 2014 Amendments (as well as the 2009 NARA regulations) leave to the federal official the responsibility to decide which e-mail communications created or received on a non-governmental account constitute federal records to be transferred to an official recordkeeping system. In small numbers, this can be accomplished routinely by an official on a contemporaneous basis, as Congress assumed when enacting the 20 day provision in current law. But in my view, neither the 2014 Amendments nor NARA's 2009 regulations reasonably contemplate leaving to an ex-official, in the absence of any oversight by a records officer or otherwise, the unilateral decision to delete large numbers of email records as personal -- absent some assurances in advance that the default rule stated above has been properly applied. Under such circumstances, interested parties are forced to simply trust that the employee or official has acted in good faith in a manner consistent with NARA's default rule, lest portions of the historical record are missed.

Further Observations and Recommendations

Over the past twenty-five years, as agencies have moved into the digital age, they have provided employees with the ability to communicate through numerous electronic communications networks, both as set up in-house, as well as through means of the Internet. Every major agency now maintains one or more e-mail systems on which a large number of official communications meeting the definition of what constitutes a 'federal record" are created and received. Some estimates are that tens of billions of e-mail communications are sent and received each year across the government; if even a small fraction of these constitute "permanent" records of the United States worthy of preservation in the National Archives, agencies must put into place adequate recordkeeping policies and controls to account for these records.

The present controversy involving a private email network appears to have been at least partially based on faulty assumptions about the state of government recordkeeping – that messages on a private network would nevertheless be archived by others in the normal course. Because that is not routinely the case, this Committee would do well to focus its attention on how electronic recordkeeping can be improved, in order both to

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preserve our history, as well as to improve citizen access to governmental decision-making.

In response to President Obama's 2011 Memorandum, Archivist of the United States David S. Ferriero, and OMB's then-Acting Director Jeffrey D. Zients, issued a Managing Government Records Directive in 2012 that presents a path forward for federal agency compliance with recordkeeping obligations in the digital age.[16] In accordance with the Directive, by December 31, 2016, all federal agencies are to manage their e-mail records in accessible electronic formats.[17] If implemented, the Directive means the end of "print to paper" policies for official recordkeeping of e-mails.

In addition, the Directive calls for agencies to meet a December 31, 2019 deadline for ensuring that future permanent federal records created or received after that date will be managed electronically to the fullest extent possible for eventual transfer and accessioning into the National Archives. In other words, after 2019, the Archivist of the United States intends that the National Archives not accept paper records initially created after that date – only "legacy" paper records from earlier decades will continue to be accepted. This Directive represents an inflection point in the history of archives, and helps to ensure greater preservation of our Nation's history in a digital age.

Congress also has acted to underscore the importance of the Archivist's Directive in enacting the 2014 Amendments, which amend section 2904(d) of the Federal Records Act to provide for the Archivist to issue regulations requiring federal agencies to transfer all digital or electronic records to the National Archives in digital or electronic form to the greatest extent possible.[18]

To help implement the 2016 and 2019 mandates, NARA has published recent guidance on how "Capstone" policies for e-mail may assist agencies in meeting their record obligations.[19] In a nutshell, Capstone represents an approach to e-mail management

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[16] See M-12-18 (August 24, 2012), https://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-18.pdf.
[17] *Id.*, section 1.2.
[18] See H.R. 1233, section 9, amending 44 U.S.C. 2904(d).
[19] See NARA Bulletin 2013-02, "Guidance on a New Approach to Managing E-Mail Records,"

that relies on the automated archiving of e-mail records with a minimum of end-user involvement. Senior officials in federal agencies, with designated "Capstone accounts," will have all of their e-mail records presumptively deemed to be permanent federal records. Everyone else at agencies adopting a Capstone framework would have their e-mail records captured in a repository for a designated "temporary" period of time – which might end up being many years. NARA has a draft General Records Schedule for agencies electing to be covered under Capstone that calls for all e-mail records to be preserved for a minimum of seven years (with senior officials' e-mail records preserved permanently).[20]

The Archivist's Directive and NARA's Capstone approach to e-mail management go a long way to solving existing defects in current agency e-recordkeeping practices. Recent controversies involving e-mail records at the IRS, as well as the present controversy, may not have happened in the same way if agencies previously had taken the initiative to ensure the automatic archiving of employees' (and especially senior officials') e-mail records in a shared official repository – instead of having to rely on reconstruction or restoration of failed hard drives, backup tapes, or recovery of records from private servers.

It remains to be seen whether senior officials across government treat as a priority meeting the 2016 and 2019 recordkeeping mandates. This Committee will perform a very useful function in monitoring the progress of agencies in meeting their recordkeeping obligations under the Directive. If agencies adopt Capstone policies for electronic archiving of e-mail, and other forms of electronic recordkeeping, they help to ensure that records in electronic form not only are preserved, but are also accessible to FOIA and other requestors.

To continue the momentum initiated by the Archivist's Directive and Congressional enactment of the 2014 Amendments, I respectfully submit the following three recommendations for the Committee's consideration.

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dated August 29, 2013, http://www.archives.gov/records-mgmt/bulletins/2013/2013-02.html.

[20] See proposed GRS 6.1, "Email Managed Under A Capstone Approach," http://blogs.archives.gov/records-express/2015/04/02/draft-capstone-grs-available/.

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1. Directing Inspectors General across government to pay greater attention to how their respective agencies are meeting the Archivist's 2016 and 2019 mandates, including providing Congress with updates in semi-annual reports. IGs ideally perform very useful functions in providing regular audits and oversight on how agency programs and policies are implemented, which if they chose to do so, could well include heightened reviews of agency progress in implementation of the Directive's mandates.

#2. Requiring OMB to ensure that as agency officials move to "cloud-based" platforms for storage of government data, they specifically take into account how their agencies will embed records management obligations and provide for FOIA access to data constituting federal records. Government-wide, it is far from self-evident that "cloud-first" policies in managing data also satisfactorily have accounted for federal recordkeeping requirements and FOIA considerations.

#3. Establishment of an Electronic Records Advisory Committee reporting to the Archivist of the United States and the Office of Management and Budget, tasked with the mission of issuing benchmark reports on what progress the government is making in meeting the 2016 and 2019 mandates, and issuing recommendations as appropriate. In particular, the Advisory Committee could be tasked with reporting on how agencies are thinking about integrating the ability to meet FOIA's requirements as part of their planning efforts to meet the 2016 and 2019 recordkeeping mandates.

The recent controversy with respect to maintenance of a private email network represents a "teaching" moment for the government, in which recordkeeping and open government issues are recognized for their importance. The history of the United States, and the availability of the government's records in electronic form for a better informed citizenry, could not be more important to recognize. We should be able to learn from recent events in urging senior federal officials to continue making progress towards ensuring a more open government in the digital age.

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I wish to thank the Committee for the opportunity to provide these views.

Sincerely,

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Biographical Statement

I served as a trial lawyer and senior counsel in the Federal Programs Branch, Civil Division, DOJ, between 1988 and 1999, and was a trial lawyer at the Department of Health and Human Services prior to that. Beginning in 2000, I served as the first Director of Litigation in the Office of General Counsel of the National Archives and Records Administration. By way of further background, I have been honored with over 20 awards and commendations during my time in public service, including from the Archivist of the United States, the Justice Department, the National Security Council, and the Department of Health and Human Services. I am the recipient of the 2013 Justice Tom C. Clark Outstanding Government Lawyer Award given by the D.C. Chapter of the Federal Bar Association, as well as of the internationally recognized 2011 Emmett Leahy Award (the first federal lawyer honored in the 40 years the award has been given), for lifetime career achievements in records and information management. I have authored dozens of scholarly papers and commentaries on the subjects of electronic recordkeeping and e-discovery, and have given over 400 presentations around the United States and the world on issues involving the preservation of e-mail and other forms of electronic records. I have served as Co-chair of The Sedona Conference® Working Group on Electronic Document Retention and Production, am presently on the boards of the Georgetown Advanced E-Discovery Institute and the Cardozo Data Law Initiative, and am also presently Chair-elect of the D.C. Bar Litigation Section's E-Discovery Committee. I have also served on the Board of Directors of ARMA International. In October 2013, I joined the law firm of Drinker, Biddle & Reath LLP, in Washington, D.C., where I practice in the Information Governance and eDiscovery Group, and serve as Co-chair of the Information Governance Initiative. I am also an Adjunct Professor at the University of Maryland's School of Information Studies, where I have taught the first e-discovery course for PhD and Masters candidates in the United States. I am a member of the District of Columbia and Massachusetts bars, as well as the bar of the Supreme Court. My full CV is available at http://jasonrbaron.com.

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